

STRUCUTURAL CHANGE OF PUBLIC INSTITUTIONS

Outline of Testimony by Elizabeth Ann Rieke

My remarks are rooted in my experience as a public servant addressing water management issues over the past three decades and most recently as a consultant on natural resources issues in California. The remarks are mine and mine alone. Now, one could argue that over that period of time whatever wisdom I may have nurtured has simply dulled at the edges where the critical issues are. I would like to think that mine has not but you can be the judge of that.

OBSERVATIONS ON NON-INSTITUTIONAL FACTORS AND INSTITUTIONAL REFORM

I am a skeptic about using institutional, structural change to address public agency failures with the expectation of creating opportunities to develop and implement good public policy UNLESS the structural analysis is paired with consideration of the wider range of issues that affect agency performance. Sometimes, perhaps often, there is a tendency to focus on the structural problems and assume their resolution will lead to more effective policy. It is important to identify and build on underlying strengths – structural and non-structural - while simultaneously identifying and eradicating weaknesses – structural and non-structural. And there is no silver bullet; there are just better, more inclusive strategies to achieve institutional change that lead to more effective public policy.

Sometimes, reform efforts succumb to the illusion that you can create one integrated, institutional ecosystem; of course, you cannot. You must divide the institutional ecosystem into parts. The new parts never fit together perfectly - precisely because they belong to one ecosystem. We need to recognize that every structural change will create many new structural problems, many new imperfect boundaries. Everything in the governance of natural resources – well almost everything – is related to everything else in that realm.

The focus of an institutional reform effort needs to include not only how to reshape the structural entities but also how to design new bridges among them. There will always need to be bridges; frequently they get forgotten. Mandating bridges is not always a successful strategy. There will be unanticipated bridges to build. Some will be formal; some will be informal.

What do I mean by bridge building? In the federal government, the Bureau of Reclamation and the Fish and Wildlife Service are often edgy when they work together. Neither, in the view of the other, recognizes the needs of the other. Sometimes they just sit in their camps and criticize each other. Making the bridges durable, with two way traffic and turn outs for

huddles, must complement any new structure. Bridge building cannot be addressed solely by structure; rather it is dependent on leadership, on the official who sees the need and figures out how to bridge the gap and finds a leader on the other side who seeks to reach back across the gap.

Another key consideration in an institutional reform effort is the fact – an unhappy but oft-proven fact - that agency culture can trump even the most carefully conceived structure. Agency culture is pervasive and persistent. It is resistant to treatment. Agency culture can trump the integrative goals of a new structure; agency culture can reject the building of bridges and just consign that effort to tomorrow's to do list. Agency culture does not change just because someone directs it to. It can be changed by new mandates that result in the hiring of new staff with different disciplines but even then the dominant culture may still prevail.

Agency and individual morale can undermine the architecture of good structure. Remembering that your people are the ones who produce results can facilitate a transition to a new structure. Putting state employees on furloughs in an environment where it is not OK to tax the rest of the public does not create an environment conducive to institutional change. Reorganizations even in the best of times are short-term negative events and can be longer-term negative events. Before you know it people have started to measure office size and the number of windows. Nonetheless, times when agencies are downsizing may be the best to reorganize and restructure rather than jerry rig.

In summary, we must be careful diagnosticians when we approach institutional change and proceed with the full range of obstacles and opportunities in mind.

TWO EXAMPLES OF CONTEMPORARY INSTITUTIONAL REFORM

THE DELTA STEWARDSHIP COUNCIL: ANOTHER ATTEMPT AT INTEGRATION OF PUBLIC AGENCY ACTIONS IN THE SACRAMENTO-SAN JOAQUIN DELTA

A dramatic institutional and resources failure was the driver behind the creation of the Delta Stewardship Council in the most recent session of the Legislature. As Phil Isenberg, Chair of the Blue Ribbon Task Force on Delta resource issues, stated in his letter to Governor Schwarzenegger transmitting the Delta Vision Strategic Plan: "The Delta has been the subject of decades of study and political deadlock. As a consequence, ecosystems have eroded, levees have deteriorated, fish populations have collapsed, and our system of delivering water has become ever more precarious." One of the recommendations in the Strategic Plan was the establishment of "a new governance structure with the authority, responsibility, accountability,

science support, and secure funding to achieve the... [coequal] goals” of “restoring the Delta ecosystem and creating a more reliable water supply for California.” As an outgrowth of that recommendation but not necessarily in full accordance with that recommendation, the Delta Stewardship Council was established.

The Delta Stewardship Council was thus borne out of a sense by many proponents of institutional change that they could not lose with the establishment of the Council because nothing else had worked.

What does the Council have authority or responsibility to do?

- ❖ Development of Delta Plan

The Council is charged with developing by January 2012 a comprehensive Delta plan to implement the coequal goals. The legislation provides a host of criteria for the contents of the plan but little guidance for the process of developing the plan.

- ❖ Consistency Review Process

The Act establishes an appeals process for review of the consistency of state and local public agency actions with the Plan. Any person may appeal an agency action to the Council on grounds of inconsistency.

What it does not have authority or responsibility to do.

- ❖ Stove piping

The Council does not have authority to eliminate the stove piping of agency actions.

- ❖ Federal Agency Actions

There is no formal mechanism for assuring that federal agency actions are consistent with the Delta Plan.

- ❖ The Isolated Conveyance Facility debate

Although the legislation was intended by many to closely confine the extent to which the Council’s deliberations would become another arena for the conflict over whether to construct an isolated facility, the Council does not have authority to prevent that conflict from spilling into its arena.

So, what is the potential for this grand experiment? In my view, the Council has the potential to be a central player in Delta resources management issues. There is no other player with such a broad jurisdiction – covering land and water resources and actions by state and local public agencies. It is well placed to help forge more effective relationships among the state and federal agencies. By virtue of its authority to develop a Delta-wide plan and carry out consistency reviews of agency actions, it has the potential to create a more cohesive resources management approach to the Delta.

Thus, the Council has great potential. For the potential to be realized, it will be important to have strong, decisive Council members with good personal leadership skills, a Chair capable of

charting a course through the conflicting interests of the stakeholders, support from the Legislature and the Administration for the independence of the Council, and adequate funding.

Let me address in more detail each of the three key roles for the Council -- development of the Delta Plan (Plan); undertaking consistency reviews for agency actions appealed to the Council; and facilitating a long-term collaborative relationship among the state and federal resource agencies.

Development of the Delta Plan

As I previously indicated, the Council is charged with developing a comprehensive Delta plan to implement the coequal goals – by January of 2012. In developing the Plan, the Council has the potential to garner support for the Plan from various quarters by using an inclusive, open and responsive process. In particular, it has the potential to involve agencies in the Committee of Agencies in a manner that increases the likelihood of constructive participation by those agencies in implementation of the Plan. The Committee of Agencies, led by the Council with skill and commitment, is an opportunity for innovation in the way the agencies approach their role in fashioning contributions to the plan. The Council could seek to push stove piping aside and ask for genuine interagency recommendations worked out in concert with a member or members of the Council.

Consistency Review Process Administered by the Delta Stewardship Council

As stated, the Act establishes an appeals process for review of the consistency of state and local public agency actions with the Plan. The selection of an appeals process over the other alternatives on the table, a self certification process or a preapproval process, was the result of much discussion among stakeholders, Legislative staff and Legislators. A self certification process was viewed as too weak. Given the broad scope of the Council's jurisdiction, a preapproval process was rejected due to its potential to clog the decision making process both for the Council and the state and local agencies.

As the decision maker in the appeals process, the Council has the opportunity to produce well-argued decisions that will influence an agency's decision whether to go forward with a decision found to be inconsistent with the Plan. A carefully-crafted decision also has the potential to influence the outcome of a further appeal.

The decision to allow agency actions to go forward, even after an adverse decision by the Council, was closely debated as the negotiations on the governance bill moved to closure. A key group of environmentalists concurred in the request of some of the water users that the power to stop a state or local agency action be left to the courts with their well developed processes and high bar for injunctive relief. As indicated above, the Council has considerable ability to influence that judicial process.

Participation of Federal Agencies in Implementation of Delta Plan

Collaboration between the state resource agencies and their federal counterparts has waxed and waned over the years. The effectiveness of the Delta comprehensive plan depends in very significant part on whether the Council can make the next decade a period of close, constructive collaboration. Creative ways will need to be devised to bring the federal agencies into the planning process and to foster a federal commitment to provide as much deference as feasible to the provisions of the Plan. The Council has no powers to make this happen. Thus, the Council's personal leadership skills, as well as those of the other parties to the state-federal relationship, will be critical to achieving the essential level of collaboration.

Why am I so optimistic in the face of the criticism from many quarters that the Council is too weak? Simply because without hope you never make progress. Because practicing optimism beyond reason is part of creating hope. Someone has to step up and say, "Yes we can do this."

But there are many and critical downside risks to the establishment of the Council. I have mentioned most of them. They are the places where the promise of integration can fail: development of the plan; stove piping and convincing the Feds to join in this new planning effort. If the Council fails, that adds another fatality to the pile making it harder to gin up the optimism to try again

BIFURCATION OF THE CALIFORNIA DEPARTMENT OF WATER RESOURCES

A long-simmering dissonance may drive institutional change removing State Water Project functions from the Department of Water Resources and creating a new public entity to manage the State Water Project. To this discussion I bring my hat as a former Director of Water Resources, albeit from a state that sometimes thinks of itself as a weak carbon copy of California. Arizona's DWR had no operational and maintenance responsibility for facilities. It had extensive authority over management of groundwater – a regulatory regime that may still be the toughest in the West. That regulatory authority included comprehensive, long-term planning for groundwater use in critical groundwater areas that was implemented to include surface water use. As a planning and regulatory agency, the Department was in regular conflict – healthy conflict – with a separate, publicly entity charged with operating and maintaining the Central Arizona Project – Arizona's equivalent of the Central Valley Project.

For me the case for separation is the easiest: it should happen. The conflict between the two roles is serious and longstanding. The two roles have proven not to be compatible. It prevents the planning and management role from being effective and being seen as even-handed.

The capability to assure the separation happens in a manner that achieves the goals I would ascribe to separation is harder to make.

Will the separation result in:

- A DWR with robust planning capability and newly born respect from sectors of the water community who have been alienated by the focus on the needs of the SWP, e.g., the environmental community?
- A DWR with sufficient financial resources to carry out the planning and management role?

Or will DWR become a remnant – less effective because it has lost its source of power and funding?

Will the separation result in:

- A new public entity that functions more like a utility, independent of some of the state restrictions that tie state entities into contractual knots, and is consequently more efficient and flexible?
- A new public entity that is responsive to the wide range of public interests inherent in managing water, such as fish populations, cultural resources, instream flows and conflicts with other users?

Or will the new public entity become captured by those who receive water from the State Water Project to the detriment of the broader public interests that in this century should always be on the list of issues that must be actively considered in a public decision?

Those are my concerns and mine only but seriously held.

CONCLUDING REMARKS: THE ROLE OF LEADERSHIP

More than anything, leadership means seeing the world of California water as “insurmountable opportunities” with the emphasis on opportunities.

Poor leadership can defeat good structure. Good leadership can overcome poor structure. Good leadership and good structure maximize the opportunities to overcome that which is seen as insurmountable and to produce constructive outcomes.