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## Introduction

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# **Symposium on the 25th Anniversary of the Report of the Governor's Commission to Review California Water Rights Law**

## **Introduction**

Ronald B. Robie\*

The editors of the *McGeorge Law Review* have assembled an impressive collection of articles and retrospectives on the 25th Anniversary of the Governor's Commission to Review California Water Rights Law. This issue and its fascinating insights should be an invaluable resource to those in the water community.

The Retrospectives offer insights into the background and process of this bold attempt to update and improve one of the most traditional and politically charged areas of the law. Three members of the Commission and two staff members, including the staff director, reflect and reminisce on the Commission.

The remaining articles address the four major subject areas of Commission analysis and recommendation in its final report. Each section begins with an excellent introductory article by a McGeorge student summarizing the Commission's recommendations in each area, and in some instances what became of them.

### **TOWARD GREATER CERTAINTY IN WATER RIGHTS**

Professor Brian Gray terms the Commission's recommendations both controversial and ahead of their time. He, as do several others, notes that courts decided major cases subsequent to the final report that adopted many of the Commission's concepts. Its greatest influence, he writes, "may have been its contributions to the California Supreme Court's contemporary water law jurisprudence."<sup>1</sup>

Samantha K. Olson and Erin K. L. Mahaney provide an exhaustive review of what the State Water Resources Control Board has done since the final report. In many instances it has implemented concepts in the final report through administrative actions.

Professor Barton H. Thompson, Jr., counsels the state needs to learn to live with uncertainty. There is more uncertainty now than at the time of the final

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1. Brian E. Gray, *The Uncertain Future of Water Rights in California: Reflections on the Governor's Commission Report*, 36 MCGEORGE L. REV. 43, 49 (2005).

report, he argues, as uncertainty cannot be eliminated by law as it is exogenous to the law. He recommends greater water marketing to reduce the evils of uncertainty and also the somewhat novel concept of insurance against water shortage.

Michael Warburton criticizes the Commission for too narrow an approach and disagrees that uncertainty is a bad thing. In his opinion, courts have been the boldest in dealing with the problems the Commission outlined. For example, Los Angeles' rights to water flowing into Mono Lake were certain at the time of the final report, and only as a result of uncertainty recognized by the public trust doctrine were major changes made. His bottom line is our need to manage uncertainty, not reduce it.

#### IMPROVING EFFICIENCY IN WATER USE

Caitlin S. Dyckman praises the Commission for its courage in addressing the issues at all, knowing that there are substantial political and institutional obstacles to improving efficiency. She provides a convenient table showing the many statutes enacted in response to the final report to facilitate water transfers. And she writes in terms of the "enduring legacy" of the Commission's "prescience" in making its recommendations.

Likewise, Andrew H. Sawyer concludes the Commission's recommendations were "remarkably successful" in the area of efficiency. In his encyclopedic article he discusses legislation and the administrative orders of the State Water Resources Control Board following the final report to improve efficiency. The answer to increasing demands, he concludes, is not in developing new supplies but the making of more efficient use of supplies already developed.

Finally, Scott S. Slater agrees water transfers hold the "greatest promise" in the area of efficiency. As examples of major successes, he cites the State Water Bank and the Environmental Water Account. However, he calls for legislation to define fair compensation under wheeling statutes. His article also cites successes at demand management, i.e., water conservation.

#### PROTECTION OF INSTREAM FLOWS

David R.E. Aladjem focuses on the 25 years since the final report and points to two areas where, driven by the public trust, major protection to instream flows was provided—The Delta and Mono Lake. While the Commission's recommendations for legislation were not enacted, he cites Cal-Fed's Environmental Water Account and the 1994 Bay-Delta Accord as setting the stage for water users and regulators to move beyond the "canned positions of the past" and attempt to collaborate in meeting the needs of diverse interests and avoid "interminable litigation."

Ryan Bezerra and Yvonne M. West, counsel for the Yuba County Water Agency, recount the history of the water right Decision 1641 of the State Water Resources Control Board in which the Board amended the Yuba Agency's

permits to include instream flow regulation downstream from New Bullard's Bar Dam. They also discuss the relationship between the Commission recommendations and the Board's decision.

Professor Harrison C. Dunning focuses on one topic explored by the Commission, the applicability of the public trust doctrine to the exercise of water rights. The Commission's comment that "the expanding public trust doctrine . . . has great potential for change,"<sup>2</sup> he writes, bore "significant fruit" although the Commission's legislative recommendations were not enacted. Dunning's article also has an excellent discussion of the background of limits on protection of instream flows going back a half-century. He points to several actions of the State Water Resources Control Board regarding instream flows, including Mono Lake. In spite of these, he concludes "it is impossible to conclude that instream flow protection law in California is in good condition."<sup>3</sup>

Finally, Jan Stevens agrees noting that progress has been made, primarily through judicial decisions, yet "[m]any of the problems noted by the Commission continue today."<sup>4</sup> Recognizing that droughts motivate action, he ruefully observes it may be necessary for another drought like that of 1976-77 to galvanize action on instream uses.

#### EFFECTIVE MANAGEMENT OF GROUNDWATER RESOURCES

Eric L. Garner and Jill N. Willis conclude that most of the Commission's recommendations for improvement of groundwater management were not implemented and the future is uncertain. These recommendations, they argue, remain viable and prudent alternatives for future water management. These authors focus on the impact on the Mojave Basin case<sup>5</sup> where the California Supreme Court took groundwater law back to the beginning and unanimously rejected the doctrine of equitable apportionment, which the final report had espoused. As a result of the Mojave decision, Garner and Willis predict adjudications may well be more lengthy and expensive. To meet that need, they recommend creation of a water court. As for local management, they note that progress in effective management has been advanced by a recent court decision that the storage space underground is a public resource and is not owned by holders of water rights.<sup>6</sup>

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2. GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 11 (Dec. 1978).

3. Harrison C. Dunning, *California Instream Flow Protection Law: Then and Now*, 36 MCGEORGE L. REV. 363, 392 (2005).

4. Jan Stevens, *Instream Uses Twenty-Five Years Later: Incremental Progress or Revolving Door?*, 36 MCGEORGE L. REV. 393, 397 (2005).

5. *City of Barstow v. Mojave Water Agency*, 5 P.3d 853 (Cal. 2000).

6. *Cent. & West Basin Water Replenishment Dist. v. S. Cal. Water Co.*, 135 Cal. Rptr. 2d 486 (Cal. Ct. App. 2003).

Kevin M. O'Brien comments the Commission had bad timing. It was conceived during a drought but its report came out followed by a decade of wet years. He found the Commission's recommendations flawed particularly for giving the State Water Resources Control Board, a regulatory body, the primary state oversight of local management. O'Brien points to many county groundwater ordinances which the courts have not held preempted by state law. He questioned whether they would be preempted if they were to regulate or restrict out-of-county transfers over which the Board has jurisdiction.

Antonio Rossmann, counsel for Inyo County, focuses his article on the groundwater controversy between Inyo County and Los Angeles which was exporting Inyo groundwater. He discusses the litigation which ensued. Most involved a series of environmental impact reports by the City which the Third District Court of Appeal found inadequate. The County adopted a groundwater ordinance which did not include a flat prohibition on export and claims of preemption never reached the appellate courts. Ultimately Los Angeles and the County developed a joint management plan.

David Sandino feels the Commission's recommendations were followed by the Legislature and the Courts in giving local agencies authority to regulate groundwater, although he concedes that annual overdraft of one to two million acre feet a year still exists. This must be eliminated, he argues. Sandino points out that 27 counties have groundwater ordinances, many designed primarily to prevent export of groundwater. This portends more litigation if these districts ever limit exports in a significant manner.

#### PROSPECTIVE

Finally, Gregory A. Thomas, in an insightful article, comments on all the articles in this issue. He concludes that the "California water world has changed a great deal since 1978, and yet the legal structures have remained very much the same."<sup>7</sup> Today the agenda is broader than that of the Commission. Federal institutional reforms must be included. Agency mandates, rather than individual water rights should be the focus. Physical solutions hold the greatest promise for resolving conflicts among water users, especially utilization of water for environmental restoration. A more interdisciplinary approach and solution-oriented approach is needed, he concludes.

All in all this Symposium Edition of the *McGeorge Law Review* is stimulating, thought provoking, and thoroughly informative. Congratulations to the editors and all the participants.

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7. Gregory A. Thomas, *The Future of Water Law Reform in California a Quarter Century After the Governor's Commission*, 36 MCGEORGE L. REV. 495, 532 (2005).