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The Governor's Commission: Success or Failure?

Harrison C. Dunning*

Blue-ribbon commissions on water resources have been appointed only occasionally in American history. The most recent such commission identified four federal ones in the twentieth century on “comprehensive federal water policy . . . in addition to other commissions that have included water policy within their charter or that have dealt with a single aspect of water management.”¹ That body also made two claims with regard to these commissions: first, that they “have reflected the dominant thinking of their time and have both ushered in new eras and pointed to the transition from one era to another;”² and second, that they “have reflected the persistence of some basic ideas of water management that have remained relatively constant—ideas rejected at one time reappear later in the same or new form.”³

Water resources blue-ribbon commissions at the state level have been even less frequent in American history; however, California had two in the twentieth century. One was the Conservation Commission, a creature of the progressive era which dealt with several natural resources, but devoted most of its report to water resources.⁴ The second was the Governor's Commission to Review California Water Rights Law (“Governor's Commission”), which, as the name indicates, was confined to questions of water rights law.

The Governor's Commission was the result of an initiative of John E. Bryson, a former environmental lawyer who served as chairman of the State Water Resources Control Board (“SWRCB”) during the first gubernatorial administration of Edmund G. “Jerry” Brown, Jr. (1975-1978). In a memorandum written toward the end of the second year of that administration, Bryson stated that existing California water rights law “contributes to wasteful use and poor allocation and does not adequately protect environmental values. It also fails to provide optimal certainty for private decision-making.”⁵ In that memorandum,

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1. WESTERN WATER POLICY REVIEW ADVISORY COMM'N, WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY 4-21 (1998). The four commissions were the Inland Waterways Commission, the Hoover Commission, the National Water Commission, and the Western Water Policy Review Advisory Commission. See generally INLAND WATERWAYS COMM'N, PRELIMINARY REPORT OF THE INLAND WATERWAYS COMMISSION, S. Doc. No. 325 (1908) (no final report was published); WATER RES. POLICY COMM'N, REPORT OF THE PRESIDENT'S WATER RESOURCES POLICY COMMISSION (1950); NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES (1973); WESTERN WATER POLICY REVIEW ADVISORY COMM'N, *supra*.

2. WESTERN WATER POLICY REVIEW COMM'N, *supra* note 1.

3. *Id.*

4. STATE CONSERVATION COMM'N, REPORT OF THE CONSERVATION COMMISSION OF THE STATE OF CALIFORNIA TO THE GOVERNOR AND LEGISLATURE OF CALIFORNIA (1912). The other natural resources discussed in this report were forests, school lands, mineral lands, and wildlife.

5. Memorandum from John Bryson, to Tony Kline 1 (Oct. 14, 1976) (copy on file with the *McGeorge Law Review*) [hereinafter John Bryson Memorandum]. Kline then served as the Governor's legal affairs

Bryson identified three specific deficiencies in California water law: “the failure to control or manage groundwater use;”⁶ “the recognition of riparian rights,” in that riparian diversions are unregulated;⁷ and the “absence of an effective means to protect minimum in-stream flows.”⁸

Interestingly, even at this initial stage, Bryson in his memorandum anticipated how the several deficiencies might be remedied. For groundwater, he said a permit system “might not be required.”⁹ Instead, he stated, “the best approach is probably giving the state power to require that controls be developed in basins in which excessive pumping threatens to deplete the firm supply or cause saltwater intrusion. The best institutional form for implementation of controls may be separate basin authorities.”¹⁰ For riparian rights, i.e. the water rights of landowners with direct access to a watercourse or a lake,¹¹ he suggested “dormant” riparian rights be extinguished and those in use be provided with permits.¹² And for instream flows, he proposed two levels of protection; one for dry years, and one for all other years.¹³

In justifying the appointment of a blue-ribbon commission to study changes in California water rights law, Bryson acknowledged that the task was “technical,” “complicated” and “likely to be strongly opposed.”¹⁴ He further believed that a legislative proposal from a basically conservative commission made up of persons with outstanding professional reputations would be more likely to succeed than would one developed by a legislator or agency of state government alone.¹⁵ He identified three possible “stars” as prospective Commission members: Donald R. Wright, then retiring as Chief Justice of California; Howard Way, the long-time chair of the Senate Agriculture and Water Committee; and Charles J. Meyers, the Dean of Stanford Law School.¹⁶

secretary. Although California was just then entering the second year of a severe two-year drought, the memorandum made no mention of that fact. The drought was referenced, however, in the executive order which established the Governor's Commission. Exec. Order No. B-26-77 (May 11, 1977). By that time, California had experienced its driest winter in recent times.

6. John Bryson Memorandum, *supra* note 5, at 1.

7. *Id.* at 2.

8. *Id.*

9. *Id.* at 3.

10. *Id.*

11. Landowners on a lake technically have “littoral” rights, but these function just like the riparian rights of those with land crossed or bordered by a watercourse.

12. John Bryson Memorandum, *supra* note 5, at 3.

13. *Id.*

14. *Id.* at 4.

15. *Id.*

16. *Id.* A year earlier, Wright had authored an important decision on groundwater rights. *See City of Los Angeles v. City of San Fernando*, 537 P.2d 1250 (1975). Meyers had been a staff counsel to the National Water Commission, had assisted the special master appointed in *Arizona v. California*, 373 U.S. 546 (1963), and was a co-author of a leading casebook on water law. In his October 14, 1976 memorandum, Bryson “tentatively” recommended six other people, none of whom served on the Governor's Commission, except for Bryson himself, ex-officio as Chair of the SWRCB, and Ronald B. Robie, ex-officio as Director of the Department of Water Resources. John Bryson Memorandum, *supra* note 5, at 4-5. Robie had served on the SWRCB during the earlier gubernatorial administration of Ronald Reagan, and he had then proposed a review of California water

He also asserted it would be “useful to bring a few legislators in from the outset.”¹⁷ This was never done, and Howard Way was not appointed to the Commission, significant perhaps regarding the later lack of legislative success for the Commission’s principal recommendations. Two former state senators, James A. Cobey and Virgil O’Sullivan, did serve on the Commission.

The October 1976 Bryson memorandum on a proposed water law commission suggested a one-year study with a budget of just over \$150,000.¹⁸ It was proposed to fund the work through federal monies granted to the SWRCB, so that there was no state budget item and consequently no legislative “buy-in” at the outset to the idea of a water rights commission. Indeed, throughout the two years that the Governor’s Commission was in operation, neither the Legislature nor the Governor’s Office paid any particular attention to the work. The Governor’s Commission did its review in a thorough and careful way but, I believe, its failure to develop an adequate political strategy contributed to the fact that many of its legislative proposals were never enacted into law. By way of contrast, it is useful to recall that the Conservation Commission, chaired by a former Governor of California,¹⁹ had many of its recommendations enacted.²⁰

Bryson anticipated that the Governor would appoint the members of the Governor’s Commission early in 1977. However, some intense behind-the-scenes political jockeying delayed the appointments until the spring.²¹ While staff had

law. Memorandum from Ronald B. Robie, to Porter A. Towner (Mar. 20, 1975) (copy on file with the *McGeorge Law Review*). That brief memorandum refers to an earlier suggested study “vetoed primarily due to objections of Congressmen in the Central Valley . . . and San Joaquin and Contra Costa County interests who are afraid of having their riparian rights inventoried or otherwise checked upon.” *Id.* Robie’s 1975 memorandum mentions groundwater management, riparian rights and pre-1914 appropriative rights as needing study. See also Ronald B. Robie, *Modernizing State Water Rights Law*, 1974 UTAH L. REV. 760 (1974).

17. John Bryson Memorandum, *supra* note 5, at 6.

18. A revised proposal a few weeks later increased the anticipated expenditure to nearly \$178,000. Memorandum from the State Water Resources Control Board, to Tony Kline, Tom Quinn, and Claire Dedrick (Dec. 1, 1976) (copy on file with the *McGeorge Law Review*). The Governor’s Commission in fact worked for two years, if the several months of staff work prior to appointment of the members of the commission are included. No definitive statistic is available, but clearly far more than \$178,000 was expended on the work.

19. The Chair was George C. Pardee, who was Governor from 1903 to 1907 and who campaigned vigorously for enactment of the legislation proposed by the Conservation Commission.

20. The Conservation Commission report led directly to enactment of the Water Commission Act of 1913, approved by the people in a referendum in 1914. The Water Commission Act imposed a permit and license regulatory system on new appropriations of surface water and of water in a subterranean stream flowing through a known and definite channel. These provisions were incorporated into the Water Code in 1943. The Conservation Commission also suggested that the State of California condemn riparian rights and make the water covered by those rights available for appropriation. STATE CONSERVATION COMM’N, *supra* note 4, at 30. The legislature did not do that, but it did enact two measures designed to limit riparian rights. Both, however, were invalidated by the state’s highest court. See *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 45 P.2d 972 (Cal. 1935); *Herrminghaus v. S. Cal. Edison*, 252 P. 607 (Cal. 1926).

21. An executive order creating the Governor’s Commission was issued by the Governor on May 11, 1977. Of the fifteen names proposed in the two Bryson memoranda, only five were appointed to the Governor’s Commission: Donald R. Wright and Charles J. Meyers, as Chairman and Vice-Chairman, respectively; Ronald B. Robie and John E. Bryson, as ex-officio members; and Arliss L. Ungar, the Water Director of the League of Women Voters of California. The other seven appointees were Ira J. Chrisman, a long-time Chair of the

been hired by the SWRCB, the administrative home of the Governor's Commission, to begin work early in 1977, one consequence of the delay in appointing Commission members was the creation of a staff with no Commission to provide it with direction. Staff used the time to begin work on six detailed and comprehensive "background and issues" papers designed to provide a foundation for the Commission's work. Three dealt with the topics flagged in the Bryson memoranda: groundwater rights, riparian water rights, and legal aspects of instream water uses; the other three dealt with appropriative water rights, legal aspects of water conservation, and transfer of water rights.²² Consideration was given to doing a paper on area of origin protection, but that idea was turned down by the Commission at its first meeting. At that meeting, the Commission did, however, approve the six topics upon which the staff had been working as appropriate for intensive study. The staff papers were treated as responsive to the directive in the Executive Order to "review existing California water rights law."²³

Once the executive order was issued and the Governor's Commission was organized, a series of public workshops were held at various locations throughout California over a period of about six months.²⁴ Copies of the background and issues papers were distributed to a mailing list of nearly a thousand people. Experts, some of them from other states, were invited to share their views at the workshops. And the public, expert or not, were invited to state what legislative action, if any, they thought ought to be taken regarding the topic under consideration. After that, several months were taken by staff and the Commission to prepare a draft report. A day-long symposium was held to explain the draft, and then four days of public hearing were held at different locations throughout California.²⁵ In December 1978, a 264-page final report was issued. The text of that report departed from the six topic format of the background and issues papers, in that the substantive material was organized under the four headings of "greater certainty," "improving efficiency" (which included voluntary transfers),

California Water Commission and a vigorous proponent of water projects; James A. Cobey, a former state senator who had been active in support of legislation authorizing the State Water Project; David E. Hansen, an agricultural economist at the University of California at Davis; Arthur L. Littleworth, a water rights attorney from Southern California who had been active on behalf of State Water Project contractors; Mary Anne Mark, an environmental advocate; Virgil O'Sullivan, a former state senator; and Thomas M. Zuckerman, an attorney who had long represented water interests in the Sacramento-San Joaquin Delta.

22. Anne J. Schneider authored the groundwater and instream papers, Clifford T. Lee authored the water conservation and transfer papers, David B. Anderson authored the riparian paper, and Marybelle Archibald authored the appropriative rights papers. Although these valuable studies were unfortunately never printed and widely disseminated, they have been available over the years from the SWRCB.

23. GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 3 (1978) [hereinafter FINAL REPORT].

24. *Id.* at 4. There were two workshops on groundwater, which throughout was the topic to which the Governor's Commission gave the greatest attention, and one on each of the other topics for which a background and issues paper had been prepared.

25. *Id.* at 5.

“protection of instream uses,” and “effective management of groundwater resources.” Each substantive chapter included commentary, recommendations, and the text of proposed legislation.

If the Governor’s Commission’s work were evaluated using only the charge in the executive order which established it, then it should be regarded as a success. The charge was to “review California water rights law . . . evaluate proposals for modifications in this law . . . and . . . recommend appropriate legislation.”²⁶ The six background and issue papers provided a detailed and comprehensive review of California water rights law in 1977.²⁷ Those papers, together with submissions at the many public meetings, produced a long list of proposed modifications in California water rights law, all of which were evaluated. And the Commission’s final report contained over a hundred pages of text of proposed legislation.

But in a larger sense, I believe that the Governor’s Commission failed in its task. The ultimate point was to get legislation enacted to modify California water rights law, and little statutory change can be credited to the work of the Commission. Indeed, very little important legislative consideration was ever given to the Commission’s recommendations on groundwater and instream flow protection. Only minor statutory changes were made regarding certainty and efficiency.

In seeking to understand the immediate failure of the Governor’s Commission’s legislative recommendations,²⁸ several factors seem important. As noted earlier, although the Commission understood the political sensitivity of many of the topics it studied, no political strategy for success was developed.²⁹ Certainly there was little grass roots concern with a topic as esoteric as water rights reform. Interest groups, such as the Association of California Water Agencies, the Farm Bureau, and the Chamber of Commerce, opposed the

26. Exec. Order No. B-26-77 (May 11, 1977).

27. See MARYBELLE D. ARCHIBALD, GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, APPROPRIATIVE WATER RIGHTS IN CALIFORNIA (Staff Paper No. 1, May 1977); ANNE J. SCHNEIDER, GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, GROUNDWATER RIGHTS IN CALIFORNIA (Staff Paper No. 2, July 1977); CLIFFORD T. LEE, GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, LEGAL ASPECTS OF WATER CONSERVATION IN CALIFORNIA (Staff Paper No. 3, August 1977); DAVID B. ANDERSON, GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, RIPARIAN WATER RIGHTS IN CALIFORNIA (Staff Paper No. 4, November 1977); CLIFFORD T. LEE, GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, THE TRANSFER OF WATER RIGHTS IN CALIFORNIA (Staff Paper No. 5, December 1977); ANNE J. SCHNEIDER, GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, LEGAL ASPECTS OF INSTREAM WATER USES IN CALIFORNIA (Staff Paper No. 6, January 1978).

28. Several years later, many of those recommendations were included in an initiative measure; indeed, the initiative borrowed recommendations from the Governor’s Commission draft report, which tended to be stronger than those in the final report. The initiative qualified for the November 1982 ballot as Proposition 13, but it was defeated by the voters.

29. Furthermore, just as the Governor’s Commission’s final report was submitted, John Bryson, primary architect of the effort, left the SWRCB to become President of the Public Utilities Commission.

recommendations almost in their entirety.³⁰ Many of the Commission's proposals resulted in more power for the SWRCB, which was at loggerheads with many in the water community on several other issues. And Governor Jerry Brown did nothing to try to get the proposals enacted into law.

Although the principal legislative recommendations of the Governor's Commission were never enacted, the Commission may be credited with at least indirect success on one major topic: the protection of instream flows. The background and issues paper on instream uses noted the potential of the venerable public trust doctrine with regard to limiting the exercise of water rights in order to promote public values. This idea was picked up two years later at a major public trust doctrine conference held at the University of California at Davis,³¹ and two of the papers, which resulted from the conference, were cited three years later in a decision on water rights in the Mono Basin.³² That decision, which greatly increased the potential for enhanced streams flows and augmented lake levels, is discussed more fully elsewhere in this symposium.³³ In this limited way, the Governor's Commission's work did usher in a new era and point to the transition from one era to another, one of the two functions claimed for water resource commissions by the Western Water Policy Review Advisory Commission.³⁴

30. Those interest groups had sought to exploit the 1976-1977 drought to get new water projects approved, and the Governor's Commission had explicitly refused to endorse such projects, regarding them as outside its area of responsibility. FINAL REPORT, *supra* note 23, at 5-6. The report stated that reforms in water rights law "are not inimical to water development projects; neither do they mandate that any particular water development policy be adopted." *Id.* at 6. But in an individual submission included in the final report, it was argued that "were these recommendations actually implemented," it would "further complicate" existing law and "could well be a deterrent to those who are or will be responsible for meeting the future water needs of California." *Id.* at 257 (quoting Ira J. Chrisman, "Comments on the Final Report").

31. THE UNIVERSITY OF CALIFORNIA, THE PUBLIC TRUST DOCTRINE IN NATURAL RESOURCES LAW AND MANAGEMENT: CONFERENCE PROCEEDINGS (H. Dunning ed., 1981). The conference was held September 25-26, 1980.

32. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983). The papers appeared in a symposium issue of the U.C. Davis Law Review that also included a portion of the conference materials. One paper cited by *National Audubon* was Ralph W. Johnson, *Public Trust Protections for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233 (1980), an earlier version of which appears in the conference proceedings. The other was Harrison C. Dunning, *The Significance of California's Public Trust Easement for California's Water Rights Law*, 14 U.C. DAVIS L. REV. 357 (1980), which was not included in the conference proceedings.

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

34. WESTERN WATER POLICY REVIEW ADVISORY COMM'N, *supra* note 1, at 4-21.