ANNE'S NEW PARADIGM FOR SOUND WATER AND NATURAL RESOURCES POLICY – CREATIVE THINKING NEEDED

…or, THE FAMILY JEWELS ARE MADE OF PASTE

THE 2017 ANNE J. SCHNEIDER LECTURE

by Robert B. Maddow, in conversation with Felicia Marcus

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ANNE'S CHALLENGE: Many of us first got to know Anne when she was a brand-new lawyer, on the staff of the Governor's Commission to Revise California Water Law. She authored important papers on groundwater and instream uses. In 2005 Professor Brian Gray said in the McGeorge Law Review that those papers were ahead of their time. So was Anne.

Anne was (as far as I know) the only attorney who served as water rights special counsel to EBMUD, MWD, and the SFPUC, and she represented literally dozens of other clients, public and private, large and small. In the 2012 Inaugural Lecture, Judge Ron Robie said that "Anne felt she had a duty to guide her clients away from the hard line, to consider the broader public interests in addition to their own private interests." He then quoted this sentence from Anne's obituary in The Davis Enterprise: "Anne's desire to find comprehensive and fair-minded solutions for the most intractable issues defined her practice."

During her final days in 2010, Anne expressed to several close friends a sense that the natural resources arena was lacking the creative thinking necessary to guide solutions to the many vexing challenges facing California and the West. She quietly challenged us, individually and collectively, to think in new and different ways about what she called "a new paradigm" for sound natural resources and water policy.

These annual Lectures – I am honored to be giving the sixth -- have attempted to answer that challenge, in a variety of ways and from a variety of perspectives.

MY STARTING POINTS:

1. California has turned away from traditional property-based water rights and practice, toward more of a resource allocation approach.

2. Reasonable use remains our central overriding principle, but it can be complex, and other factors have become critical and in some cases primary.

3. Balancing competing and conflicting demands for a limited supply is hard to do, and creative voluntary negotiated solutions can be more practical and lasting.

INTRODUCTION:

1. When asked what a newcomer should know about California, Wallace Stegner answered with four words: "It's about the water." California history is best understood from the perspective of its development and utilization of water – and water fights.

2. An introductory war story – as with a lot of my remarks, this goes back to my career at East Bay Municipal Utility District. In 1972, my boss Jack Reilley handed me a copy of WRPD-14, a 3 or 4-inch thick binder with copies of EBMUD's key water rights documents. He said "This is your copy of The Family Jewels." In 1991, I met with Jack and his predecessor Hal Raines, and showed them that WRPD-14 had grown into 2 volumes. Hal had not followed water law evolution since his 1966 retirement, and asked me the question Thomas Jefferson asks in Act II of "Hamilton" – "what did I miss?" I briefly explained the Public Trust, the rise of CEQA, NEPA, the Clean Water Act, and the ESA, and increasing inroads into and pressures on traditional water rights. Hal put his hand on my shoulder and said "When I was practicing, a water rights license was like a deed, but now I think it's more like a month-to-month tenancy. I think The Family Jewels have turned to paste."

3. "Disclaimers" – one man's experience – 45 years – more of a GC than a specialist; and not a scholarly treatise – don't waste your time looking for citations!

4. Allocation of water resources is a classic zero sum game.

SHIFT FROM PROPERTY RIGHTS TOWARD RESOURCE ALLOCATION APPROACH:

Historically, there were systems for allocation of available water that were very closely tied to land occupied by small communities. For example, Mormon settlements in Utah featured church-decreed water rights for use in common by residents of small discrete communities. In California and elsewhere, colonial Spanish or Mexican authorities assigned pueblo water rights to specific communities, for residents of those communities to share in common.

Irresistible opportunities for mining, agriculture, and commerce led to explosive population growth and an exponential increase in demand for water for numerous and widespread beneficial uses. The establishment and expansion of irrigated agriculture, and the establishment and sometimes meteoric growth of cities increased demand and competition for water, frequently for uses that were remote from water sources. Competition for water placed new emphasis on water rights for particular uses, and clashes between riparians and appropriators, and among appropriators became commonplace.

The 20th Century ushered in what I call the Era of Long Pipes. Before 1925, the Los Angeles Department of Water & Power, San Francisco, and East Bay Municipal Utility District had all conceived of, gotten property and some form of water rights for, and had built or were building major water production and conveyance systems to bring water from the mountains to the population centers on the coast. In 1933, California enacted the Central Valley Project Act, which evolved into the federal CVP; the State Water Project came along about 25 years later.

These large-scale diversion and conveyance systems were generally based on some form of appropriative right. Throughout that period, property-based individual water rights continued to have great significance in various watersheds and communities, in spite of the big projects.

From the perspective of the evolution of California water rights, we have to look at Herminghaus v. Southern Calif. Edison, decided by the California Supreme Court in 1926 –it had absolutely critical significance regarding water rights in general, and particularly riparian rights – some commentators have called it the peak of water rights being primarily a property-based system of resource allocation.

Amelia Herminghaus owned 18,000 primarily riparian acres straddling the San Joaquin River. Spring runoff filled the sloughs and fed her verdant pasture land, most of which was leased to heirs of the Miller and Lux estate for about $2/acre. Miller and Lux had settled their riparian claims against Southern California Edison when it started its upstream hydropower project, but Amelia did not settle -- she sued Edison. The California Supreme Court held her riparian land was entitled to the unreduced full flow of the stream for flood irrigation. Reasonableness of use or method of use was not a restriction on her riparian rights. One analyst said the case's result was that 98% of the stream was preserved so Amelia could use 2%.

A mere 23 months later, the voters approved the 1928 Constitutional amendment establishing reasonable use as the core principle of all California water rights, including riparian rights. The amendment did not define "reasonable," and nor did the Legislature. Generations of water lawyers and engineers have labored for almost a century now to fully explore what the word means, and during that period many more factors have come into play. We found ourselves having to find balance between conflicting and competing needs for and uses of water.

I submit that the most important policy determinations and resources allocations that we have done since 1928 involve some form of balancing, to determine what is reasonable and what is mutually, societally, politically, legally, and/or technically acceptable when we have a multitude of competing and conflicting claims to a finite water resource, that someone or some interest needs for one or more of the numerous and frequently incompatible beneficial uses. And I submit that balancing has gotten harder and harder.

Water policy and key decisions have been influenced by population growth and urbanization, by increasing complexity/competition for water for a wide variety of beneficial uses, and by dramatic changes in agricultural markets, crops, and techniques. Water rights alone no longer answered difficult policy and allocation decisions. We could talk for days about these changes and competitive pressures, but I will instead highlight a few examples of factors for change.

First, the Legislature turned away from absolute time priority:

--Water Code 106 (1943) – domestic use is highest priority, and irrigation is next.
--Water Code 1460 (1943) – municipal use is first in right, even if not first in time.
--Water Code 106.3 (2012) – human right to safe, clean, affordable, accessible water.

Second, major new policy directions occurred in California and nationally:

--Environmental movement -- started with "Silent Spring" (1962)?
--Nixon's presidency brought EPA, NEPA, Clean Air Act (all in 1970), Clean Water Act (1972), FESA (1973 – biggest change of all?); Reagan signed CEQA (1970)
--Intersections between water quality and quantity, and water and land use planning

Third, significant appellate decisions – I've cherry-picked a few from a huge field, and noted cases where courts moved away from or added to our understanding of fundamentals of property-based California water law:

--Paraphrasing Cliff Shultz's summary commentary in a 1988 Pacific Law Journal article: Historically, in absence of waste, senior rights holders would never be expected to sacrifice any part of their use for benefit of a junior rights holder, and certainly not for any use (e.g., instream, fish, water quality) for which there was no recognized right.

--EDF v EBMUD I and II (1977 and 1980) – reasonable use principles apply to water supply contract between California public agency and the US.

--Audubon (1983) – even the most secure appropriative right was subject to reevaluation to consider adequacy of protection for uses within the public trust.

--US v SWRCB (Racanelli, 1986) – SWRCB must modify appropriative rights if necessary to protect water quality standards set for the Delta; road map for how to balance among the myriad beneficial uses of Delta water and water of its tributaries.

--IID v SWRCB (1990) – old principle of "absolute right of use" been replaced by newer concept of "comparative advantage of use…"; 4th Appellate District quoted from Professor Freyfogle's 1989 Stanford Law Review article – "the concept that 'water use entitlements are clearly and permanently defined' … is a pretense that must be discarded."

NO LONGER JUST ADJUDICATING COMPETING CLAIMS TO PROPERTY RIGHTS – NOW WE NEED TO "BALANCE" – AND BALANCING IS HARD TO DO

We have to understand the fundamentals, and reasonable use remains the core principle, but other factors influence the balancing act that is needed whenever there are conflicting claims and competing demands. The water rights themselves no longer provide complete answers.

E.g.: EDF v EBMUD – 1972 challenges to CVP water service contract, based on reasonable use doctrine, generally regarding American River point of diversion – EBMUD seeking upstream highest quality water -- challengers preferred to see water stay in River for fish, recreational, and aesthetic purposes -- general demurrer, appellate court decision, CA Supreme Court decision, SCOTUS decision, 2nd CA Supreme Court decision, amended complaint, trial court sent case to SWRCB, 3 years later case sent back to trial court for 2-month trial. 20 years of "balancing."

E.g.: Bay-Delta WQCP – really hard to do. Classic intersection of water rights and water quality, significant endangered species issues, and complex water quality and supply issues. Large numbers of parties/issues/beneficial uses, and multiple layers of competition among uses and users. Last time, SWRCB and parties sidestepped major multi-sided adversarial hearing largely because parties reached a number of compromises – VAMP (San Joaquin River tributaries), Phase 5 (Mokelumne River) and Phase 8 (Sacramento Valley) – principal water rights responsibility for implementation of water quality plan was assigned to SWP and CVP.

PREVIOUS LECTURERS ADDRESSED COMPLEXITY AND DIFFICULTIES OF BALANCING

In 2014, Buzz Thompson said that the current system of ecological protections does not seem to be working well for anyone, and suggested that a "big thinking" new direction is less likely to focus on individual species and more likely to look at overall ecological health.

In 2013, Joe Sax, in discussing decades of battles over Delta water resources, urged competing interests to "try some sort of 'good enough' solution, invoking Voltaire ("the quest for the perfect is the enemy of the good") and the inimitable Walt Kelly's Pogo Possum ("we have met the enemy and he is us").

CREATIVITY AND INNOVATION -- MODELS FOR MOVING FORWARD?

Some EBMUD experiences show the role of creativity

-PARDEE HISTORY – water rights application filed in 1924, water delivered in 1929 (5 years):

> --Thayer damsite downstream – riparian right to operate run-of-river power dam – creative solution was to condemn that right and that right only -- one stick from the "fee simple bundle." Conflict resolved through creative solution.
>
> --Lodi - California Supreme Ct (7 Cal. 2d 216, 1936), based on 1928 Constitutional amendment, held courts have a duty to seek a physical solution to avoid waste when sorting out correlative rights of senior and junior appropriators. EBMUD could divert, but had to provide a substitute supply if its diversions injured a competing appropriator in a defined way. Creative solution satisfied water needs of both competitors.

-CAMANCHE HISTORY – application in 1949, dam closed (saved Lodi) in 1964 (15 years):

> --Competing appropriative applications, with senior application for irrigation use by local agricultural district – but permit was awarded (Decision 858, 1956, by State Engineer Harvey O. Banks) to junior Municipal & Industrial applicant, based on Sec. 106, meaning that use priority trumped time priority.

--Creative solution was thought to be that Auburn-Folsom South Project had been Congressionally authorized, and would serve this senior applicant; however, Folsom-South Canal was not completed and the local district has been water-short ever since.

-1977 DROUGHT EMERGENCY PROJECTS – profound drought emergency drove creative and innovative solutions, in non-competitive atmosphere and deep water shortage:

--Mokelumne Aqueduct No. 1 used by State to convey water from Middle River to Indian Slough/Rock Slough for Contra Costa Water District.

--Aqueduct #2 used to convey CVP water from Middle River to EBMUD terminal reservoirs to supplement EBMUD supply.

--Metropolitan Water District's SWP water pumped into South Bay Aqueduct, through interties to Hetch Hetchy system, City of Hayward, and EBMUD, and conveyed across Richmond San Rafael Bridge to Marin Municipal Water District.

-1988 DROUGHT EMERGENCY PROJECT – another drought emergency, but an example of how a creative effort can fail:

--"Camanche Pump-back Project" – creative proposal to pump CVP water uphill from Delta to Camanche and allow more diversions of Mokelumne water to flow to East Bay.

--Temporary permit denied – protestants persuaded SWRCB they would be injured because of potential adverse water quality impacts, and threat of water hyacinth seeds being pumped upstream.

--<u>LESSONS</u> -- EBMUD's creative idea could not overcome "no injury" fundamental, and EBMUD failed to win any community or political support.

-FREEPORT PROJECT– EBMUD's CVP contract signed in 1970, California Supreme Court decisions in 1977 and 1980 - final trial court decision in 1992 - compromise deal struck in 2002 - first delivery to EBMUD in 2014 (44 years):

-Dispute between 2 CVP contractors, largely based on reasonable use, requiring complex balancing. Both wanted to divert water from Folsom-South Canal.

-Decades of litigation - everyone claimed victory - nothing happened – water demand continued for both sides.

-10 years later parties stopped fighting, and reached a creative, mutually acceptable physical solution. Neither party diverts from originally planned location, but both parties get their CVP water.

COLORADO RIVER – A REMARKABLE 95-YEAR OLD MULTISTATE MODEL

In Pat Mulroy's 2015 Lecture/dialog with Jeff Kightlinger, she described the 1922 Compact that began the century-long relationship between 7 states regarding the Colorado. Quoting from the transcript, could this serve as a model for how we might strive to address, e.g., Delta issues?

"It took a concept of an agreement between seven states under a tool allowed under federal law, which is a compact – approved by seven legislatures, signed by seven governors, approved by Congress, and signed by the President. Everybody's in, and it changed first in time, first in right for this river system amongst the states.

It said: We are an equal partnership. Every one of us has equal right to a future. Every one of us has equal right to waters that we share. We set aside first in time, first in right because in the interest of all, we are going to share this system."

Get the right people in the room; get everyone to acknowledge that there is a limit to the available resource; get everyone to acknowledge that there are more claims/demands than there is water; establish a partnership approach that says that it is in every partner's interest to see to it that every partner succeeds. Be willing to sit across from each other long enough to be able to argue the position of everyone at the table. Build compromise solutions that recognize that in a world where growing population and water demand is occurring simultaneously with climate change, the security and reliability every water user wants can only exist if all of the competing water users get security and reliability.

REGIONAL COLLECTIVE AND COOPERATIVE EFFORTS – although not as sweeping as the Colorado model, we now have numerous examples of efforts where entities that might in earlier days have been competitors for a limited resource are now working together to try to achieve common or parallel objectives:

-Integrated Water Resources Management Plans
-Sacramento Water Forum, Water Authority, and Groundwater Authority
-Freeport Regional Water Project
-Woodland-Davis Clean Water Agency
-Bay Area Regional Reliability Program
-…and probably dozens more

-And the biggest of all – Sustainable Groundwater Management Act (SGMA)

DELTA PROBLEMS – Delta issues do not involve multiple states, but there are a lot more than 7 key players, the issues are inordinately complex, and the participants are not all interested in the same outcomes or the same beneficial uses. But even here, there are a few hopeful signs:

-Previous WQCP proceedings included VAMP/Mokelumne/Phase 8.

-In face of curtailment, Delta farmers voluntarily significantly cut diversions.

Current WQCP Update Proceeding --began with SWRCB staff reports on flows needed for fish protection – immediately controversial and adversarial.

-- Chair Marcus wrote to Governor Brown on 12/22/16 and authored a 12/11/16 OpEd column calling for voluntary agreements in lieu of full-fledged battle.
-At least one San Joaquin tributary group has proposed a possible settlement.
-Comprehensive settlement discussions underway – discussions that may range to matters well beyond the WQCP itself??

CONCLUSION:

1. Water policy has always been a challenging and competitive subject, and although we always must start with a sound grasp of the fundamentals and a complete understanding of the facts in any situation, we must do so with a clear realization and acknowledgement that population growth, increasing demand for agricultural products, and the need for protection and enhancement of the natural environment. Striking an appropriate balance in any resource policy or allocation decision is much more complicated than when we entered the "reasonable use" era.

2. Every policy or allocation decision will impact multiple parties and interests, and each of them are worthy of recognition and acknowledgement if our decision will in the long run be fair-minded and truly comprehensive.

3. Advocates for conflicting and competing interests do not start and may never end up as friends, but they can only reach those fair-minded and truly comprehensive decisions if along the way they develop respect for and trust in the other participants.

4. Balancing is hard to do, and really hard to do well. Anne taught us, as Judge Robie said, that we need to be prepared to guide our clients "away from the hard line, to consider the broader public interests in addition to their own private interests." That statement, to me represents the "new paradigm" that Anne challenged us to seek.

ENDNOTE:

I will finish where I began – talking about Anne. The greatest opportunity for true creativity and innovation in California water today will be local conversations among people reliant on individual groundwater basins about how best to cooperatively manage those groundwater resources. That's SGMA. One outcome of those discussions may be communication and comity that will spread to and affect surface water issues and problems as well. There is a direct connection between the groundwater work Anne did for the Governor's Commission, and the provisions of SGMA, which in the long run is likely to be her greatest legacy.