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Water for the Environment: A Californian's Retrospective

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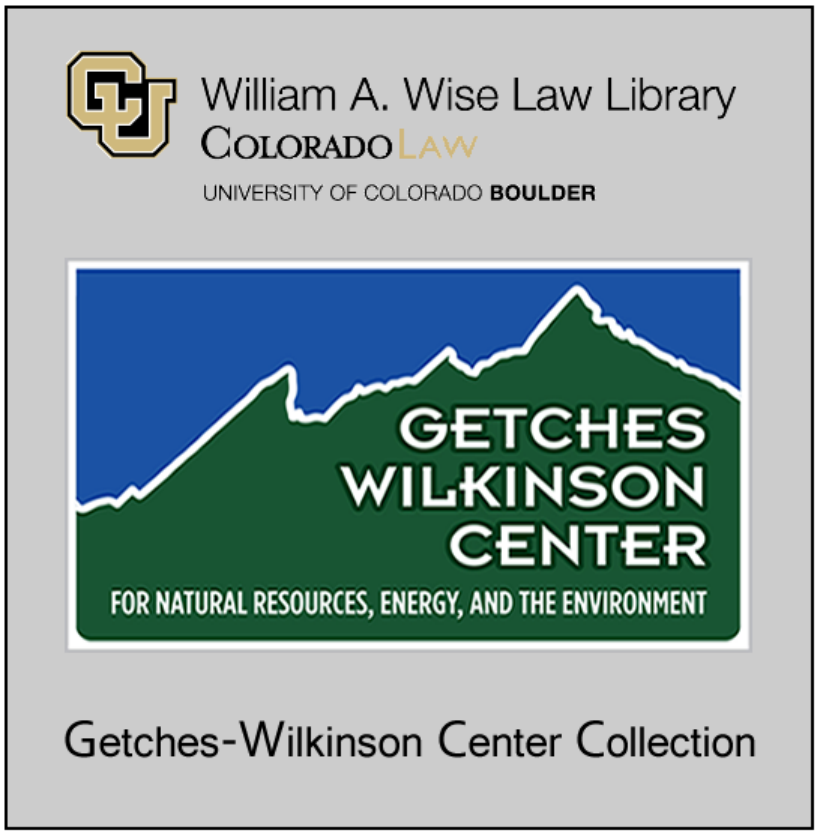

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WATER FOR THE ENVIRONMENT:

A Californian's Retrospective

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Two Decades of Water Law and Policy Reform:
A Retrospective and Agenda for the Future

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Water for the Environment:

A Californian's Retrospective

This 22nd Summer Conference of the University of Colorado School of Law's Natural Resources Law Center takes as its title "Two Decades of Water Law and Policy Reform: A Retrospective and Agenda for the Future." The title itself raises some interesting questions. Has there been water law and policy reform for just two decades? Or were their precursors before that? And is there a progression here, a positive reform-oriented trend? Or is the picture actually more complex: what is progress in one person's view is regression in another's?

As I started my environmental law career in the early 1970's, the beacon of water law and policy reform was the report of the National Water Commission. Chaired by Charles Luce of Bonneville Power Administration and Consolidated Edison fame, the intellectual brainpower that informed the Commission's thinking included such luminaries as Stanford Law Dean Charley Meyers and then Michigan and now Boalt Law professor (also, until recently counselor to Interior Secretary Babbitt) Joe Sax. To Meyers, the principal need for policy reform arose out of the economic misallocation that federal water project subsidies engendered. His principal solution: a much greater reliance on water markets to allocate a scare resource. To Sax, the principal need for policy reform arose out of the disregard that western water project development had shown towards environmental values. His principal solution: a focus on the public trust as a mechanism to raise environmental values to a status at least equal to the traditional consumptive uses historically served by water development. Viewing my thirty-year career as an environmental advocate in retrospect - - a perspective that allows for a considerably higher degree of clairvoyance than I often felt at the time - - I can see many times when I have advocated for Meyers-style solutions to the environmental problems I encountered and many others when I advocated Sax-style solutions. Often times no conflict arose between their respective points-of-emphasis. Those situations, in which one or the other approach was paramount were easy to deal with. Harder were the times when the two orientations tended to conflict. But I am getting ahead of my story.

Let me begin with three of the big controversies on which I cut my legal teeth in the early 1970's. Two involved classic early NEPA battles over big dams, New Melones and Auburn. Ultimately, they were legal losers; the federal government just kept improving its environmental documentation until its EIS's were sufficient to pass judicial muster. But both also involved more interesting administrative proceedings in which the challenges of our federal system led to surprising results, both substantive and legal. In accordance with the requirements of state water law, the federal government, even as it began construction on the two big dams, New Melones and Auburn, sought permission from the State Water Resources Control Board of California to acquire water rights for its facilities. After much struggle, the Board did grant water rights to the federal government, but in both cases with environmental strings attached, strings that the United States ended up arguing were legally inconsistent with the mandates of the Reclamation Act of 1902 and the specific Congressional authorizations for the projects involved.

In the case of Auburn, the Board required the Bureau of Reclamation to maintain a regimen of instream flows on the Lower American River. In the case of New Melones and the Stanislaus River, the Board restricted the United States' ability to store water in New Melones until it had returned to the Board with a better-defined and justified set of reasonable uses for the stored water. The United States' objections to these decisions reached the U.S. Supreme Court in 1978 in the seminal case of United States v. California, in which the court held that the Reclamation set of 1902 deferred to state law on matters not explicitly inconsistent with other Congressional mandates.

The third case of note from the early 1970's was a suit I brought on behalf of the Environmental Defense Fund and others against the East Bay Municipal Utility District alleging the waste, unreasonable use, and unreasonable diversion of water by EBMUD. EBMUD had signed a contract in 1970 with the United States for a supplemental water supply to be derived from the Auburn-Folsom South project, but we filed EDF's suit in state court against a state-created agency. Fatefully EBMUD and the United States both chose not to have the federal government joined in the suit. It has now been twenty-nine years since the case was originally filed and it is still pending in Alameda County Superior Court. On a personal level, it provided me with my one and only U.S. Supreme Court victory. In October 1978, relying on its fresh United States v.

California precedent, the U.S. Supreme Court vacated and remanded an adverse California Supreme Court decision that had held federal, not state, law controlling of EBMUD's decision to seek a supplemental water supply upstream on the American River.

In all three of these controversies, as well as in the parallel National Audubon Society v. City of Los Angeles public trust doctrine case involving Mono Lake then wending its way through state proceedings and litigation, (in which I played an occasional advisory role), the Sax approach was paramount. In all four cases, plaintiff environmental organizations sought administrative and judicial restraints against governmental activities based on arguments that the public interest favored leaving water in stream, rather than having it be stored or diverted for consumptive use. Interestingly, however, even in these cases one aspect of "conservative" doctrine was critical. The importance of state law as the basis for environmental public interest arguments created a strange bedfellows alliance between those who favor devolution and states' rights with those who pitched the environmentalists' cause.

Through the late 70's and 80's, however, adherents for the Meyers approach were also active, me included. Perhaps most noteworthy was the publication by the Environmental Defense Fund in 1983 of its seminal report, Trading Conservation Investments for Water: A Proposal for the Metropolitan Water District of Southern California to Obtain Additional Colorado River Water by Financing Water Conservation Investments for the Imperial Irrigation District. Arguably, the water policy reform era in the United States was launched in earnest with California voters' defeat of the Peripheral Canal referendum in June of 1982. The passage of a massive multi-billion dollar public works authorization bill by the California legislature in 1980 had become the subject of the first statewide referendum in two and half decades. The ensuing campaign was bitterly fought, as powerful economic and political forces divided nearly evenly, creating a "fair fight" in political expenditure terms. At the intellectual level, environmental arguments were raised on both sides. The Peripheral Canal itself had some environmental adherents and the bill package contained significant environmental commitments. For others, however, these commitments were far outweighed by the environmental threats posed by the projects authorized in the bill. What voters in northern California heard from opponents was the significance of those environmental threats to the northern half of the state. What voters in southern California

heard from opponents was the multi-billion-dollar cost of the facilities being authorized. Over ninety percent of northern California voters and forty percent of southern California voters concurred with the opponents, creating a remarkable sixty-two percent statewide defeat for the bill.

The defeat of the Peripheral Canal bill in the referendum smashed the old way of doing water policy business in California: public subsidies to water development. But what alternatives to building more dams and canals existed to accommodate the water needs fueled by growth in California and the west at large? This is the question EDF tackled in the Trading Conservation Investments for Water treatise. The principal answer, EDF argued, lay in water markets, in voluntary exchanges of water between willing sellers who, by foresight or accident of history, held plentiful rights, and willing buyers who sought supplemental supplies to meet their needs or wants. Other approaches were tried as well. Governor Deukmejian unsuccessfully proposed a scaled down through-Delta conveyance facility alternative to the Peripheral Canal. The Mono Lake Committee, with allies in the Southern California water establishment, successfully promoted an aggressive water conservation and reclamation program designed to offset Los Angeles' water losses from the restrictions placed on its Mono and Owens Basin diversions.

For the most part, however, what characterized the 1980's water policy was the Reagan administration's disinterest in spending taxpayer money on water projects. Bureau of Reclamation and Corps of Engineers budgets withered, even as the President and his appointees gave lip service to the business interests who sought federal subsidies for their pet projects.

A couple of surprising events from that era are worth recounting, in light of some of the most bitter controversies of our present day. Late in the 1980 presidential campaign, First Lady Rosalynn Carter paid an unusual visit to Fresno, in which she raised substantial funds for her husband's campaign. Shortly thereafter, Secretary of the Interior Cecil Andruss reversed three years of aggressive effort to limit the federal government's water and drainage service commitments to the Westlands Water District and offered a generous permanent contract to Westlands which was then operating on year-to-year contracts. Westlands surprised many at the time, refusing the offer, perhaps in anticipation of the Presidential election result. When James

Watt took over as Interior Secretary, however, he withdrew Andrus' offer and proposed considerably less generous take-it-or-leave-it terms to Westlands, threatening to cut off Westlands' water supply if it chose not to sign. Westlands sued the Secretary to compel continued deliveries of water. EDF sought to intervene in that litigation of 1981 on Secretary Watt's side. Unfortunately, in light of subsequent history, both the plaintiffs and defendants opposed EDF's intervention and EDF was not allowed into the suit, which was eventually settled by the United States on terms extraordinarily favorable to Westlands. That court-approved so-called Barcellos settlement, which purported to commit the United States to environmentally unsustainable water delivery and drainage service obligations, lies at the core of some of California's most intractable water policy conflicts to this day.

Drought struck California and much of the southwest in the late 1980s. The inflated water delivery commitments the United States had made in the Barcellos settlement and the build-up of demand on the State Water Project, combined with drought-induced short supplies to wreak havoc on the fisheries of the Sacramento/San Joaquin system. Both anadromous salmon runs and resident native fisheries crashed to endangered levels.

That physical backdrop, combined with a unique set for political circumstances, led to the passage of the most significant piece of water policy reform legislation in American history; the Central Valley Project Improvement Act of 1992 (aka the Miller-Bradley bill). Miller-Bradley, from a conceptional point-of-view, combined elements of both the Meyers and the Sax approaches. Borrowing from Meyers, Miller-Bradley, following the precedent set two years before in Truckee-Carson Pyramid Lake Water Rights Settlement Act of 1990, authorized the resale of federally developed water rights. It also established other ground rules for federal water marketing and for federal contract renewals and it created a fund, the Central Valley Project Restoration Fund, to be fueled by increases in the prices at which federal water and power would be sold, that the United States could use to purchase supplemental water supplies for both wildlife refuge and fisheries needs. Borrowing from Sax, Miller-Bradley also specifically rededicated significant quantities of water under federal control to the refuges, fisheries, and the Trinity River.

Neither the Meyers nor the Sax-inspired reforms have yet turned out to be resounding successes. Carl Boronkay, the General Manager of the Metropolitan Water District of Southern California during the Congressional struggles over Miller-Bradley, declared its authorization of federal water transfers a great boon to southern California, as good as several new dams and reservoirs. Soon thereafter, Boronkay resigned. His successors, and their counterparts elsewhere in California's water management sector, for a complex set of reasons have moved gingerly if at all to take advantage of the marketing opportunities afforded by Miller-Bradley. As for the Sax-inspired dedication of water to environmental needs, the ink from the first President Bush's pen signing Miller-Bradley into law was hardly dry before a succession of lawsuits began attacking nearly every effort the federal government has made to implement the environmental dedications.

Assessing the decade of the nineties is more difficult than its predecessors. A decade of agreements and accords, of passage of propositions and funding authorizations, and of governmental decisions with both regulatory and planning components, the years since 1992 pose a challenge to the water law and policy historian. Was the celebrated Bay-Delta Accord of 1994 a breakthrough in comity among the wizened water warriors of California? Or was it just a brief water policy truce inspired by gridlock in federal-state relations and a shift in the political landscape? Did the state and federal authorizations of large ecosystem restoration appropriations in 1996 signify a belated recognition on the part of the major consumptive water users that the ecosystem really was in trouble and needed an infusion of investment, albeit better paid for by taxpayers than by themselves? Or was it merely a down payment, to be supplemented by taxpayer investments in future years more directly to be spent on the pet projects of the water users themselves? And most recently was the 2000 CALFED Record of Decision and State Certification jointly signed by Secretaries Babbitt and Nichols the harbinger of a new cooperative comprehensive plan to meet California's water needs for the next several decades? Or was it merely a politically-inspired document that allows the federal and state governments to proclaim progress in the state's water affairs, even as major litigation and other uncertainties about funding and financing lay just below the happy-face surface?

Even more uncertain than a clear understanding of the recent past is any prediction of the future to come. But let me close nevertheless with several prognostications. After all, the title of the conference promises not only a Retrospective, but also an Agenda for the Future. Some might argue that the Counter-Reformation is in full force. The new federal Administration is filled with ideologically committed conservatives and libertarians. The Court of Claims has just issued a ruling in a takings case, brought by users of State Water Project contracted supplies, upholding their claims that SWP reductions in deliveries in the early 90's occasioned by federal biological opinions issued under the Endangered Species Act did indeed constitute compensable takings of private property. Even the apparently liberal Ninth Circuit has issued a recent ruling upholding a claim by aggrieved landowners on the San Joaquin Valley's west side that the United States owes them Congressionally-promised drainage service, if not necessarily the precise form of that service anticipated in the 1956 legislation authorizing the San Luis Unit of the Central Valley Project. But for every Counter-Reformation yin one can find a corresponding reformist yang. Take for example the recent decision of a state District Court of Appeal, left undisturbed by the California Supreme Court, holding the 1994 Monterey Agreement that reformulated the State Water Project to have been illegally adopted. Its ridicule of the SWP's "paper water" promises stands in stark contrast to the Court of Claims' characterization of those same commitments as solemn "entitlements". As for the Ninth Circuit's admonition to the United States to get on with providing drainage service to Westlands, what self-respecting conservative Administration, not to speak of Congress, is going to allow the federal courts to dictate federal water project priorities and funding decisions?

Finally, what about CALFED and the Record of Decision? What will Secretary Norton do? What will Congress do? In a recent *op ed* that Terry Anderson, the leading libertarian commentator on western natural resources issues, and I jointly published in the San Jose Mercury News (5/16/01), we argued that water markets, not taxpayer subsidies to water development, should be the lead policy instrument in addressing California's future water supply needs. Charley Meyers would have loved the piece had he lived to see it.

But Anderson and I recognized a need for public intervention as well. If water markets are to prevail, indeed if a strict takings jurisprudence is to prevail as well, how will the public

environmental values long championed by Joe Sax be addressed? The Anderson-Graff *op ed* finesses that question, calling on political leaders, especially President Bush, to answer it for us. But in concluding this presentation let me answer it for Graff alone. Miller-Bradley had it right, at least directionally. Those who use natural resources, i.e., all of us, must pay the costs of addressing the environmental damages occasioned by the resource exploitation involved, preferably when we use the resources involved. If infrastructure is to be expanded beneficiaries should pay its costs, with the possible exception of those situations where there are direct environmental benefits flowing from the expenditures. Miller-Bradley, however, went only part of the way in eliminating unwarranted subsidies and in increasing rates as a mechanism to establish a restoration account. Moreover, it applies only to federal users of one project in one state of the Union. The challenge ahead is to extend that precedent to state and local users and to other resources as well.