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Retrospective on the Governor's Commission

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For the four brand new lawyers who were the research staff for the Governor's Commission to Review California Water Rights Law ("Commission"), working for the Commission was the ultimate post-doctoral educational opportunity. Of the four, three have continued to practice in the field of water law, and we are still dealing with essentially the same issues we worked on in 1977 and 1978. In tackling the subject areas covered by the Commission, we had the unique opportunity to meet and work closely with California's leading water lawyers, engineers, and water industry representatives. Twenty-five years later, I appreciate more than ever how incredible it was that those individuals spent literally hundreds of hours talking with us and, in my case, explaining the elaborate history and subtleties of groundwater law and institutions. I also now appreciate far better how much was at stake.

Although a great deal has happened in the world of California groundwater in the last twenty-five years, almost none of it can be said to have directly resulted from the work of the Commission. Nonetheless, the Commission cast a shadow over the future sufficient to help galvanize interested parties into action. The prospect of *any* oversight or control by the State Water Resources Control Board ("SWRCB") over groundwater was viewed then (and still) as a potential disaster. At the same time, however, the Commission had concluded that "groundwater problems have become critical but adequate, comprehensive management has not been undertaken in many overdrafted areas of the state,"[1] and the Commission was very concerned that the critical problems might not be addressed. In the Final Report, the Commission noted that groundwater is a "common pool" resource and, "[l]ike other common pool resources, groundwater is subject to what has been called the 'tragedy of the commons.'"[2] The Commission was concerned that "taking 'no action' could have serious drawbacks" before drastic physical limitations or harm came into play (such as seawater intrusion).[3]

The Commission strongly favored problem-solving management at the local level to address problems related to overdraft, groundwater quality, and to make possible conjunctive use and groundwater transfers. However, the Commission concluded that, although groundwater management should be "primarily local in nature," some form of "hammer" was required. The Commission did not espouse

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1. GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 135 (1978) [hereinafter FINAL REPORT].

2. *Id.* at 143-44.

3. *Id.*

any significant degree of state regulation of groundwater, but it wanted to make sure that "no action" would not remain an option:

> Members of the Commission believe it is imperative that California now take steps to initiate more effective management of groundwater resources. Such management should be primarily local in nature, but it should be designed to achieve goals important to the entire population of the State. Whenever possible, groundwater management should be coordinated with surface water management and local water districts should be encouraged to work cooperatively.[4]

Although the Commission's recommendations intended to strongly emphasize local control over groundwater management, its proposed legislation did so in a way that would have allowed the SWRCB to insinuate itself in certain crucial decisions. This was, however, viewed as the minimum required to avoid "no action" being taken in areas where effective management was imperative to avoid "tragedy of the commons" problems.

The Commission's basic groundwater management conclusions and recommendations[5] were, "[b]ecause of various levels and types of existing [local] management programs and the substantial differences in groundwater basin conditions and needs in the State, [any] proposed legislation would allow for flexibility whenever possible."[6]

Since groundwater basins differ a great deal throughout the state, it was first necessary to identify logical basin boundaries, taking into account geological, hydrological, and political considerations, as directed by California Water Code section 12924 (enacted in 1978).[7]

If a basin did not have adequate groundwater management, local entities within the basin would have the option to agree on a groundwater management authority.

The entity would have been given extensive powers to control storage, regulate groundwater extraction, impose extraction charges (pump taxes), levy basin equity assessments and taxes, and to issue revenue bonds.

In basins that needed groundwater management, if the SWRCB determined that no local entity or joint powers authority had been agreed upon to take over groundwater management, a groundwater management district would automatically be formed for the basin.

Whether formed by agreement or fiat, the entity was required to adopt a groundwater management plan within two years, but that groundwater management

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4. *Id.* at 14.

5. *Id.* at 170-230.

6. *Id.*

7. The Department of Water Resources ("DWR") has identified basins subject to critical conditions of overdraft. That work is reported in the Bulletin 118 series. *See, e.g.*, DEP'T OF WATER RES., CALIFORNIA'S GROUNDWATER UPDATE 2003 (Bulletin 118).

program was subject to SWRCB evaluation and comment. If the plan were deemed by the SWRCB to be inadequate, or if a plan were not prepared, the Attorney General would be authorized to file a Superior Court action to adjudicate, impose an appropriate groundwater management program, or seek other appropriate relief.

The overwhelming problem with this proposal was, of course, that the SWRCB's "nose was under the tent." In one of only two "minority reports," Commission member Ira J. Chrisman noted:

> An early decision of the Commission in the area of groundwater was to stress management as opposed to adjudication. The recommendations placed the primary responsibility for management and control at the local level. Studies are presently underway to detail boundaries of proposed groundwater management areas. These studies are under the direction of the Department of Water Resources. Ultimate designation of such areas will be a function of the State Water Resources Control Board. At the moment there is significant concern expressed as to a precise definition of "local control." Many have indicated that given the role of the State in this area, approval of the concept of local management and control is viewed as actually being State control.[8]

The concerns articulated by Mr. Chrisman were shared by many. Even the limited role accorded the SWRCB was viewed with great concern. In retrospect, the Commission's view of the role of the SWRCB in its proposed legislation was that it was as limited as possible, the very least that could be done in the face of the "tragedy of the commons" dynamic. The Commission did not choose to venture where none had gone before in California, to endorse SWRCB permitting jurisdiction over groundwater. However, the Commission did embrace the notion that there could well be basins in the state in which pumping would not be managed, and some form of state authority would have to be brought to bear.

What has occurred, instead, is that the Legislature has chosen to make available tools and to create financial incentives in place of the "camel's nose." In fact, as early as 1979, Justice Ronald B. Robie (then-Director of DWR) noted:

> Local agencies throughout the valley, partly in response to the perceived fear of state groundwater programs, are accelerating their own programs and are making them truly conjunctive use programs under which surface water is limited to those who actually reduce their groundwater use. So whether by fear or whatever, I think we are making real progress in groundwater management in California.
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> . . .

8. FINAL REPORT, *supra* note 1, at 256-57.

> The progress has not been speedy. It's been rough and harsh. At times controversies have not been pleasant, but the people of the state through their many governmental agencies and institutions, in my opinion, are beginning to move slowly but surely toward the recognition of the realities of water management. The water community is finally coming to grips with the need to realistically put aside past prejudices and fears and develop programs that truly meet our current needs.[9]

Most recently, the carrot (versus the stick of SWRCB involvement) has been refined. Programs such as the Local Groundwater Management Assistance Act of 2000 (AB 303)[10] and SB 1938,[11] enacted in 2000 and 2001, respectively have provided grant funding to local agencies for groundwater management efforts. SB 1938 requires that groundwater management plans be completed in order for agencies to be eligible for certain public funds for groundwater projects. There are numerous other examples, probably the most significant of which has been the adoption of well over 150 groundwater management plans throughout the state under the provisions of AB 3030,[12] enacted in 1992. These and other legislative actions have been significant catalysts for the preparation of groundwater management plans. There have been extensive and very substantial conjunctive use projects undertaken and more are being planned all the time. Perhaps the only areas of the original Commission groundwater program in which substantial progress has not been made are the areas of groundwater adjudications and transfers of groundwater.

There certainly have been forays made in these twenty-five years to change the basic "DNA" of California's groundwater law and institutions. One of these relates to adjudication concerns discussed by the Commission. The Commission recognized that adjudication has led to successful programs for several Southern California groundwater basins, and suggested procedural rules to make adjudication less onerous. The Commission also recommended substantive changes in its proposed legislation stating, "[T]he doctrine of mutual prescription is not revitalized. Instead, the basis of future groundwater adjudications is fair and equitable apportionment of rights to extract groundwater, with considerable discretion to be left in the court to avoid races-to-the-pumphouse and other problems."[13]

Since the Commission's Final Report, which discussed the Mojave adjudication at some length, the California Supreme Court decided the *Mojave* case.[14] The court decided, by a margin of nine to zero, that even agreement of a super-majority of

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9. Ronald B. Robie, *Groundwater Management: Policy and Experience, in* PROCEEDINGS OF THE TWELFTH BIENNIAL CONFERENCE ON GROUND WATER 7-8 (Nov. 1979).

10. CAL. WATER CODE §§ 10795-10795.20 (West Supp. 2004).

11. *Id.* §§ 10753.1-.9.

12. *Id.* §§ 10750-10756 (West Supp. 2004).

13. FINAL REPORT, *supra* note 1, at 169.

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

pumpers as to what "equitable apportionment" meant in the Mojave basin did not trump basic principles of groundwater rights; the rights of overlying landowners must be recognized. The Court's decision has been viewed by many as a resounding rejection of equitable apportionment-based adjudication.

The Commission did not tackle the question of the extent of the SWRCB's permitting jurisdiction over groundwater. What is a "subterranean stream flowing through a known and definite channel,"[15] versus "underflow," versus percolating groundwater is an issue that was not addressed, but the Commission did acknowledge problems that are entailed with state agency efforts at "piecemeal regulation." The Commission focused on the Coastal Commission's assertion of jurisdiction over certain pumping within the coastal zone as an example, but characterized the issue broadly stating, "[i]n many areas there is no groundwater management program. Various agencies, including state agencies, attempted to fill this vacuum where they perceived that there are problems related to their area of interest."[16]

In the SWRCB permitting jurisdiction context, the issue has been raised numerous times since the Commission's work was completed, as to whether groundwater is true percolating groundwater (and not within SWRCB permitting jurisdiction) or whether it is subterranean stream water, and perhaps "underflow," (that is within SWRCB permitting jurisdiction). In an effort to address this issue, the SWRCB enlisted Professor Joseph Sax to propose a resolution to the debate over the extent of SWRCB permitting jurisdiction over groundwater. Professor Sax wrote a very thought-provoking and extensive report that set out the history of the issue and identified the problems involved in differentiating between jurisdictional and nonjurisdictional groundwater. In the end, Professor Sax basically punted, the Sax Report was not embraced by the SWRCB, and little has changed in this arena. Many are concerned that the SWRCB has its "camel's nose under the tent" in every stream which could conceivably be characterized as a "subterranean stream flowing through a known and definite channel." The issue of the extent of SWRCB permitting jurisdiction over groundwater and "subterranean streams" is an issue that will persist, since groundwater pumping impacts on streamflow will continue to be a contentious issue.

Overall, the work of the Governor's Commission to Review California Water Rights Law was a tremendous effort, and successful in many ways. I was very fortunate to be a part of that process.

15. CAL. WATER CODE § 1200 (West 1971).

16. FINAL REPORT, *supra* note 1, at 148.

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