

CALIFORNIA'S OLDEST NEWSPAPER - EST. 1851

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Mountain counties protecting source water



TOM CUMPSTON, second from right, EID general counsel, speaks at a joint meeting alongside San Francisco attorney Roger Moore, far right, Sacramento attorney David Aladjem and Cindy Tuck, deputy executive director for governmental relations of ACWA. Photo by Roberta Long

By [Roberta Long](#)

[From page A1](#) | March 11, 2013 | [Leave Comment](#)

In view of recent and potential changes in water laws and regulations, water leaders in the Sierra Nevada mountain counties are concerned that the historic rights to the use of their waters are in jeopardy.

At the quarterly joint meeting of Mountain Counties Water Resources Association (MCWRA) and the Association of California Water Agencies (ACWA) Region 3 on Dec. 11, 2012, at El Dorado Irrigation District, the issue was discussed.

MCWRA and ACWA are taking action to inform and educate people in rural and urban areas about the importance of protecting the Sierra Nevada river basins. They are also actively participating in statewide water planning.

ACWA Chair lays it out

Bob Dean, Chair of ACWA's Region 3, said the water from the Sierra Nevada river basins is critical to the rest of the state. Society is becoming more urban and people in the state take their water for granted. The Sierra Nevada area provides 60 percent of the state's water supply. The \$11 million water bond that is rescheduled for the November 2014 ballot provides only two percent for water projects in the mountain counties. The small water systems that treat and distribute the source waters are struggling to meet the new standards. People in the California need to make investments in the water infrastructure in the mountain counties, he said.

Direct from the Delta Stewardship Council

The Delta Stewardship Council is working to finish the Delta Plan by June 30. The Delta Plan has a short-term 20-30 year horizon and a long-term horizon to 2100.

Chief Deputy Executive Officer Dan Ray came to meet the members, give a brief report and answer questions. He is a planner and ecologist, with 35 years in water management and natural resources.

Ray said the key is to figure out what the flow regime will be, which means how much water can be reasonably anticipated and at what times during the year. Scientists have been studying the question, including forecasts for the impacts of climate change on sea level and snowpack.

The Forest Service weighs in

Barnie Gyant, U.S. Forest Service deputy regional forester for resources for the Pacific Southwest Region, talked about the national forests' role in California water issues. "We (professionals) don't know how to communicate with the average person. Water is critical to life. Our bodies are 90 percent water," he said.

Gyant said that national forests cover 20 percent of the landscape in California. The Forest Service is working with other agencies, private companies and organizations to do ecological restoration projects. "Common issues, such as wildfire, smoke, invasive species, drought, climate change and sedimentation, know no boundaries," he said.

The purpose of ecological restoration projects is to make the forest landscapes more resilient and healthier in the future. By thinning vegetation, the threat of wildfires can be reduced and water flows increased. He mentioned the Trestle Forest Health Project, located east of Grizzly Flats in the Eldorado National Forest. The project involves forest thinning and fuels reduction on approximately 4,000 acres. It would benefit the Grizzly Flats Community Services District. The goal for the region is to treat 500,000 acres a year. Gyant wants to push it to one million.

Still fighting about water rights: background

Before California became a state in 1850, the doctrine of riparian rights was recognized by England and the eastern United States. The doctrine held that owners of lands adjoining a stream shared the right to the waters of the stream for use on the adjacent lands to the exclusion of use on any other lands. The first California Legislature adopted English common law as the state's legal system, which made riparian rights the test for resolving legal disputes.

Appropriative rights were recognized among the early miners who required the transfer of water from streams and rivers to claims that were distant from the source. The principle was that whoever first extracted and used a certain quantity of water would be allowed to continue the use against any later claimant. Early on in California, riparian rights adjacent to private land were held to be superior to appropriative rights. Appropriative rights were recognized as "first in time, first in line."

As mining gave way to agriculture, and increasing populations required land development, pressure on the supremacy of riparian rights increased.

The California Constitution of 1879 declared that "the water resources of the State be put to beneficial use to the fullest extent ... and that the conservation of such waters is to be exercised..." It also declared that all water appropriated to be a "public use, and subject to the regulation and control of the State."

The public trust doctrine holds that certain resources — air and running water, for example — are above private ownership and are held in trust for the benefit of the people. From English Common Law, the doctrine originally applied only to fishing and commerce on tidelands and navigable waters, but in California it has been expanded to include other waters and recreational and environmental benefits.

In 1913, the legislature passed the Water Commission Act, creating a state agency to determine whether proposed appropriations should be allowed.

A 1928 amendment to the California Constitution mandates that holders of all water rights, including riparian, must use the water and do so reasonably and beneficially. Failure to do so results in loss of the right.

The State Water Project, a water storage and delivery system of 20 dams and reservoirs, aqueducts, powerplants and pumping stations, was planned in the early 1930s to provide a reliable source of water to central and southern California and flood protection in northern California. Due to the Depression, the state was unable to finance the entire project. The federal government stepped in, with an initial authorization in 1935, to build the Central Valley Project. The keystone, Shasta Dam, was completed in 1945. Folsom Dam was completed in 1955. Voters approved funding for the State Water Project in 1960, and Oroville Dam was built in 1968. Water supplies from these two projects are sold through the State and U.S. Bureau of Reclamation by contract to public agencies.

The California legislature passed the county-of-origin act in 1931 and the area-of-origin act in 1933. With the conflicts over the transfer of water from Owens Valley to Los Angeles in mind, the laws provided legislative assurances to counties of origin that necessary water supplies would be reserved to them for future use.

In 1970, the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA) were both enacted. NEPA requires an environmental analysis and mitigation of impacts on any project that receives federal funds. CEQA applies to any project in the state requires discretionary approval. Water projects often involve dual compliance.

The Endangered Species Act of 1973 authorized the U.S. Fish and Wildlife Service and National Marine Fisheries Service to protect and recover endangered and threatened species and the environments on which they depend. Under this law, water that would normally be delivered to contractors for agriculture and domestic use is channeled for the benefit of threatened and endangered salmon, smelt and other fish. The situation is acute during prolonged drought periods.

In 1994, following several drought years and a an abundance of litigation over water issues, state and federal agencies operating in the Sacramento-San Joaquin Delta came together to coordinate activities. The CALFED Bay Delta Program's primary objectives were water supply reliability, water quality, ecosystem restoration and levee system integrity.

The Delta Stewardship Council, successor to CALFED, was created in 2009 as an independent state agency to develop a Delta Plan. The co-equal goals of the Delta Plan are to provide a more reliable water supply for California and protect, restore and enhance the Delta ecosystem. The goals are to be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource and agricultural values of the Delta as an evolving place.

Given that the river basins in the Sierra Nevada are the source of the water flowing through the Delta, mountain county water leaders are skittish about sacrificing their water rights to resolve problems in the Delta.

MCWRA Executive Director John Kingsbury said, "Mountain counties are not responsible for the problems in the Delta, and we receive no benefits from the Delta. We do not want to be used to solve the problems in the Delta."

A trio of water rights experts

A panel of three attorneys who specialize in water issues discussed some of the current risks to water rights in the mountain counties.

David Aladjem is a partner in the law firm of Downey, Brand, Seymour & Rohwer, Sacramento, and represents clients in the acquisition and exercise of water rights. He talked about D-1644, the Lower Yuba River Decision adopted by the State Water Resources Control Board in 2001. D-1644 established long-term instream flow requirements for the Yuba River. Aladjem said that under the decision water rights took second place to the public trust doctrine. In 2008 the State approved the Lower Yuba River Accord, the result of years of negotiations among 17 stakeholders. The Yuba Accord allows the Yuba County Water Agency to operate its Yuba River Development Project for hydropower, irrigation, flood control, recreation and fisheries benefits. The accord also reaffirms the water rights of the Yuba County Water Agency and its member irrigation districts.

Aladjem cited an opinion by California Appellate Court Judge Ronald Robie in 2006 that calls for a balance of appropriate water rights and the public trust doctrine.

An important case on area-of-origin rights is the Tehama-Colusa Canal Authority v. U.S. Department of the Interior. Downey Brand represents the plaintiff. In August 2011 Judge Oliver Wanger, U.S. District Court, Eastern District of California, ruled that Central Valley Project contractors in the Sacramento Valley are not entitled to a priority of water allocations in dry years over exports to water contractors located south of the Delta. The plaintiff appealed to the Ninth Circuit Court of Appeals. Oral argument was held Dec. 5, 2012. No ruling has been made.

El Dorado Irrigation District General Counsel Tom Cumpston described a lawsuit the district won on appeal that protects its area-of-origin rights. El Dorado Irrigation District v. State Water Resources Control Board tested EID's priority appropriate water rights. Cumpston said the State Board violated the core principle of senior rights by imposing Term 91 on the district without imposing it on all holders of junior water rights.

Term 91 was developed and made a condition to permits issued after 1965. Term 91 requires the appropriator to curtail diversion of water when the U.S. Bureau of Reclamation and/or State Department of Water Resources are releasing stored water from the CVP or the SWP to meet water quality objectives in the Delta.

In 1991 EID and the County Water Agency (El Dorado) received an assignment of an application from the State Board to appropriate water from the South Fork of the American River using water rights that were granted to EID in 1927 as a reserve for future use. Cumpston said the application for the right to appropriate additional water was made in 1991 because El Dorado County was then beginning the General Plan process in anticipation of future growth.

The State Board included Term 91 in El Dorado's permit even though other water users with appropriative rights based on applications filed after 1927 are not bound by this restriction.

The trial court found in favor of El Dorado. The State Board, joined by Westlands Water District and State Water Contractors, filed an appeal. Appellate Judge Ronald Robie, in an opinion dated Sept. 8, 2006, upheld EID's senior water rights. The Court found that inclusion of Term 91 in El Dorado's permit without conducting a proceeding to include similar restriction in the permits and licenses of junior appropriators in the Delta watershed violated the 1927 priority date of El Dorado's permit.

Roger Moore, partner in Rossmann and Moore, San Francisco, said that California's water culture has a "dueling vision of the future." He described engineers as "technocratic optimists," as opposed to "curmudgeons," skeptics who see the natural state as arid. He said appropriation assumptions are in conflict with the political environment. We have "paper rights" and "paper water."

Moore listed what he called sleeping giant legal principles: 1) area of origin rights; 2) the public trust doctrine; and 3) reasonable use. "Reasonable use can change," he said.

He pointed out the water supply forecast from the Department of Water Resources that by the year 2050 the snowpack in the Sierra Nevada will be 25-40 percent less than today. "We will have a whole lot less water to serve an even greater population," he said.

The next joint MCWRA and ACWA meeting will be held on March 15 in Auburn. For more information, visit mountaincountieswater.com.



Roberta Long