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Foreword

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Symposium

Foreword

George A. Gould*

It has been ten years since the Governor's Commission to Review California Water Rights Laws examined California water law. In the ten years since the Commission's Report, California has continued to struggle with the problems resulting from competing demands on its water resources. The conflicts between Southern California and Northern California, between the demand for water for consumptive uses and for instream uses, between agricultural needs and urban needs, and a host of other conflicts, have intensified during this period. Other conflicts, such as that between the state and federal government appear to have cooled, but have by no means been fully resolved. For a few problems, such as adequate controls on groundwater use, time seems largely to have stood still: but the legal questions and policy considerations persist.

Water law both shapes and is shaped by these struggles. The ten years since the report have produced some important changes in California water law. Some of these changes are the result of legislative enactments, including a number of statutes recommended by the Governor's Commission. The more significant changes, however, are the product of judicial decisions. These decisions include *National Audubon Society v. Superior Court of Alpine County*,¹ which applies the public trust doctrine to water rights; *United States v. State Water Resources Control Board*,² which attempts to clarify the relationship

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1. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

2. 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (1986).

between water rights and water quality standards in the Sacramento-San Joaquin Delta and which portends far reaching changes in California water law generally; *In re Waters of Long Valley Creek Stream System*,³ which suggests the eventual demise of unexercised riparian rights; *In re Waters of Hallett Creek Stream System*,⁴ holding that National Forests have riparian rights; and *California v. United States*,⁵ which significantly alters the relationship of the state and federal governments concerning control of water resources. In addition, events not directly related to water law and policy have changed the perspective from which such problems are viewed. For example, the growing federal budget deficit and the current resistance to additional taxes has forced a reassessment of water development as a solution to water problems and has invigorated the movement toward "market" solutions. Thus, revisiting California water law at this time seems appropriate.

The emphasis of this symposium is on California water law as it exists today. While some history is unavoidable in understanding the present, the goal of the symposium is to examine and discuss contemporary water law and policy. In developing the symposium, an effort was made to obtain a broadly representative cross-section of the practicing water bar. Several of the attorneys are employed by state water agencies, many are private practitioners representing a variety of water interests, one is a Superior Court Judge (although previously he had a long association with the state's water agencies), and one is an employee of the federal government. The articles are generally objective in their discussions. Nevertheless, where policy is involved or where the law is subject to varying interpretations, the articles understandably reflect the perspectives of their authors. It would have been impossible to present opposing viewpoints on each and every controversy, and the symposium does not attempt to do so. However, by involving a cross-section of attorneys the symposium achieves an overall balance.

The symposium focuses on water use or water "quantity" problems. Water pollution or water "quality" problems are not discussed, except as they relate to water rights. The exclusion of pollution in the symposium is not meant to suggest that water pollution and other water quality problems are not important. Rather, it is the result of

3. 25 Cal. 3d 339, 599 P.2d 656, 158 Cal. Rptr. 350 (1959).

4. 44 Cal. 3d 448, 749 P.2d 324, 243 Cal. Rptr. 887 (1988).

5. 438 U.S. 645 (1978).

the complexity of the law in these areas. A symposium could easily be done on these problems alone. To have included them here would have produced a volume of impossible length.

An effort was made to avoid duplication in planning the symposium. Nevertheless, some overlap does exist. This is partly the inevitable result of the multi-author approach. Certain cases and legal principles are important to a variety of topics, and authors of papers on those topics understandably consider it necessary to discuss such cases and principles. Furthermore, duplication is often an asset because the cases and principles are examined from different perspectives.

Some readers may also find that certain topics do not receive the attention they feel is warranted. Again this is partly the result of the multi-author approach. Despite the best efforts at organization, unpaid volunteers ultimately write about that which they want to write about, with the result that some topics do not receive the expected coverage. For the most part, however, the symposium includes the important issues relating to California water rights.

The symposium begins with an initial overview of California water rights and water quality laws by William Attwater and James Markle.⁶ The article presents the development of water rights from a historical perspective, which greatly facilitates its understanding. Although summary in nature, as it was intended to be, the article presents a complex and confusing body of law in a clear and readable manner and is highly recommended to anyone attempting to gain a general understanding of California water rights. This article is one of the two articles in the symposium to address water quality and pollution. Recognizing the interrelationship of water quality and water quantity laws, California is one of the few states to combine administrative responsibility for both bodies of law in a single agency, the State Water Resources Control Board (SWRCB). Consequently, as Chief Counsel to the SWRCB, Mr. Attwater is particularly well qualified to examine this topic.

“The Delta Decisions: The Quiet Revolution in California Water Rights” by Judge Ronald B. Robie⁷ and “Changing Judicial Attitudes Towards Property Rights in California Water: From Vested Rights to Utilitarian Reallocations” by Clifford W. Schulz and Gregory S.

6. See Attwater & Markle, *Overview of California Water Law*, 19 PAC. L.J. 957 (1988).

7. See Robie, *The Delta Decisions: The Quiet Revolution in California Water Rights*, 19 PAC. L.J. 1111 (1988).

Weber⁸ should be considered companion pieces. Judge Robie's article deals with efforts to establish and implement water quality standards to protect the Sacramento-San Joaquin Delta from salt water intrusion. More specifically, it concentrates on the decision in *United States v. State Water Resources Control Board*, commonly referred to as the *Racanelli* decision.⁹ In that decision, the court, relying principally on the 1928 constitutional amendment¹⁰ requiring "reasonable use" of all water rights and the public trust doctrine, held that the SWRCB has broad authority to reevaluate and alter existing water rights in order to meet water quality requirements in the Delta. Judge Robie concludes that this decision provides California with a "one-of-a-kind modern water rights system" which "gives discretionary authority to the state water rights administrator to consider a broad range of public policy issues and to impose its requirements on water right holders without regard to priority or nature of right."¹¹

Schulz and Weber trace the evolution of judicial attitudes regarding water rights as "property." They examine the evolving interpretation given the 1928 amendment and the expanded sweep given the public trust doctrine, particularly in the last twenty years. From a provision intended to do little more than place riparian rights and appropriative rights on a par with regard to efficiency and waste, the authors argue that "reasonable use" has become a device, used alone or in conjunction with the public trust doctrine, for the judicial or administrative reallocation of water without triggering constitutional requirements of due process and just compensation. This, they assert, has moved California to an era where a water right is not viewed as property but "as a government granted privilege to be monitored by the Board and courts and, when necessary, reallocated among competing users to achieve the greatest social good."¹²

A third article that is associated with the two just discussed is "Salinity Control and the Riparian Right" by Marcia J. Steinberg and Michael Schoenleber.¹³ This article focuses on a specific issue, the right of riparian water rights holders in the Sacramento-San

8. Schulz & Weber, *Changing Judicial Attitudes Towards Property Rights in California Water: From Vested Rights to Utilitarian Reallocations*, 19 PAC. L.J. 1031 (1988).

9. 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (1986).

10. CAL. CONST. art. 10, 2.

11. See Robie, *supra* note 7, at 957.

12. See Schulz & Weber, *supra* note 8, at 1110.

13. See Steinberg & Schoenleber, *Salinity Control and the Riparian Right*, 19 PAC. L.J. 1143 (1988).

Joaquin Delta to reasonable protection from seawater intrusion.

“Water Marketing” by Kevin O’Brien examines water marketing as a solution to California’s water problems.¹⁴ Mr. O’Brien does not indulge in the hyperbole of so many writers who claim that the marketplace holds the solution to all water issues. In fact, as the author himself acknowledges, the article actually examines voluntary water rights transfers, rather than a true commodity-type market for water rights.

No contemporary symposium on California water law would be complete without an article on the public trust doctrine. “The Public Trust v. The Public Interest” by Arthur L. Littleworth fills that role in this symposium.¹⁵ Mr. Littleworth argues that, except to subject old water rights to current environmental review, the *Audubon* decision gives environmental and instream needs no preference and does not really alter recent practices of the SWRCB in balancing consumptive and instream uses.

As its title suggests, “Imported Groundwater Banking: The Kern Water Bank—A Case Study,” by Russell Kletzing, examines issues and problems associated with the proposed Kern Water Bank project.¹⁶ That project would utilize the aquifer underlying the lower Kern River Valley for the storage of State Water Project water by the Department of Water Resources. In addition to examining the law relating to the uses of aquifers for storage, the article contains a good discussion of California groundwater law generally.

“State Regulation of Groundwater Pollution Caused by Changes in Groundwater Quantity of Flow” by Andrew H. Sawyer is the second article in this symposium which deals with water quality problems.¹⁷ The article examines groundwater quality problems, such as seawater intrusion, which are caused by groundwater withdrawals. He discusses various legal approaches which might be used to attack these problems. Ultimately, he notes that most of these problems are caused by the failure of the legislature to enact comprehensive permitting provisions regulating groundwater withdrawals. He suggests that authority granted the SWRCB for groundwater quality might, in appropriate cases, be utilized to regulate withdrawals.

14. See O’Brien, *Water Marketing in California*, 19 PAC. L.J. 1165 (1988).

15. See Littleworth, *The Public Trust vs. The Public Interest*, 19 PAC. L.J. 1201 (1988).

16. See Kletzing, *Imported Groundwater Banking: The Kern Water Bank—A Case Study*, 19 PAC. L.J. 1225 (1988).

17. See Sawyer, *State Regulation of Groundwater Pollution Caused by Changes in Groundwater Quantity or Flow*, 19 PAC. L.J. 1267 (1988).

“Federal-State Water Relations in California: From Conflict to Cooperation” by Roderick E. Walston¹⁸ and “Cooperative Federalism in the Acquisition of Water Rights: A Federal Practitioner’s Point of View” by Sandra Dunn¹⁹ should also be considered companion pieces. Mr. Walston’s article addresses the historic conflict generated by efforts to subject the water rights of the federal Central Valley Project to state control. The author argues that the Supreme Court decision in *California v. United States*,²⁰ has ushered in a new era of cooperation in federal-state water relations, as evidenced by the recent adoption of an agreement for the coordinated operation of the Central Valley Project and the State Water Project.

Ms. Dunn’s article suggests that if cooperative federalism is to work in California and elsewhere in the West, the states must show greater sensitivity toward federal needs. She examines two recent cases, *In re Hallet Creek Stream System* and *Nevada v. Peter Morros*, in which state officials resisted attempts by federal agencies to acquire water rights under state law.²¹ Ms. Dunn attributes both cases to wayward attempts by the states to protect their systems of water allocation and suggests that the states have erected an unnecessary barrier between the two levels of government. She asserts that the states invite federal preemption by denying federal agencies the right to acquire water rights under state law.

A significant portion of California’s water resources lie wholly within the geographic boundaries of the state, sparing California from some of the interstate conflicts which plague other western states. The Colorado River and the Lake Tahoe-Truckee River system represent two notable exceptions, and California has experienced interstate problems with regard to both. “Lake Tahoe, the Truckee River, and Pyramid Lake: The Past, Present, and Future of Interstate Water Issues” by John Kramer²² and “California Colorado River Issues” by Warren J. Abbott²³ explore these problems.

Mr. Kramer’s article is an excellent case study of compact negotiations and interstate allocation in the modern world. His discussion

18. See Walston, *Federal-State Water Relations in California: From Conflict to Cooperation*, 19 PAC. L.J. 1299 (1988).

19. See Dunn, *Cooperative Federalism in the Acquisition of Water Rights: A Federal Practitioner’s Point of View*, 19 PAC. L.J. 1321 (1988).

20. 438 U.S. 645 (1978).

21. See Dunn, *supra* note 19, at 1325.

22. See Kramer, *Lake Tahoe, the Truckee River, and Pyramid Lake: The Past, Present, and Future of Interstate Water Issues*, 19 PAC. L.J. 1337 (1988).

23. See Abbott, *California Colorado River Issues*, 19 PAC. L.J. 1389 (1988).

of the negotiation, ratification, and eventual failure of California and Nevada to win congressional approval of the California-Nevada Interstate Compact, is particularly instructive and points out many of the pitfalls which make the resolution by compact of interstate water conflicts so difficult. Mr. Kramer also discusses other options for the apportionment of Lake Tahoe-Truckee River waters.

Mr. Abbott's article begins with a discussion of the compacts, agreements, administrative regulations, court decrees, and treaties which make up "the law" of the Colorado River. This discussion, although not detailed, provides a good overview for one trying to get an initial understanding of this enormously complex body of law. Mr. Abbott then considers four legal problems of significance to California: (1) proposed interstate sales of Colorado River water, (2) proposed intrastate sales of Colorado River water within California, (3) proposed sales of Colorado River water held by Indians, and (4) problems of meeting the Colorado River obligations owed to Mexico.

Reviewing this symposium causes one to reflect on the incredible complexity of California water law and leads one to question how it works at all. The answer may be that it does not. Prior to coming to California, I once asked Frank J. Trelease, who had then been a resident of California for several years, how a system based on two such fundamentally inconsistent theories as the appropriation doctrine and the riparian doctrine could function. His answer was that "When California has a water law problem, it throws some water at it and the problem goes away." That is, to a large degree, California has made water rights irrelevant by developing water supplies to meet most of its needs. This ability to effectuate "physical solutions" has been a blessing, but, as Andrew Sawyer observes in his article,²⁴ it may also turn out to be a curse. Unjustified faith in physical solutions may forestall painful, but necessary, changes in California water law. Past experience suggests that one should be cautious in predicting disaster. California may muddle through, but it could be in spite of and not because of its water law. What is certain is that water rights and water policy will continue to be litigated, legislated, discussed and debated.

24. See Sawyer, *supra* note 17.