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Anne J. Schneider Lecture  
“Parting the Delta Waters - Will It Take a Miracle?”

I am pleased and honored to return to Sacramento to join you for this event in honor of the late Anne Schneider.

As many of you are aware, I have spent considerable time in the last two years here in Sacramento working with stakeholders engaged in Delta water management.

In that time, I have learned a lot about this unique estuary, its many uses, and its irreplaceable ecology. I count myself lucky to have had time to learn and to make so many friends among the dedicated advocates working with such passion and commitment.

Some years ago, when giving the inaugural lecture of this series, Justice Robie suggested that we best honor Ms. Schneider by focusing on “the big picture.” Tonight, I shall attempt to follow that advice.

This year 2019 is fast coming into focus as a very big picture year.

Existing rules that govern water allocation among the many and various Delta users are being challenged from all sides.

Governor Newsom has cancelled the twin tunnel version of Water Fix.

Massive infrastructure proposals to store more water for export are pending.

State federal conflicts are on the rise.

Regulatory proceedings have drifted into an impenetrable tangle of uncoordinated piecemeal, disputes.

I believe we are all beginning to recognize the system is broken, and that it is time to chart a new course for Delta waters.

Governor Newsom has admonished “we ... need a fresh approach when it comes to meeting California’s massive water challenges.”

Commentators from the Public Policy Institute of California are advocating that the time is at hand for a “grand compromise, including ecological water budgets that can be stored, traded and flexibly allocated.”

Before examining how we might approach a grand compromise dividing the waters, let us first step back and look briefly at where matters presently stand.

There are at least six pending proposals and regulatory proceedings that may affect how we apportion waters among Delta water users in the various regions, municipal, industrial, agriculture, fisheries and environmental flows in tributaries and to San Francisco Bay.

1. Water Fix is intended to benefit exports to the South.
2. The Bay Delta Update proceeding before the State Water Board proposes the opposite – to reduce exports to the south.
3. At the Federal level a “re-consultation” promoted by President Trump would relax the Endangered Species Act to increase exports.
4. The Trump administration also proposes to extend the Federal WINN Act to increase exports.
5. The Bureau of Reclamation plans to raise Shasta Dam to generate more exports.
6. State and regional agencies plan to build the Sites Reservoir to store additional waters, a portion of which would go for export.

This brief summary reveals one indisputable fact. None of these various proposals, taken individually or together, comes even close to addressing the big picture question - what is the proper division of Delta waters among the many demands of this over stressed ecosystem?

Given that these various proposals have each been developed within individual silos, considering the lack of clarity about how increased storage will actually be allocated, and considering the disposition of Bureau and federal regulatory agencies to bend the regulatory process to justify pre-determined outcomes, it is virtually impossible to draw any meaningful conclusion regarding how much water will go to the various regions and uses. The big picture remains a blank canvas.

So, the question remains: can there ever be a stable, lasting division? Or must we resign ourselves to a Sisyphean future of unending repetition and conflict?

What is increasingly evident from all these disparate proposals is that consideration of Delta futures is proceeding in random fashion. Adding all these proposals into a coherent framework for the division of Delta waters is for all intents and purposes impossible.

The only way forward toward a rational framework is to directly confront the big picture question- how to reach an equitable division of the waters between north and south.

Some will undoubtedly call for more studies, recommend consulting more experts, or assure us that somehow an answer will emerge, *deus ex machina*, from this accumulation of individual deals and conflicting regulatory initiatives.

The unhappy reality, however, is there is no neat, packaged answer available from the experts.

Given the complexity of this ecosystem, the instability brought on by advancing climate change, the many ways in which river systems have been altered, the incursion of invasive species, and escalating export demands, there is no perfect, formulaic answer.

In the end, who gets the use of how much of this limited resource is a judgment that must be resolved through transparent, public legislative process.

The appropriate, indeed the only place where a division of such consequence to the future of the entire state should be considered and settled is by state government - Governor Newsom and the California Legislature.

Realistically, there is little or no chance that either the Governor or the Legislature will undertake to directly prepare a division formula for consideration and enactment into law. That task, in my experience, must be initiated with extensive participation from the public and the stakeholders themselves.

However, the process and the rules for participation must be set in advance by either the Governor or the Legislature or both.

This task of dividing the waters is assuredly difficult. However, this is not the first time that public officials have been called on to allocate an overextended resource, and there are many instructive precedents for such a process.

Many successful allocations begin with an independent commission to find facts and make recommendations. An instructive example at the Federal level in a non-water context is the well-known Base Relocation and Closure (BRAC) process. Base closures are hardly less controversial than water rights. The BRAC process has generated extensive legislative and regulatory precedents that are suggestive of how a water allocation process could be structured within a single state by the Governor and the Legislature.

Closer to home is the Interstate Compact process that has been successfully used throughout the west to allocate limited water resources. California is party to two well-known examples, the Colorado River Compact and the Klamath River Compact. Both provide instructive comparisons for how a “compact” process for a single state might be initiated here in California.

The essential first step for a successful negotiation is selection of a representative group or “commission” to initiate the process.

The path to a statewide negotiation could begin with the Governor selecting a manageable table of stakeholders from among candidates nominated by the various agricultural, environmental and urban interests throughout the state.

Such a negotiation would be confined to one, and only one, topic: a fair and rational division of waters. The task force would be charged to come up with a recommendation, and that recommendation would then be submitted to the Legislature for enactment into state law, much as interstate compacts are ratified by the Congress.

Clearly no one historical example provides a perfect guide. For purpose of this lecture, I take the Colorado River Compact as it is the example with which I am most familiar.

In the early years of the last century the Colorado River basin states, including California, were gridlocked in an interminable controversy over how to apportion the river among the seven states and Mexico.

Finally, in 1922 the states agreed to initiate a compact process that eventually divided the waters of the Colorado River by a formula subsequently affirmed by the Supreme Court.

With that framework set in place the basin states have managed to work together on the River for over a half century without significant disruption or litigation. Even today, in the throes of a severe drought the basin states and the Bureau of Reclamation have continued to work constructively on river management.

To be sure, the Colorado River Compact is an interstate compact created under the specific requirements of the compact clause of the Constitution. However, the principles that underlie that compact process could be applied to an *intrastate* compact dividing waters within a single state.

What happens, you may ask, if the parties to such a structured negotiation cannot reach agreement? That is what happened initially in the Colorado River compact negotiation. The impasse finally motivated the Congress to legislate an apportionment based largely on the unfinished compact negotiation.

An essential pre condition to such a process would be for parties to declare a truce-in the form of a moratorium on all projects and regulatory processes, federal and state, currently underway including a hold on proposals for a single tunnel Water Fix, the Bureau's proposal to raise Shasta Dam and further work on the Sites Reservoir.

Placing a hold on all current regulatory proceedings and infrastructure proposals would focus attention and generate pressure for a settlement.

In the case of the Colorado River Compact, it was only the pressure generated by the impasse over construction of Hoover Dam that brought and kept the parties at the table.

Apart from winding down the water wars and bringing a measure of stability, a framework division would enhance water planning based on realistic assumptions about the relative availability of Delta water.

The water wars have been going on for so long they have become an enduring part of California culture. Water policy has become an insider game, something of a board game for a narrow circle of special interests.

It is time for change. It is time to begin a wide ranging, public discussion of California's Delta water future.

California has long been the home of innovation, justly recognized for its seemingly endless capacity to create new ways of shaping the future. Now is the time to invoke that spirit in water management by moving beyond the static, unworkable present toward a new vision of Delta futures.

Thank you. And I wish you all success.