FEATURE ARTICLE

# LEARNING FROM FAILURE: CALIFORNIA'S 30 YEARS' WAR IN THE DELTA (PART II-CONCLUSION)

*By Joseph L. Sax*

In the first part of this article, published in the September 2013 issue of the *California Water Law & Policy Reporter*, I set out the many obstacles that for decades have prevented an acceptable resolution of Bay-Delta water issues. I suggested that the Delta's problems called for "transformational change" in the way we accommodate traditional water uses to the contemporary demand for protection of instream values. The first part of this article ended with the question "What then would a more appropriate strategy look like?"

## The Loss of Instream Values—The Product of Disregarding the Value of Natural Systems

First, it would invoke Pogo as well as Voltaire: "We have met the enemy and he is us." The loss of instream values is the product of policies that have dominated the country from its founding, policies that treated rivers as raw materials for economic development and virtually disregarded their value as natural systems. Every water user has benefitted from those policies. And the burden imposed in achieving those benefits is chargeable to all of us as water users. That is the fundamental truth about responsibility for transformational change.

## Financing the Transformational Change

That observation necessarily raises two other basic questions. The first is how we want to finance such a change. At the very least, as I have already emphasized, the costs ought to be borne by the water users within the hydrological system at issue. Insofar as we are bringing about such change state-wide, the actual economic profile as between charging water users as such, or water users as a larger public, is a question worth the attention of economists.

In this respect, it is useful to consider other changes effected by profound reconsideration of public values. For air pollution (which in my boyhood was described as the smell of jobs), we impose direct costs on emitters (who have customers that ultimately pay the costs of production). For municipal water pollution, much of the cost was paid by federal taxpayers. Auto emissions controls are imposed on car manufacturers, and are built into the costs of autos and ultimately paid by drivers. So there is no single cost allocation scheme that is necessarily correct for such widespread issues.

In thinking about cost allocation we need to distinguish two quite different things. The first—which is what I have been discussing—is allocating the cost of change equitably. But the second—which is an entirely different matter—is using effective (usually economic-incentive-based) means to generate desired adaptive changes by water users. Under the present approach those two issues are conflated.

I can best explain it this way. In general, most water users are using their water in ways that have long been deemed acceptable. By long-established practice, what they are doing was not viewed as wasteful or unreasonable. And the transformational change that we seek to implement, though it requires (among other things) that additional water to be left instream, does not itself make existing uses wasteful or unreasonable. I make this distinction because as a matter of water policy, we need to accomplish two distinct goals.

## Promoting Adaptive Changes to Reduce Demand

The first, as I have discussed earlier, is to spread among all water users who have caused water to be

taken out of the streams responsibility to bear the cost of providing needed instream water. The second, however, is to promote adaptive changes that will reduce the demand for out-of-stream uses without threatening the benefits to the economy that rely on traditional uses.

Both of these issues are separate from the conventional notion of wasteful and unreasonable use, which describes behavior that deviates from the norm of acceptable water use. Such deviations are the proper subject of ordinary law enforcement, and properly call for individualized and detailed judicial or administrative proceedings. But that is not a productive approach to transformational change, where the norms themselves are new, and the goal is to modify the way everyone uses the resource.

By focusing on the law enforcement mode as the means to achieve the larger goals of *adaptation* and fair *allocation*, we not only make the task ever more time-consuming and costly, but even more importantly fall into the "perfect is the enemy of the good" trap, when what we need is a good-enough approach that can be implemented more efficiently and more effectively, even though it has some rough edges.

Also, instead of legalistic disputation over whether a growing grass lawn in Los Angeles is unreasonable, we need to focus on incentivizing adaptive changes. How do we get people in arid and semi-arid regions to find alternatives to the heavy water demand of conventional uses? These adaptive issues are essentially matters of using economic incentives to generate changed behavior, not legal issues. We know this, and considerable progress has been made in the setting of household use. Thus, policies like those pioneered in Las Vegas, where public funding and information is used to encourage switching to more indigenous plantings, are illustrative of adaptive planning; as are well-established changes like installing metering for household water use, and tiered pricing to encourage more efficient uses.

Such techniques (along with more efficient water-using appliances) are well developed for urban uses, and were successfully implemented by the Los Angeles DWP in the aftermath of the Mono Lake case. We know all these approaches, and we have good legislation calling for per capita reductions in urban water use (*e.g.* Water Code §. 10608.16), but the same innovativeness is not found across all areas of water use, including our most consumptive uses. And some changes, such as reducing irrigated acreage, do not achieve savings if the change involves moving from limited seasonal use to year-around use, with the same annual total consumed.

### An Integrated System is Required

Moreover, adaptations to reduce demand only work as part of an integrated system. As we have learned from previous droughts, it hardly helps to reduce agricultural surface water demand when it just increases compensatory groundwater pumping, which may actually make the supply/demand system worse than it was.

Efforts to take water away from some targeted users under adjudicative-type proceedings is often not only unfair in targeting only some of those responsible, but encourages efforts to maintain existing practices and existing quantitative uses through other means, such as raising existing dams, importing water, and other engineering-type solutions. While such solutions are sometimes appropriate, for the most part they divert attention from efforts to innovate adaptations appropriate to a new way of thinking about water (*i.e.* denaturing such systems as little as is practicable consistent with maintaining a vigorous economy), which is what transformative change is really about.

### The *Mono Lake* Case Example

In this perspective, the *Mono Lake* case—seen in the large—offers an instructive example. (*See*, *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 658 P.2d 709 (Cal. 1983).) At the time Los Angeles applied for its permits, in 1940, though there were objections to the lowering of the lake level, as I mentioned earlier, the State Water Resources Control Board's predecessor found that since domestic use was legally declared the highest use of water, despite the adverse impact on the Lake, "there is apparently nothing that this office can do to prevent it." In 1940 L.A.'s plan was understood to be fully in accord with what the general welfare required. Los Angeles had done nothing wrong in the context of 1940s public policy, and 40 years later it remained on the same path. What had changed was the public conception of the general welfare, and what was required to put water "to beneficial use to the fullest extent..."

Despite a bitterly fought lawsuit in the traditional manner, ultimately a plan emerged—thanks largely to

the forward-thinking Mono Lake Committee—that was in tune with the transformative approach I am suggesting here (*see*, C.A. Arnold, "Working Out an Environmental Ethic: Anniversary Lessons from Mono Lake," 4 *Wyo.L.R.* 1 (2004).

It is true that the setting there was more manageable than a complex system like the Delta, inasmuch as the impact on Mono Lake was caused by a single project providing water from four feeder streams generating supply to a distinct public (users served by the Los Angeles DWP). Thus, putting the burden on Los Angeles met the concept of fairness that I have suggested here.

But other elements of the final outcome are indicative of an appreciation of the centrality of adaptation in effectuating transformative change:

(1) The plan for restoration ultimately adopted by the Board was to extend over several decades, emphasizing that the issue was one requiring adaptation to new goals, rather than a conventional law enforcement mandate.

(2) In addition, post-litigation attention turned to finding alternatives consistent with Los Angeles' legitimate needs. Rather than seeking out another environmentally harmful supply source, the state established a $60 million fund to help the City build water reclamation and conservation facilities (Environmental Water Act of 1989, Water Code §§ 12929 *et seq.*).

(3) Beyond that, Congress enacted legislation authorizing federal expenditures to develop reclaimed water that could serve as an offset diminished Mono Lake diversions (43 U.S.C. §390h-11; H.R. Conf. Rep. No. 102-1016, at 183, 1992 U.S.C.C.A.N. 4041.)

(4) Both the state and the federal government also helped fund water conservation programs that aided the city in reducing substantially its per capita water use.

These steps are notable not only because they show an adaptive response focused on water-conserving efficiencies, but also indicate the propriety of using general public funds to assist in a transformation, so long as public subsidy does not operate to undermine water-saving incentives on the part of the users.

Compared to a vast and complex watershed like that of the Sacramento-San Joaquin Delta, Mono Lake presented a relatively straightforward problem. Urban water use is also an area where successful strategies for limiting per capita use are well-known and proven effective. How then can appropriate transformative approaches be applied to provide additional flows at needed seasons in much more complex systems?

## The Importance of Moving Away from a Litigation Model

While, as in the Mono Lake setting, litigation is often indispensable to get stakeholders to come to the table seeking solutions consistent with contemporary public policy, the challenge is to move away from that mode as soon as possible and shift into an affirmative overall strategy for implementing the transformation. In light of the considerations I have described to this point, what should a transformational water policy look like? In essence it should combine responsibility to all those users who created the need by their water use under the old system. It should effectuate the transformation to the maximum extent possible by using economic incentives, and minimizing economic loss. And it should be amenable to public subsidies to the extent they do not undermine users' incentives to use water more efficiently.

One model for such a program might look something like the following:

(1) All water users responsible for the shortage of instream flows should be charged a quantitatively-based user fee, constructed to reflect estimated reasonable uses for various purposes and settings.

(2) Such fees should provide revenue sufficient to acquire water rights for instream flows.

(3) By being spread widely, such fees should impose modest burdens on any given user, by contrast to the burdens now borne via the litigation/enforcement approach.

(4) User fees, to the extent possible, should employ a tiered pricing system designed to encourage conservation.

(5) To the extent users diminish their uses, such saved water should be available for sale to the public to provide a source for enhancing instream flows. Notably, as the above-described charges generate diminished use, rational users will cut back their least productive water uses, offering the opportunity to sell water into the market the water that has produced the least returns for them. This should provide attractive economic benefits to those users.

(6) With the additional water it will acquire (largely or—at best—exclusively) with the revenues from user charges, the state can establish an effective water bank so that it will have control over sufficient supplies on the relevant mainstreams and tributaries within the watershed to supply needed flows at needed times.

## Conclusion

Obviously, not every water user is contributing to loss of instream values in proportion to their usage in acre-feet, and not all the problems instream are the product of diminished water flows. It may be that riparian area restoration should be largely paid for by taxpayers generally. And it may be that workable water-use charges will not generate sufficient funds to do the job, and some public subsidy may be required. So too, a satisfactory market may not develop in some places, and eminent domain may have to be employed as a last resort. But all these—and no doubt many other—concerns need to be considered under the powerfully relevant observation I cited earlier: the search for the perfect is the enemy of the good.

Three decades of exacting (if not pettifogging) disputation in the Delta may suggest that for water problems the time has come to try some sort of "good enough" solution. The science will not be perfect; the allocation of causes will not be perfect; nor will allocation of responsibility. Good enough should be our goal, so long as users are on track to implement the public welfare as the public conceives it in this century.

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