FEATURE ARTICLE

LEARNING FROM FAILURE: CALIFORNIA'S 30 YEARS' WAR IN THE DELTA (PART I)

By Joseph L. Sax

This is the first of a two-part article analyzing why legal wrangling over the Bay-Delta has dragged on inconclusively for decades. In the second article, to be published here next month, I shall suggest new some strategies that hold out hope of greater success.

Introduction

For some years I have been thinking about an aspect of the law that seems not to have attracted much attention. That is, while some changes are merely new applications of well-established principles and values, such as the new technologies that impact privacy, others reflect fundamentally different societal values, such as the way in which once new concerns about child labor or worker safety transformed the traditional idea of freedom of contract, that you are entitled only to what you can bargain for, however horrendous the outcome. I call these latter changes—which are driven by changing societal values—transformational. They are so basic that we can't simply apply the established legal tools to implement them.

This duality can be found in every area of law. For example, most modern pollution laws simply deal with an established idea (like nuisance) in new settings, under new technologies and at increased magnitudes. But some environmental concepts—like habitat in the setting of land and water—embody fundamentally new ideas and values that have no recognition in the old system. For example, in the conventional law of property habitat does not exist: no one owns it, no law protects it, and it is conceptually at odds with the very idea of human-set boundaries that undergird land law.

The Transformational Change of Water Policy in California

With this distinction in mind, I want to turn to water and to its version of transformational change.

For well over a century the water system in the West was built on a policy of diverting and damming streams in order to promote hydropower and out-of-stream benefits. Though fish ladders and some bypass flows were known historically, the impact of conventional water uses on instream values was almost entirely ignored. In many places rivers were entirely dewatered during the irrigation season. The older view was summed up many years ago in the State Water Resources Control Board's (Board or State Board) response to a Fish & Game Department's objection that Friant Dam would effectively dry up the San Joaquin River for miles below it. The Board rejected the plea to keep some water in the river to preserve the salmon stream. It said: "There certainly is nothing in Federal law requiring a priority for fish life [sic] over irrigation, but quite the contrary"[1] and it held that bypassing water to maintain a salmon fishery in the river "is not in the public interest..."[2]

Twenty years earlier similar objections were made that Los Angeles' Mono Lake project would harmfully lower lake levels, but the Board's predecessor said "there is apparently nothing this office can do to prevent it."[3]

In recent decades a fundamental change in public policy has occurred, putting protection of instream values on a plane with diversionary and hydropower uses. But despite the fundamental, transformative nature of this change in public policy, no equally transformative means have been developed to implement these changes. Indeed, we are using the tools of the old system to implement a very different conception of water policy, and those tools are inadequate to bring about that transformation in a timely, efficient and reliable manner. The seemingly endless (so far) "30 Years War in the Delta" is illustrative of the misfit between means and ends.[4] And that is a principal reason why we are seeing on one side "takings" and breach of contract claims asserted against efforts to restore instream values,[5] and on the other invocations of the California Constitution's "reasonable

and beneficial use" provision[6] made against uses that have been thought entirely reasonable and beneficial for well over a century. One indicator of the problem is the emphatic and repeated statement in our most up-to-date legislation—the 2009 Delta Reform Act—that it "does not affect ...any water right."[7]

These claims and such 'savings clauses' in the law are only one manifestation of the effort to address a fundamentally new problem through concepts devised for a system whose goals and values were profoundly different. An even more central flaw in relying on what I shall call 'old system' rules is that doing so fails to meet one of the central precepts of fairness in a legal system: that those who create a problem should bear responsibility for resolving it. If we ask who created the problem of loss of instream values within a given watershed, the obvious answer is: all those water users who have diminished or modified the periodicity of instream flows, as well as those who have modified the riparian habitat that supported instream values.

In short, within a given watershed, like the vast Delta system, that means all those who are diminishing and modifying the historic hydrograph, in proportion to their imposition on that historic system. (That is not to say anything about how much we wish to restore of the historic situation; it is only to note the distribution of causation for whatever level of restoration is desired.) But causation is not the principle that guides restoration efforts. Instead, we use the tools of a system that was designed for different purposes and that produces results quite at odds with cause and effect.

The Issue of Water Use Responsibility and the Allocation of that Responsibility

Of course the question of responsibility is not new. In 1986, an important judicial opinion, popularly known as the Racanelli decision,[8] was issued dealing with water quality in the Delta, and among its holdings was that the plan to impose all the burden of meeting water quality standards on the State Water Project and the Central Valley Project was not lawful, and that other upstream users (called north-of-Delta diverters) also bore responsibility for solving the problem. These were mostly agricultural water users in the Sacramento Valley, and included riparian users as well as appropriators. The determination of who would have to contribute water, and how much, was left to the State Board, which was tasked with resolving that issue along with numerous others involving water quality in the Delta, such as salinity.

In due course the Board issued a lengthy decision, D-1641, which provided for the ultimate resolution of a number of issues through phased hearings. The question of allocation of responsibility among the north-of-Delta water users was to be resolved in what came to be known as the "Phase 8 Process." As might have been expected, allocating responsibility among these users was extremely controversial. Among the issues debated was whether the seniority system had to be used, in which case riparian users (many of them rice farmers along the Sacramento River) would be most favored, with senior appropriators next most favored, so that the heaviest burden would fall on the most junior appropriators. Alternatively, the claim was that a duty to meet water quality laws could be imposed equally on all users, without regard to their status in the priority system.

The issue was so controversial, and the prospect of protracted litigation such, that the problem was ultimately mitigated with an infusion of public money. As a result, the Phase 8 hearing to ascertain legal liability was put on indefinite hold. One result is that responsibility for the Delta among water users has been driven by other legal forces that were not intended to deal with such questions.

Enter the Federal Endangered Species Act

One dramatic example is the functioning of the federal Endangered Species Act (ESA). As the act is administered by the federal government, the primary enforcement tool is §7, which—in the water context—focuses on a particular user who seeks a permit or license renewal or some other federal action.[9] In a revealing Ninth Circuit case on the Klamath River, the §7 applicant who had to comply with a Biological Opinion's statutory reasonable and prudent alternative to avoid jeopardy noted that it was diverting only a little more than half the water that had generated jeopardy for the species in the river, yet was being required to provide all the increased flows required under the Biological Opinion. The Ninth Circuit held that the ESA permitted no such causation defense.[10] Similarly, in the Tulare Lake case in California, adverse impacts on the endangered Delta Smelt were focused solely on water exported from the Delta by southern California water districts because of a §7 Biological Opinion.[11]

FERC Licensing

A similar process occurs in the context of Federal Energy Regulatory Commission (FERC) relicensing of dams, where the burden falls upon those who need their licenses renewed. So too with the State Board's current effort to obtain increased flows from San Joaquin tributaries—an improvement over the previous approach—but already criticized for excluding upstream diverters and polluters.[12] My point is simply that wherever one looks, the immunizing of some water users from a solution that calls for enhanced instream flows generates more of the endless "not me" litigation that is so pervasive and unproductive.[13]

The *NRDC v. Salazar* Decision

Another recent Ninth Circuit case, *Natural Resources Defense Council v. Salazar*, is illustrative (the decision has been granted reconsideration *en banc*).[14] In that case pre-CVP water users on the Sacramento River held contracts assuring water to maintain their pre-project uses. When those contracts came up for renewal, the users claimed that they were immune from ESA review because renewal of their contracts was non-discretionary, thus effectively shielding them from having to contribute to instream water needs.

I make no claim here about the correct legal interpretation of the law at issue in these cases. I simply observe that such old-system legal approaches not only engender interminable, costly and protracted litigation, but produce results at odds with actual responsibility. Such cases, and the laws they litigate, are built on a conception of individual law violation, of deviation from an established old-system norm, rather than on how equitably to implement a new norm on the part of users who—for the most part—are only doing what we have long encouraged and authorized them to do. We need focus on how to get them to be more adaptive and innovative, rather than insisting on how transgressive they have been.

The Misfit between the Ends and the Means—A Water Rights System Designed to Address Disputes Among Individuals

This misfit between ends and means is endemic when we invoke the traditional water law system, which is essentially designed to resolve disputes among individual users relating to shortages attributable to variation from year to year in natural flows. For example, whatever the virtues of prior appropriation for allocating water among diverters in times of shortage, such as junior appropriators being on notice that they must bear the burden of water-short years, that rationale bears no relation to a problem that did not exist in the past: how to reallocate a fully appropriated system to purposes that were not previously recognized (instream restoration) and to which all users, senior and junior, have equally contributed. The same may be said of all the other elements of the traditional system, the special status of riparian users, and the exempt status of almost all groundwater users.

This misfit is obvious and familiar. A classic example is the San Joaquin River, where efforts to provide adequate flows to the southern Delta were heavily imposed on the most junior facility, New Melones Dam on the Stanislaus, to the advantage of more senior users on the Merced and Tuolumne Rivers, generating breach of contract litigation by contract water users from that dam.[15] Equitable allocation of responsibility is also frustrated by the separate status of the upper river controlled by Friant Dam. The Friant situation is unusual, as the instream burden was considered only that stretch of the river between the dam and the first downstream tributary of the San Joaquin, so that Friant water was not viewed as having to contribute to downstream Bay-Delta problems, though it will eventually do so via restoration of flows.

Aside from basic issues of fairness, using traditional water law allocational tools to achieve instream flows generates a seemingly endless parade of 'not me' and 'not my fault' type litigation that basically just churns out claim after claim to the effect that someone else, or something else, must be held responsible for fixing the problem. Sometimes that litigation is based on legal defenses of the sort I've just noted, sometimes on pointing to the indisputable multiple causes of a watershed's decline, including out-of-watershed causes like ocean predation and sometimes on the science of a Biological Opinion.[16]

Conclusion: A Water Rights Resolution System Striving for Perfection and Driven Heavily by Science

Another important consequence of an approach that converts an over-arching public resource allocation problem into a litigative minefield is to generate the fallacy that Voltaire famously described: the

quest for the perfect as the enemy of the good. In our water situation we see this both in the interminable disputation over exactly who is responsible for what; as well as in the appropriation of scientific work as grist for litigators' mills, rather than as necessary tools—though inevitably imperfect and tentative—to develop workable solutions to complex and dynamic problems.

A dramatic and recent illustration of the phenomenon is illustrated by Judge Wanger's 126 page opinion of May 27, 2010, and his 225 page opinion of December 2010 in the *Delta Smelt Consolidated Cases*.[17] That we are still judicially wrangling over such ESA science issues in dealing with exports is itself a dramatic indicator of old-system failure.

On all these fronts—and such disputation continues today, the proposed tunnels[18] being just the latest setting[19]—we should be doing better after more than three decades of efforts to restore a declining Delta. What then would a more appropriate strategy look like?

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ENDNOTES

[1] Decision D-953 (June 2, 1959), at 22. There was however something in state law: §§ 5937 and 5946 of the California Fish and Game Code, requiring releases from dams sufficient to re-establish and maintain fisheries, which had been enacted in 1953, but did not play a significant role in water policy prior to the Mono Lake controversy.

[2] Id., at 24.

[3] Div.Wat. Resources Dec. 7053, 7055, 8042 & 8043 (Apr. 11, 1940), at p. 26, cited in *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 428, 658 P.2d 709,714 (1983)

[4] I chose the years leading up the Racanelli decision (note 8, infra) as the starting point of the current Bay-Delta controversy, but efforts to resolve conflict between traditional water supply and ecosystem values in the Delta go back even further, to the Board's Decision D.991 of 1961, 1961 WL 6816.

[5] E.g., *Tulare Lake Basin Water Storage Dist. v. U.S.*, 49 Fed.Cl. 313 (2001), *Casitas Mun. Water Dist. v. U.S.*, 543 F.3d 1276 (Fed.Cir. 2008), 556 F.3d 1329 (Fed. Cir; 2009); *Stockton East M.W.D. v. U.S.*, 75 Fed.Cl. 321 (2007), 638 F.3d 781 (Fed.Cir. 2011).

[6] Art. X, §2.

[7] Water Code §§ 85032(i); 85057.5(c).

[8] *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 227 Cal.Rptr.161 (Ct. App. 1986).

[9] 16 U.S.C. §1536.

[10] *Pacific Coast Federation of Fishermens' Assns. v. U.S. Bur. of Rec.*, 426 F,.3d 1082, 1089, 1093 (9 Cir. 2005).

[11] *Tulare Lake Basin Water Storage Dist. v. U.S.*, 49 Fed.Cl. 313 (2001). That case arose from a §7

biological opinions dealing with the delta smelt and winter-run Chinook salmon in the Sacramento River/ Delta watershed, and set out restrictions on pumping export water from the Delta to southern California water districts, which claimed their water rights had been unconstitutionally taken.

[12] Valerie C. Kincaid, in California Water, at p.68 (December 2012).

[13] California's area-of-origin preference laws also generate such litigation. See *Tehama-Colusa Canal Auth. V. U.S. Dept. of the Interior et al.*,2013 WL 3285795 ___F.3d___(9 Cir. 2013).

[14] *Nat. Res. Def. Council v. Salazar*, 686 F.3d 1092 (9 Cir. 2013), reh.en banc granted, 710 F.3d 874.

[15] The Bay-Delta Accord imposed a number of contraints upon the operation of the CVP, which included various provisions that directly impacted the operation of the New Melones Reservoir." *See Stockton East, W.D. v. United States*, 583 F.3d 1344, 1349 (Fed. Cir.2009).

[16] Scientific controversy over the causes of declining fish populations in the Delta go back many years. Arthur E. McEvoy, The Fisherman's Problem: Ecology and Law in the California Fisheries 1850-1980 (1986).

[17] *Delta Smelt Consolidated Cases*, 1:09-cv-00407-OWW DLB [et al.], Memorandum Decision re: Cross Motions for Summary Judgment (D.Ct., E.D. Ca, Dec. 14, 2010).

[18] Huge pumps on the south side of the Delta lift water into canals that transport it to the Central Valley and Southern California. Because these pumps harmfully entrain Delta fish, various proposals have been made to bring water directly from the Sacramento River to the pumps, avoiding in-Delta reverse flows. A so-called peripheral canal proposal was defeated by the voters in 1982. The current proposal seeks a similar result by constructing tunnels under the Delta to carry water from the Sacramento River, north of the Delta, directly to the pumps.

[19] E.g., the *Los Angeles Times* reported on April 25, 2013, that "Jerry Meral, deputy director of the state Natural Resources Agency, ... allegedly told officials that Brown's water plan was never about saving the delta and that in fact the delta could not be saved." latimes.com/news/local/political/la-me-pc-jerry-brown-water-jerry-meral-delta-water-plan-resignation-20130425,0,7348556.story