

What Is, What Has Been, And What Ought To Be

**The Honorable Ronald B. Robie
California Court of Appeal, Third Appellate District**

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What Is, What Has Been, And What Ought To Be

The Inaugural Anne J. Schneider Memorial Lecture

by Justice Ronald B. Robie

University of California, Davis

May 1, 2012

I am truly honored to have been chosen by the Anne J. Schneider Foundation to give the inaugural lecture in the memory of Anne Schneider in support of the foundation's efforts to encourage professional and personal commitment to water law and policy.

Anne was an amazing person -- an accomplished college athlete, mountain climber, skier, marathon runner, velodrome and long-distance cyclist; a devoted mother; a dedicated conservationist. And, most importantly for our purposes, a gifted and skillful attorney, not to mention one of the first women to practice water and natural resources law, back when that was a rare thing indeed.

But what I think of most when I think of Anne is the *kind* of attorney she was. Last year I heard our Chief Justice, Tani Cantil-Sakauye, speak at an Inn of Court Meeting in Stockton. The Chief Justice said, "An ethical attorney is one who does the right thing when no one is looking." To me, the Chief Justice was describing Anne. In her practice, Anne felt she had a duty to guide her clients away from the hard line, to consider the broader public interest in addition to their own private interests. As the author of Anne's obituary put it, "Anne's desire to find comprehensive and fair-minded solutions for the most intractable issues defined her practice."¹

¹ *Obituary for Anne M.J. Schneider*, The Davis Enterprise (Aug. 15, 2010) .

I think Anne's ability to look for comprehensive and fair-minded solutions to our state's water problems, to see "the big picture," and to get her clients to see that picture, too, stemmed not only from who she was as a person, but also from the way in which she came into the practice of water law in the first place. As some (but not all) of you will remember, in 1976 -- the year Anne graduated from King Hall here at U.C. Davis -- the worst drought in history at that time struck the state. As the Director of the Department of Water Resources, I joined with John Bryson, the Chair of the State Water Resources Control Board, in recommending to Governor Jerry Brown that he establish a broad-based commission to review California water rights law.² Just as California's water quality law had been substantially updated and revised with the passage of the Porter-Cologne Water Quality Control Act in 1969,³ we hoped that a "blue-ribbon" commission, headed by the recently retired Chief Justice, could help us obtain the public and water community support needed to convince the Legislature to act to modernize our state's archaic, and sometimes arcane, water rights law.

In the early years of his first administration, Governor Brown sincerely supported change and reform in California institutions, and so he decided to proceed on our recommendation. And so it was that Anne -- fresh out of law school -- was hired along with three other "brand new lawyers" to constitute the research staff of the Governor's Commission to Review California Water Rights Law.⁴

² See Robie, *The Governor's Commission: A Reminiscence*, 36 McGeorge L.Rev. 13, 14 (2005).

³ Stats. 1969, ch. 482, § 18, pp. 1051-1084, codified as amended at Wat. Code §§ 13000-14958.

⁴ See Schneider, *Retrospective on the Governor's Commission* (2005) 36 McGeorge L.Rev. 23, 23; Dunning, *The Governor's Commission: Success or Failure?* (2005) 36 McGeorge L.Rev. 17, 20, fn. 22.

Anne described her work for the Commission as “the ultimate post-doctoral educational opportunity.”⁵ Among her contributions to the Commission’s work were two staff reports -- “Groundwater Rights in California” and “Legal Aspects of Instream Water Uses in California” -- which remain important resources for lawyers today, more than 30 years after they were written. Her scholarship was impeccable, and personally I must say it was a true joy to have her serving the Commission (of which John Bryson and I were ex-officio members).

In thinking about how Anne came to be the lawyer she was, it occurred to me that working for the Commission may have had something to do with it. Being able to devote her initial years as an attorney to considering and contemplating not just what the state of water rights law in California was, but what the law *ought* to be, gave Anne a perspective on water law and policy that most practitioners never get. And today, as we move into a future where we will not be able to manage the state’s water resources as we have in the past, I think it’s a perspective we can all benefit from.

So in honoring Anne’s memory, I think we should take the opportunity to think broadly about water law and policy, as Anne did. To consider the bigger picture. To contemplate not just what is or has been, but what ought to be.

In reflecting on that point -- what California water law and policy ought to be -- it is important to note that in the more than 30 years since the defeat at the polls of Governor Brown’s major water program (the Peripheral Canal) and my departure from the Department of Water Resources, there has been very little development of new water supplies in California. In fact, considering that the southern part of the state has been forced to cut back on its historic use of Colorado River water, which up until

⁵ *Id.* at p. 23.

recently had regularly exceeded the state's actual entitlement by nearly 20 percent,⁶ water supplies are actually less than they used to be.

In the meantime, the population of the state has continued to grow by leaps and bounds. The figures from the U.S. Census Bureau are really quite staggering. In 1980 there were over 23 million people living in California,⁷ but by 2010 there were more than 37 million people living here.⁸ In other words, in 30 years the population increased by more than 13 million people, which is an increase of more than 50 percent. And according to the Bureau's projections, the people are going to keep coming. The Bureau projects that by 2030, the population of California will be 46,444,861.⁹ That means that if the Bureau turns out to be an accurate prognosticator, the state's population will have nearly doubled in the 50 years between 1980 and 2030. And you can be assured, the great majority of those people are not moving (or being born) where the rain and snow are (when we get rain and snow). So as you can imagine, we're going to need a lot of water, and we're going to need it in a lot more places than where it comes from.

Over the last 30 years, in the absence of new water supplies, we have managed to cope with the increasing needs of this constantly increasing population by various means -- greater efficiency in the use of water, water transfers, water banking, and the use of more surface and underground storage of already developed supplies (for

⁶ See *In re Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 785.

⁷ The actual figure from the 1980 U.S. Census was 23,667,902. (See <http://www.census.gov/population/cencounts/ca190090.txt>.)

⁸ The actual figure from the 2010 U.S. Census was 37,253,956. (See <http://quickfacts.census.gov/qfd/states/06000.html>.)

⁹ See <http://www.census.gov/population/projections/SummaryTabA1.pdf>.

example, the Metropolitan Water District's terminal storage efforts). With millions more people due to arrive over the next two decades, however, the water shortage that we will face in the years ahead is going to be significant.¹⁰ And with few new water projects on the horizon, the only way we will survive over the next 30 years is to make even greater use of the techniques that have carried us through the last 30 years. But more than that, we need to think -- as the Governor's Commission did -- about fundamentally modernizing California water rights law and policy to deal with the ever increasing demand for what is becoming an increasingly scarce resource. We need to think about what ought to be, and what we can do to achieve it.

In considering the future of water law and policy in California, we need to ask ourselves several different questions. First, how can the lawmakers -- the legislators -- help the state deal with these increasing needs , both for consumptive and nonconsumptive uses?

Second, how can administrators -- specifically, the State Water Resources Control Board (which, for ease of reference, I will refer to as the Water Board) -- employ its powers, particularly in the absence of any legislative initiative, to help the state achieve what is best in water law and policy?

And third, how can the lawyers -- the attorneys practicing water law throughout California -- best emulate the example Anne set in her practice of the law and help their clients achieve their private goals while simultaneously striving to achieve what is also in the public interest of all Californians?

¹⁰ See Committee on Sustainable Water and Environmental Management in the California Bay-Delta (2012) *Sustainable Water and Environmental Management in the California Bay-Delta*, p. 176.

Addressing the first question first -- what can the Legislature do? -- my thoughts return to the recommendations of the Governor's Commission, contained in its final report issued in December 1978.¹¹ The report identified four aspects of California water rights law and administration that could be improved with legislative action, specifically, the certainty of water rights, water use efficiency (including water transfers), the protection of instream uses, and groundwater management.¹² The report included the text of specific legislation the Commission proposed in each area; the groundwater proposals alone ran 80 pages in a 264-page report.¹³ Unfortunately, and much to my regret, the Legislature largely ignored the Commission's legislative recommendations.¹⁴

In 2005, the McGeorge Law Review published a symposium issue devoted entirely to the 25th anniversary of the Commission's report.¹⁵ One participant in the symposium -- Professor Brian Gray of U.C. Hastings College of the Law -- noted in his article that the report's recommendations on instream use and groundwater were "ahead of their time."¹⁶ I agree, but I say their time has now come. At the very least, it is time -- long past time, in fact -- for legislators, administrators, and water lawyers to

¹¹ Governor's Commission to Review California Water Rights Law, Final Report (Dec. 1978).

¹² Gray, *The Uncertain Future of Water Rights in California: Reflections on the Governor's Commission Report* (2005) 36 McGeorge Law Review 43, 44-45.

¹³ *Id.* at p. 45; Dunning, *supra* note 4, at p. 20.

¹⁴ Gray, *supra* note 12, at p. 45; Dunning, *supra* note 4, at p. 21.

¹⁵ *Symposium on the 25th Anniversary of the Report of the Governor's Commission to Review California Water Rights Law* (2005) 36 McGeorge L. Rev. 1-533.

¹⁶ Gray, *supra* note 12, at p. 46.

reconsider the Commission’s recommendations as a step towards moving California water law and policy into the 21st century.

A Committee of the National Research Council issued a report on the Bay-Delta a little more than a month ago which includes the following statement: “The committee recommends California undertake a comprehensive review of its water planning and management functioning, and design modifications to existing responsibilities and organizations that will anticipate future needs. . . . These needs include dealing with scarcity, balanced consideration of all water use practices and water-engineering alternatives, and adaptive management that can adjust to changing conditions.”¹⁷ If any such comprehensive review is to be undertaken, the recommendations from the Governor’s Commission that have largely lain dormant for the past nearly 35 years would be a good starting point.

In his article for the McGeorge symposium on the Governor’s Commission, U.C. Davis School of Law Professor Emeritus Harrison “Hap” Dunning, who served as the Commission’s Staff Director, noted that one of the factors contributing to the “immediate failure” of the Commission’s legislative recommendations back when they were first made was that various interest groups opposed the recommendations “almost in their entirety,” preferring to press (with little success, I might add) for the approval of new water projects in the wake of the 1976-1977 drought.¹⁸ Indeed, John Bryson and I warned Governor Brown about these interests when we first recommended the establishment of a commission to review California water rights law.¹⁹ And I recognize

¹⁷ Committee on Sustainable Water and Environmental Management in the California Bay-Delta, *supra* note 10, at p. 178.

¹⁸ Dunning, *supra* note 4, at pp. 21-22 & fn. 30.

¹⁹ Robie, *supra* note 2, at p. 14.

that even today, more than 30 years later, with all the water that has both literally and figuratively passed under the state's many bridges, there continue to be interests like these within the state that will continue to advocate for the status quo in water rights law and policy even in the face of our exploding population, as well as our expanding recognition of the environmental value these resources have. In the face of such inertial forces, California's water law community might well be tempted to set its sights too low, to strive for something less than the sort of comprehensive review the National Research Council committee has recommended, something less than the fundamental changes the Governor's Commission proposed. But in Anne's spirit, I encourage those who seek the best for California's future not to be held back by those who are too much vested in what is and what has been. If we are to achieve substantial legislative reform in the area of California water rights law and policy, we must keep our focus on what ought be.

Turning to the second question I posed -- what can the Water Board do? -- my thoughts turn back to the origins of the Board. It was in the late 1960's, when I was working as the staff for the Assembly Water Committee, chaired by Assembly Member Carley Porter, that the committee first conceived the idea of merging the administration of water rights with the oversight of water quality,²⁰ and the State Water Resources Control Board was created as the vehicle to implement that concept.²¹ At the time, there were high hopes that the beneficial effects of creating this new body would be great. Remember, this was the dawn of the environmental era in California, and the United States as a whole. In 1969 the California Legislature enacted the Porter-Cologne

²⁰ Assembly Interim Comm. on Water, A Proposed Water Resources Control Board for California: A Staff Study (July 1966).

²¹ Stats. 1967, ch. 284, pp. 1441-1459.

Water Quality Act, the United States Congress passed the National Environmental Policy Act, and the state followed shortly with the California Environmental Quality Act. In Washington in rapid succession we had the Clean Air Act and the Clean Water Act. Expectations were great.

Unfortunately, in my estimation, the Water Board has not lived up to those expectations. As our Supreme Court recently noted, the Board “is responsible for the ‘orderly and efficient administration of . . . water resources’ and exercises ‘adjudicatory and regulatory functions of the state’ ” in that area.²² The Board has primary responsibility for implementing the reasonable use doctrine of Article X, section 2 of our State Constitution and the public trust doctrine.²³ It also is statutorily charged with ensuring that water is best developed, conserved, and utilized in the public interest.²⁴ In my view, however, the Board has been too timid in its leadership, and overall has been a disappointment.

Forty years ago in an article for in the Ecology Law Quarterly, I noted that “[a] major problem in the administration of water rights in California ha[d] been that critical issues,” like the potential environmental effects of a proposed diversion, “often [we]re not considered in administrative proceedings because the applicants and protestants, if any, fail to raise them.”²⁵ At that time I suggested that because the Board needed “to

²² Robie, *Effective Implementation of the Public Trust Doctrine in California Water Resources Decision-Making: A View From the Bench* (2012) 45 U.C. Davis L.Rev. 1155, 1162, quoting *Cal. Farm Bureau Fed’n v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 428.

²³ See *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446 ; *State Water Res. Control Bd. Cases* (2006) 136 Cal.App.4th 674, 777.

²⁴ Robie, *Some Reflections on Environmental Considerations in Water Rights Administration* (1972) 2 Ecology L.Q. 695, 700-701.

²⁵ *Id.* at p. 705.

consider a far greater range of factors in acting upon applications” than it had in the past and had the authority to deny applications to appropriate water “that conflict with the public interest in environmental protection, *information regarding environmental factors clearly [had to] be obtained by the Board’s staff* if the Board [was] to carry out its responsibilities properly.”²⁶

Of course, today there is a much greater chance that a non-profit group dedicated to protecting some aspect of the environment will step forward to take up the banner of environmental protection when a matter comes before the Water Board. As just one example, in 2003 the Board issued a decision involving permits on the lower Yuba River, in which the Board relied on the public trust doctrine as the basis for revising the minimum instream flow requirements in the permits to protect fish and fish habitat in the river.²⁷ The impetus of that decision was a complaint filed years earlier by a coalition of fishery groups, one of which participated in the evidentiary hearing before the Board.²⁸

However, we cannot, and should not, expect the burden of raising these issues to fall primarily on the private sector. Even with the greater environmental awareness and activism that exists today, I believe it remains critical for the Water Board to take a more active role in applying the reasonable use and public trust doctrines -- as well as the statutory public interest standard -- *of its own accord*, without waiting for a participant in a proceeding to raise them or advocate a particular application of them. More than 50 years ago, the predecessor to the Water Board -- the State Water Rights

²⁶ *Id.* at p. 706 (emphasis added).

²⁷ Robie, *supra* note 22, at p. 1164, citing State Water Resources Control Board, Revised Water Rights Decision 1644 (July 16, 2003) at pp. 1-2, 4, 31.

²⁸ Revised Water Rights Decision 1644, *supra*, at pp. 1, 4, 6.

Board -- referred to the public interest as “a beacon light to guide the Board at arriving at each decision made by it.”²⁹ I venture to say that today, with our greater appreciation of the need for environmental protection, the Water Board ought to consider the public interest, the reasonable use doctrine, and the public trust doctrine as a trio of beacons to guide it -- three shining lights upon a hill. As the competing demands for our water resources continue to grow, it becomes more and more important for the Board to manage -- to “control -- those resources so as to best serve all of the people of California. The three beacons -- the public interest, the public trust, and reasonable use -- can and must serve as fundamental tools in the Board’s efforts to do so.

So I urge the Board to be more proactive, more bold, than it has been in the past in fulfilling its adjudicatory and regulatory functions of the state in the area of water resources. But if I may, let me offer a brief cautionary tale from my own experience on the Board. In 1971, when I was a member of the Board we considered a water rights matter involving the development of Rancho Murieta, which most of you know as a gated, golf-course community in eastern Sacramento County. The developer of Rancho Murieta wanted to appropriate water from the Cosumnes River and several of its tributary streams for various purposes and the development plan called for the water to be stored in a number of reservoirs on the property. I believed the diversion from the Cosumnes would result in the river having diminished recreational value because of the reduced flows, and I convinced the Board to include a condition to the appropriation that the developer make its reservoirs available for recreational use by the public. The decision was challenged, and after losing in the trial court, they took the matter to where I now sit, the Third District Court of Appeal.³⁰ And while that court, in an opinion written

²⁹ State Water Rights Board, Decision 935 (June 2, 1959) at p. 61.

³⁰ *Bank of America National Trust & Savings Ass’n v. State Water Resources Control Bd.* (1974) 42 Cal.App.3d 198.

by former Presiding Justice Frank Richardson shortly before his appointment to the California Supreme Court, did not disapprove outright of the Board's imposition of such a condition, the court decided that the administrative record in the case before it was "barren of evidence . . . of 'ponderable legal significance' in support of the conclusion that the diversion would result in a reduction in the recreational value of the Cosumnes."³¹ I offer this tale merely to suggest that in its efforts to protect and serve the public interest, the public trust, and the reasonable use doctrine, the Board may have to develop its own record if facts are not raised by the parties. Of course, had the public trust doctrine been available at the time of the Rancho Murieta case, the Board would have been required to consider its implications. So now, Board, be bold. Keep your eye on those three shining lights on the hill, and consider, in Anne's spirit, what ought to be.

Now finally, I turn to the last of the three questions I posed -- what can lawyers do? More specifically, how can attorneys practicing water law throughout California best emulate the example Anne set in her practice and help their clients achieve their private goals while simultaneously striving to achieve what is also in the public interest of all Californians?

In a sense, every lawyer in private practice already serves two masters. You have a duty to be an advocate for your client, but you also have duties to the public at large as an officer of the court. For example, under the rules of professional conduct, in presenting a matter to a tribunal you must "employ . . . such means only as are consistent with truth," and, among other things, you must not "seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law."³²

³¹ *Id.* at p. 213.

³² Cal. Professional Rules of Conduct, rule 5-200.

Obviously, the duties imposed on you as an officer of the court temper and condition what you may do as an advocate for your client, and so it should be, if the courts are to remain a place where we seek truth and justice, and not just victory.

Well, let me suggest that as a water lawyer, you play a third role that should also have a significant bearing on how you practice. Not only are you an advocate for your client, and an officer of the court, but you are a citizen of this great state. As such, you are one of the “public” for whom the navigable waters and the shorelines of California are held in trust under the public trust doctrine. You are also one of the “public” in whose interest the Water Board is charged with acting. Finally, you are among those for whose “general welfare” the reasonable use doctrine enshrined in the state Constitution “requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof.”³³

As a citizen/attorney of California you owe a duty to yourself, and to your fellow citizens, to consider, as Anne considered, more than just the immediate desires of your clients. You owe a duty to do as Anne did, to seek comprehensive and fair-minded solutions for the intractable water issues that we face every day, and that we will face more and more as our great state continues to grow. Indeed, I encourage the entire water community -- attorneys and clients, legislators and administrators, activists and citizens alike -- to shed the parochial, self-interested viewpoints that have too often been the hallmark of California water law and policy in the past, and to embrace a broader, more public-spirited point of view.

³³ Cal. Const., art. X, § 2.

It is reputed that at the signing of the Declaration of Independence in 1776, Benjamin Franklin said something to the effect of, "We must all hang together, or assuredly we shall all hang separately."³⁴ To some extent, I think this describes where we stand here in California with respect to our water issues, well into the 21st century, as our population continues to expand while the abundance of our water does not.

We can come together, strive to find common ground, follow the beacons of reasonable use, the public interest, and the public trust, and try to solve our water problems for the benefit of all Californians, or we can drive ourselves to ruin -- economic, environmental, or otherwise -- squabbling over who gets the last drop.

So, in memory of Anne Schneider, a great water lawyer, and even more importantly, a great citizen of this great state, I urge each of you, in playing whatever role you may play in the water law and policy problems of our time, to consider, as Anne did, not just what is, or what has been, but what ought to be.

³⁴ Bartlett's Familiar Quotations.