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CONTENTS

Continued on next page

FEATURE ARTICLE

BRING US LAW TO MATCH OUR RIVERS

By Antonio Rossmann

Historical Perspective

Twenty-five years ago, as chair of the State Bar Committee on the Environment, I moderated the statewide debates on the Peripheral Canal. In one respect that was a sound assignment, in that I remained undecided until the last week of the campaign how to vote. Compelling arguments belonged to both sides, and some of my most respected and closest colleagues presented those arguments pro and con. In the end I cast my ballot with the majority against the canal, not because of its engineering or technical design, but because of the failure of my own profession to provide mandates to govern the works.

A quarter century on we are here again, and once again (now in the capacity of Lecturer in Water Resources Law at Boalt Hall) I will moderate Debates II. The stakes are higher now; we own evidence of the Delta's inability to operate as before, we have millions more Californians within the state, and climate change is poised to redefine the amount and timing of our natural water supply. Can our legal profession afford to stand again on the sidelines, and leave the debate to the engineers and biologists? Or are we obligated to propose constitutional and statutory measures that can accompany legislative and popular votes on 21st century water investments, which can assure the electorate that future water projects sustain both our population and our environment?

We are privileged to address that obligation within our lifetimes, indeed, in the coming year. Thankfully, the California Legislature and Governor failed this fall to advance to popular vote their premature and incomplete proposals that focused on the plumbing of waterways or reservoirs, leaving untouched the transcendental issues of governance and mandate. "Thankfully," because virtual consensus from the water establishment will be needed to produce a narrower but winning majority from the voters. Attaining consensus compels our best efforts to perfect new law to match our rivers.

We draw on California's experience in the 1920s. Then the state had reached an impasse, as riparian rights flourished but their unlimited exercise threatened the development of storage capacity for municipal and hydroelectric use. When the California Supreme Court in *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81 (1926), venerated riparian rights over all other considerations, members of the water bar responded by crafting a constitutional amendment, adopted by the people in 1928, which remains our bedrock mandate for reasonable and beneficial use of all water resources. (Cal. Const. art. X, § 2.)

Today California stands at a similar crossroads. Like the riparians' excesses of the 1920s, today's appropriative excesses have placed both our ecosystems and water reliability at great risk; with permanent limitations imposed or imminent in the Delta, the eastern Sierra, and the Colorado, we are witnessing the end of California water as we knew it. To these perils we now add the reality of climate change as a transcendental constraint. It is time for our best leaders, those within and those without the cadre of riparians and appropriators, to define, as a prerequisite of major manmade revisions to our environment, a constitutional and statutory structure that secures the protection of that environment.

Here in my perspective of 25 years of teaching and 35 years of practice are measures that should be publicly debated, improved, and acted upon for inclusion in any water package presented to the electorate. These measures are designed to create the political and legal structure that, together with physical and

engineering measures developed by other disciplines, render the risk of manmade change acceptable. They include provisions for vigorous and effective judicial review because the judicial department must be engaged to ensure that important non-majoritarian interests are protected.

The Public Trust

We need to adopt into the California Constitution the public trust doctrine as expressed by the California Supreme Court in the Mono Lake case (*National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983)). As applied to water resources, the public trust doctrine has been broadly accepted for a generation as an integral part of our legal heritage and water-resource administration; it deserves a (presently unoccupied) place in our Constitution. Such a measure should include the Supreme Court's premises that (1) trust values be protected whenever feasible; (2) the State and its agencies hold an ongoing duty to reconsider and readjust past allocations that threaten trust values; and (3) public trust determinations are reviewed by the courts in the exercise of their independent judgment.

Interpreting that mandate, the State Water Resources Control Board in both its Mono Lake (D. 1631) and Imperial to San Diego Water Transfer (D. 2003-0013, 2002- 0016) cases embraced air quality as a trust resource to be protected in its determinations. To address climate change in the context of water allocations, the constitutionally-defined public trust should expressly include air as well as water as a trust resource.

Constitutionalizing the trust doctrine will strengthen the state's ability to defend its public trust decisions when challenged on federal grounds; the absence from the State Constitution of public trust as applied to non-coastal waters caused the California Attorney General to argue for its rejection in the Mono Lake case.

Moreover, restating the Supreme Court's *Audubon* doctrine in the Constitution will correct the Court of Appeal's recent and overly-modest reading of public trust in the *State Water Resources Control Board Cases*, 136 Cal. App.4th 674 (2006). There the court in my view misread *Audubon* by holding that the State Board's determination of "feasibility" would be confirmed solely on the support of substantial evidence. *Id.* at pp. 777-780. But the Supreme Court's trust jurisprudence up to *Audubon* followed the Court's application of Constitution article X, § 2, in examining within its independent judgment whether trust values have been sufficiently protected. By constitutionalizing the public trust, we can assure that a presumption honoring ecological limitations will prevail—a rebuttable presumption, to be sure, and one in which deference to lower agencies will be given—as determined by an independent judiciary.

Watershed of Origin

The watershed of origin doctrine, protecting each tributary watershed in the state from excessive appropriations out of that watershed to other watersheds, also deserves adoption into the Constitution. Such a measure would validate the 1955 Attorney General opinions (25 Ops. Cal. Atty. Gen. 8, 25 Ops. Cal. Atty. Gen. 32) on which the State Water Project was approved in 1960—including the ecological foundation of those opinions, namely that no appropriation should deprive an upstream tributary watershed of the entirety of its only natural supply. In addition to benefiting the watershed of origin, this doctrine serves the entire state by discouraging appropriation to the edge of unsustainability.

This doctrine—and its variant forms, such as the "county of origin," "area of origin," and "Delta protection" statutes—presently lacks statewide uniformity in the standards it requires, the projects to which it applies, and the rivers to which it applies. Moreover, the *State Water Resources Control Board Cases* read the doctrine to apply uniformly to all competing uses within the San Joaquin River drainage, rather than drawing a distinction between an upstream tributary with no alternative supply, and a bottom-land appropriator. The watershed of origin's foundational principles, however, deserve application in every tributary watershed. And the representations made to the people in 1960, that upstream and upstate watersheds *would* be protected, must be honored.

It bears emphasis that a watershed-of-origin constitutional amendment was proposed in the 1950s as a predicate to adoption of the State Water Project. As shown in Ethan Rarick's recent biography of Pat Brown (*California Rising*, UC Press 2005), this measure was put aside in the rush to produce the 1960 vote on the State Project bond act. Rather than constituting a new proposal, placing the watershed-of-origin in the Constitution will complete California business a half-century overdue.

The State Board as Constitutional Agency

The State Water Resources Control Board deserves establishment into the Constitution as an agency on par with the Public Utilities Commission, with secure funding and tenure of appointment. If water is, as often claimed, our most important California resource, its governance should be matched in the dignity we accord to electricity and motor vehicle carriers.

Unlike the PUC, however, judicial review of State Board decisions should not be confined to the original jurisdiction of the Supreme Court. That well-intentioned measure from 1911 has over the years both burdened the Supreme Court and frustrated challengers; the Court has to review every complaint against the commission, but the petitioners are not assured of plenary Court review on the merits of any of them.

On the other hand, the existing practice of Superior Court retrial of the State Board's rulemaking and adjudication essentially duplicates the board's own evidentiary proceedings, and only delays the finality of its decisions, which in virtually all cases end up in the Court of Appeal. We can borrow from the practice of the Worker's Compensation Appeals Board in California, and of the federal regulatory agencies, and provide through constitutional amendment that State Board decisions are reviewed initially in the Court of Appeal. itigation will be shortened, every appeal will be decided by plenary hearing on the merits, and the Supreme Court spared the exercise of original jurisdiction.

Restoration of Shortage Provisions in the State Water Contracts

Long before our current Delta crisis became well-known and accepted, former DWR Director David Kennedy and the largest State Water Contractors decided in secret to eliminate article 18(b) from the project contracts, which provided that a permanent shortage in the project's anticipated 4.2 MAF build-out would be adjusted by reducing project shares proportionately to conform to realistic and reliable delivery amounts (in 2000, determined to be approximately half). The Court of Appeal in *Planning and Conservation League v. Department of Water Resources*, 83 Cal.App.4th 893 (2000) set aside the EIR on these "Monterey Amendments," expressly requiring a new EIR and accompanying reconsideration by the DWR Director of reinstating article 18(b). As the court noted, our predecessors who created the State Water Project wisely established the article 18(b) mechanism in anticipation of today's reality—that the environment cannot sustain a permanent distribution of 4.2 MAF annually from the project. Article 18(b) should be reinstated as part of new water investments to require the state at the end of day to govern the project at an environmentally-realistic level of capacity—ensuring that both project contractors and land use decision-makers not perpetuate unrealistic expectations of future water availability. Only then will the Delta enjoy enhanced security from excessive demands—and expectations of demands.

Article 18(a), which initially created a preference for urban uses over agriculture in time of short-term shortage, should also wisely be reinstated. As water managers in other Southwestern states recognize, the presence of substantial agricultural allocations to be reduced in time of drought provide the safety valve to assure long-term reliable supplies to the greatest number of people. When the Monterey negotiators decided in secret to eliminate article 18(a) and essentially treat every drop of water in the state project as transferable to inflexible urban use, they eliminated the long-term security of California's urban supply. Reinstatement of article 18(a) will create a margin of safety for our population, and a margin of safety relieving the Delta in times of shortage.

Assured Judicial Review on the Merits

To ensure judicial review of water resource determinations involving multiple parties and complex structures, modification of the indispensable party doctrine (Code of Civil Procedure § 389) should provide that in water-related litigation if a single indispensable party is named, others shall be allowed to intervene of right, but the proceeding shall not be dismissed for failing to name any remaining indispensable parties. The recent past has seen an epidemic of ambitious water districts evading judicial review (or causing years of delay in attempting to do so) because litigants cannot at the outset identify all potentially interested parties, or have the wherewithal to name hundreds of them. A particularly unfortunate example arose in *County of Imperial v. Superior Court (State Water Resources Control Board*, 152 Cal. App.4th 13 (2007), where two water districts asserted that because the State Board lacked jurisdiction over their operations, they were not indispensable to liti-

gation against the board, and then turned around and moved for dismissal for failure to name them; in the end, this tactic delayed litigation for more than two years with no apparent effect on the ultimate resolution of the merits.

The legislature can determine by amendment to § 389 that justice is best served by allowing any party claiming an interest to participate in litigation, rather than arming that party with the abusive weapon of dismissing judicial review entirely. A more modest suggestion would amend § 21167.6.5 of the Public Resources Code, to require in the California Environmental Quality Act (CEQA) decisions that the lead agency identify the recipients of its approval and thereby fix the parties that must be named in any CEQA challenge.

This assured judicial review is vital if the substantive provisions outlined above are to provide the environmental assurances that will earn popular support for major new water investments. If projects and programs are sensibly and collaboratively developed, their proponents need not fear judicial review. If on the other hand project proponents are allowed to treat environmental assessment and judicial review as matters to be evaded, our greatest obstacle to a better California water future—distrust—will be perpetuated.

In Conclusion, Why Should We Do This?

Water suppliers and project managers probably ask, "What's in it for us?" The immediate answer connects the need for a major water investment to command a majority of the electorate to fund it. While many factors contributed to the defeat of the Peripheral Canal in the 1982 referendum, [The California State Bar Committee on the Environment's impartial assessment of the 1982 referendum, as approved and distributed by the California State Bar before the election, appears at landwater.com/publications/, together with two post-election commentaries analyzing the result] in the end the measure failed because of overwhelming lack of trust in Northern California. Today in my view an even greater distrust, now extending to Southern California urban voters, defines the attitude of civic and environmental leaders toward the two major water projects and their principal contractors.

Those who operate and immediately benefit from the projects that will be served by major modifications in the state's plumbing can regain necessary trust by signing on to and supporting this suite of proposals. That support will demonstrate to an apprehensive electorate that the water projects and districts buy into the public trust, the watershed of origin, and these other measures; that they are prepared not to evade or even merely tolerate these principles, but embrace them as terms of the social compact governing California's water resources.

Finally, the proposals here should be seen as an initiative, not a final answser. Water managers and suppliers should sharpen their own pencils and propose from their prospective additional measures that will produce a reliable and environmentally secure resource for 21st century California. To restate Sam Walter Foss' words inscribed on State Office Building One in Sacramento, if the 19th century demanded men to match our mountains, the 21st asks for laws to match our rivers.

Antonio Rossmann, founding partner of Rossmann and Moore in San Francisco, serves as Lecturer in Water Resources Law at the University of California (Boalt Hall). Through his firm, Mr. Rossmann represents state and local agencies and private entities in major land use and water disputes. Mr. Rossmann has sat with distinction on the Advisory Boards of the *California Water Law & Policy Reporter* and the *California Land Use Law & Policy Reporter* for many years.