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## Introduction and Dedication

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# *Symposium*

## Introduction and Dedication

BRIAN GRAY\*

[On February 4, 2006, the *Hastings Law Journal*, in conjunction with U.C. Hastings College of the Law and the *West-Northwest Journal of Law and Environmental Policy*, hosted the second annual California Water Law Symposium in San Francisco. The Symposium included panels and speakers on the latest issues in this growing field. The following Section contains transcripts of the introductory and keynote speeches and panel discussions. Transcripts have been edited for brevity and clarity, and, where possible, citations to authority have been added.]

It is a pleasure to be here. I welcome you to the second annual California Water Law Symposium. In contrast to other water law events, this is an entirely student initiated and student organized conference, and because of that I would like to thank all of the students who were involved in organizing this event. I want to give special thanks to Tom Hicks, a recent graduate of USF who was the original inspiration for this conference. Finally, I would like to thank those who were primarily responsible for organizing the symposium: Jason Fellner, Diana Kruze, and Beth Koh.

Last year's conference coincided with a memorial service for Jean Auer, who was a good friend to many of us in this room. Thinking back on that weekend gave me an occasion to reflect on Jean and so many of the people who have helped shape the agrarian California water resources law and policy. There are four individuals whom we have lost over the last decade or so and I want to say a few words about each of them.

Adolph Moskovitz was one of the grand people in the field. His

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colleagues rightly called him a lawyer's lawyer. He was a consummate professional and a true gentleman. Over the course of a career that spanned over four decades, Adolph helped to create modern California water policy. As a young lawyer for the Bureau of Reclamation, Adolph worked on the *Ivanhoe* litigation,<sup>1</sup> dealing with the 160-acre limitation. He moved on to become a deputy to Attorney General Pat Brown. In that capacity, he helped advise the Attorney General on the creation of the state water project, and wrote the Attorney General's opinion, which to this day defines California's "area of origin" laws.

In the late 1950s, Adolph co-founded Kronick, Moskovitz, Tiedmann & Girard, a firm that since its inception has been synonymous with the private practice of water law in this state. He litigated, both for parties and as amicus curiae, many of the great cases of his time, including *Fresno v. California*,<sup>2</sup> *Dugan v. Rank*,<sup>3</sup> and *Barcellos & Wolfsen, Inc. v. Westlands Water District*,<sup>4</sup> which all involved the Central Valley Project Water Service Program. California cases on in-stream flow protection and in-stream water rights include *Environmental Defense Fund v. East Bay Municipal Utility District*,<sup>5</sup> *Fullerton v. State Water Resources Control Board*,<sup>6</sup> and *California Trout v. State Water Resources Control Board*.<sup>7</sup> Other cases include *Long Valley*,<sup>8</sup> a case before the California Supreme Court on the subject of dormant riparian rights and the reasonable use doctrine, and the California Supreme Court's landmark California Environmental Quality Act (CEQA)<sup>9</sup> decision in *Friends of Mammoth v. Board of Supervisors of Mono County*.<sup>10</sup>

I met Adolph in 1982 when he argued the *Mono County* case before the California Supreme Court. I was a brand new lawyer. I had written an amicus brief on behalf of the City of San Francisco in the case that Adolph and his clients were not too happy with. I remember he was very gracious to me. I will never forget Adolph's argument. He had broken his finger, his middle finger, and it was in a cast. It was one of the best arguments I have ever witnessed. He was absolutely battered by the

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1. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958) (holding unconstitutional the portion of the Reclamation Act of 1902 providing that no right to use of water should be sold for lands in excess of 160 acres in single ownership).

2. 372 U.S. 627 (1963).

3. 372 U.S. 609 (1963).

4. 491 F. Supp. 263 (E.D. Cal. 1980).

5. 605 P.2d 1 (Cal. 1980).

6. 153 Cal. Rptr. 518 (Ct. App. 1979).

7. 255 Cal. Rptr. 184 (Ct. App. 1989).

8. *In re Waters of Long Valley Creek Stream System*, 599 P.2d 656 (Cal. 1979).

9. The California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21177 (Deering 2005).

10. 502 P.2d 1049 (Cal. 1972).

justices. It was a very hostile bench, a quite liberal California Supreme Court with Rose Bird still Chief Justice. They just ripped him throughout the argument. But what I remember most is that he handled the justices' questions with such grace and humor; it was really a *tour de force* performance. He would occasionally gesture to the justices, which made it look as though he was giving them the finger. He might well have, at least mentally. He certainly would have been entitled to do so. Late in the argument Justice Frank Richardson, who was the only remaining Republican appointee to the court, had an exchange with Adolph. Adolph had said to the justices, "If California wants to take Los Angeles' water supply from it to protect the public trust of Mono Lake, then it ought to pay the people of L.A. for doing so." Justice Richardson interjected and said, "It seems to me, Mr. Moskovitz, that if the City of L.A. wants to take the water supply and damage the public trust in Mono Lake, then they ought to pay the people of California for that privilege." Adolph acknowledged afterwards that he realized he was probably not going to win the case after that exchange.

Adolph used to joke that his greatest professional contribution to California water law was losing the *Long Valley*<sup>11</sup> and *Mono County*<sup>12</sup> cases before the California Supreme Court, because those two cases firmly established reasonable use and public trust as cornerstones of modern California water law. What I remember most about Adolph was that he had complete dedication to his craft. He was very kind to me and generous with his time. He had, as I said, grace and humor under pressure, and he was gracious in his many accomplishments and in his occasional defeats.

The second person I want to remember today is Marc Reisner. Marc passed away in 2000. Marc is best remembered of course for *Cadillac Desert*,<sup>13</sup> the book that has introduced a generation of readers to the glories and scandals that marked the development of American western water policy. Glen Martin wrote in his remembrance of Marc in *The San Francisco Chronicle*, that *Cadillac Desert* is "so powerful, so exhaustive in its research, so beautifully written, that as much sweat had to have gone into it as ink."<sup>14</sup> But he continues, "I never saw Reisner sweat. Quotidian (one of his favorite words) recreation, the grind of daily work, the enmity of foes, the fulsome attentiveness of admirers: You somehow sensed that he enjoyed it all equally, the plaudits and the invective, the sunshine and stinging sleet. He simply like the friction of being alive."<sup>15</sup>

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11. 599 P.2d 656.

12. 502 P.2d 1049.

13. MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* (1986).

14. Glen Martin, *Author Marc Reisner's Zest for Life Was a Natural Wonder*, S.F. CHRON., Aug. 6, 2000, at SC-7.

15. *Id.*

I saw Marc's joy for his work when I testified with him and Jean Auer before Bill Bradley and the Senate Subcommittee on the Miller-Bradley legislation that ultimately became the California Central Valley Project Improvement Act (CVPIA).<sup>16</sup> Some of the testimony was tedious; I spoke on the subject of water transfers. Some of it was comical; a real estate and entertainment industry consultant who was presumably there to talk about the comparative value of urban water supply talked about the overuse of water by farmers growing alfalfa sprouts rather than alfalfa. I remember Jean almost fell out of her chair as she was sitting there before the committee. When it was Marc's turn to speak, he lit up the room. He regaled the senators with accounts of some of the more odious violations of the acreage limitation. He went on to explain to them the consequences of abuses of the federal reclamation subsidy on the ecosystems from which these subsidized and inflated demands for the Central Valley Project water were met. More importantly, as a writer, he was able to tell the senators a compelling story about why the CVPIA was necessary. Not just to protect fish, but to allow for the management of the Bay Delta system for sustainable human benefits to the water supply and water quality. After the hearing, he and Senator Conrad Burns from Montana, who was no friend to federal reclamations reform, spent a good half-hour laughing and swapping war stories about their common experiences.

In the last few years of his life, Marc embarked on an effort to persuade the rice growers in the Sacramento Valley that they could manage their fields and irrigation water, not just for production, but also for habitat and conjunctive water supply for migrating season. With considerably more difficulty, he also set out to convince his colleagues in the environmental movement that they should make peace with an old *bete noir*: the growing price in the desert. Marc did not live long enough to accomplish this *détente*, but he did begin the process of constructive engagement in the Sacramento Valley to find ways of managing lands and water resources for the multiplicity of economic and environmental benefits. Marc brought to his work creativity, courage, and the recognition that people are part of the contemporary environmental equation. He had an important sense of humor, and as Glen Martin said, "a great appetite for life as well."<sup>17</sup>

Next is John Krautkraemer. We lost John eleven years ago. John was lucky and talented enough to land a staff attorney's position at the Environmental Defense Fund (then EDO) as his first legal job. He, too, was a creative and dedicated professional with skills that he combined with preternatural charm and a wonderful sense of humor to achieve

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16. Central Valley Project Improvement Act of 1992, Pub. L. No. 102-575, 106 Stat. 4706 (1992).

17. Martin, *supra* note 14.

monumental success in his short career. John was also something that many environmental lawyers are not: he was a user of the lands and water that he worked to protect. John was a mountaineer, an expert kayaker, and an amazing alpine skier. Indeed, we lost him to a ski accident in Squaw Valley. John cut his teeth on the *EDF vs. East Bay Municipal Utility District*,<sup>18</sup> which was the first significant case in which the reasonable use of public trust doctrine was used to limit the exercise of an appropriate water right in order to protect fish, recreation, and other big stream uses. Then John moved on to the Bay Delta controversy. A labyrinthine, multi-decade, probably multi-generational conflict that has tested the skill, patience, creativity, and perseverance of even the most experienced professionals.

Still a young lawyer, John quickly became one of the key players in the negotiations that led to the December 1994 Bay Delta Accord,<sup>19</sup> the document that remains the foundation of our management of the estuary, its fisheries and water quality, and the water projects that impound water from the Sacramento and San Joaquin River systems. John assumed the leadership role in these negotiations for two reasons. First, he was willing to think broadly about the myriad of problems with water supply and ecosystem protection and agreed to a set of standards that would reasonably accommodate the competing interests. Second, he brought personal credibility to the negotiations that both allowed water users and water managers to trust his promises and enabled John to speak on behalf of a diverse, and frequently skeptical, environmental community. He brought the environmental community on board and kept them on board. John was smart, creative, and coolly analytical. He brought tremendous integrity and a welcomed sense of humor and fun to his work. A decade down the road, the CALFED Bay Delta Program (CALFED) is in something of a disarray, with collaboration and trust in short supply. We sorely miss him.

Finally there is Jean, who died unexpectedly last winter. Jean Auer was simply an extraordinary woman. She served as a citizen member of two regional water quality boards and the State Water Resources Control Board. She was president of the League of Women Voters. She was an advisor to the San Francisco Estuary Project, and a member of the board of the San Joaquin Range program. She was the president of the Commonwealth Club. And in her spare time, she was the mayor of Hillsborough. Marsha Brockbank, program coordinator for the Estuary Project, called Jean "the consummate Renaissance woman." During her service on the Board, Jean participated in many of the Board's path-

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18. 605 P.2d 1 (Cal. 1980).

19. CalFed Record of Decision, (Dec. 15, 1994), available at <http://calwater.ca.gov/Archives/GeneralArchive/SanFranciscoBayDeltaAgreement.shtml>.

breaking decisions, including the establishment of the first water quality standards for the Bay Delta and the assertion of jurisdiction over the U.S. Bureaucratic Commission to implement those standards.

After stepping down from the Board, Jean continued to be an active and forceful advocate for water policy reform. I had the pleasure of working with Jean on the water transfer legislation for the CVPIA and on the negotiations that led to the creation of CALFED. I was happy to work with Jean, rather than in opposition to her and her positions. Jean was a formidable adversary. She insisted on thinking broadly on the water policy programs, and challenged her colleagues to put aside their assumptions. She seldom took no for an answer. As one of Jean's close friends said at her memorial service last year, "I really thought Jean would never die, because when death came for her she would simply out heartbeat him." I teach my students that citizen participation is an essential aspect of modern environmental law and policy. Jean was an exemplar citizen.

So I propose today that we dedicate this conference to the celebration of the lives of these four exemplary individuals. They each produced a significant legacy of professional achievements. What is more is that they offer us a lesson on character. Notice that I use many of the same words to describe Adolph, Marc, John, and Jean: dedication, passion, creativity, perseverance, adaptability, and an inviting sense of humor in the face of the frustrations, disappointments, and defeats that are an inevitable aspect of life. They all had an infectious zest for life itself. As Terry Young said to me last week, "these are the qualities that comprise one's true resume." I hope that you enjoy the conference.