Notes from the CAP Water Meeting, July 7, 2014

Rick Mines and Pat McGreevy

These notes are attempts to capture the points made by Tom Infusino, environmental lawyer.

1. The per capita water usage listed by the State of California varies by geographic area between 100 and 250 gallons per day approximately with people living in the drier areas using the most. When the state asks citizens to reduce water use, the conservation targets vary according to the historic per capita use in each area.
2. Until 1914, there was no water board. The water right was assigned to people who had a beneficial use for the water on a first come, first serve basis. Before 1914, in a year of low water availability, the early user had senior rights. The rights were often recorded on deeds by the county recorder.
3. After 1914, the state water board managed water rights. If a party had a beneficial use, they could apply to the Board for a permit. The current board is called the State Water Resources Control Board (SWRCB).
4. In 1927, the state created the ‘origin of water rights’ for counties where the water originated so that these upstream users were protected from downstream urban interests that might exclude ‘counties of origin’ from beneficial use. Under these provisions, counties were allocated minimum rights to which they had first preference to use the water (senior rights). For example, Calaveras was allocated 27,000 acre feet from the Mokelumne watershed in the 1927 law. Amador and Alpine were also given allocations to Mokelumne Water.
5. There are other rights such as ‘riparian rights’ which give landowners rights to water running through their property. If a parcel with ‘riparian rights’ is subdivided, the daughter parcels with running water (i.e. with water running on the property) keep their riparian rights, while the others lose theirs.
6. All of these rights can be suspended in an emergency such as a drought when the state can abridge water rights to meet a public emergency need and deny water to holders of water rights. If a drought leads the state to mandate reductions of water below levels to which right holders are entitled, the state may have to compensate that holder at a later date for his losses. Tom Infusino said that he knew of no case where compensation was actually paid.
7. In 1939, CPUD purchased two historic canals including infrastructure and water rights.
   1. The 1852 Mokelumne Canal that diverted water from the South Fork Mokelumne River downstream from the HWY 26 Bridge and conveyed it to Mokelumne Hill and beyond. In 1972, this canal was replaced with pipe to Mokelumne Hill, San Andreas and Paloma and this system continues to operate today.
   2. The 1852 Sandy Gulch Ditch that diverted water from the Middle Fork Mokelumne River below the currently existing Schaads Reservoir which was built by the District in 1940.
      1. Some Middle Fork water was conveyed to Sandy Gulch to operate the Associated Lumber & Box Company mill (1940-1969) and the Wilseyville Housing Camp (1944-1976).
      2. Middle Fork water was also used to augment the supply to Mokelumne Hill and beyond. This water ran down the Sandy Gulch Ditch to Blue Mountain Road at Mayflower that happens to be the watershed divide. Here the water was piped under the road and down the drainage on the south facing slope to the Licking Fork that flows to the South Fork and the Mokelumne Canal. Around 1997, the State Water Control Board closed the ditch because of leaks and, in effect, cut the connection between Schaads Reservoir and the CPUD distribution system. Today, the water from Schaads Reservoir flows down the middle fork to EMUD’s Pardee Reservoir except for a small volume that is purchased by CCWD during dry years and pumped from its Charles Street facility to West Point and Wilseyville.
8. Today, CPUD stores about 500 million gallons of water in Jeff Davis Reservoir (South Fork and Licking Fork water) and another 500 million gallons in Schaad’s Reservoir (Middle Fork water), but sells only water from the South Fork to its customers. As stated, on occasion, it sells some limited amount of Middle Fork water in dry years to CCWD.
9. In 1970, CPUD agreed with EBMUD that it will have rights to pump 1,740 acre feet from the south fork into Jeff Davis. This, despite the fact that the county had a water allocation of 27,000 acre feet from its ‘origin of water rights’ assigned by the State Water Resources Control Board in 1927.
10. The question is why Calaveras settled for so little. The answer is that Calaveras cannot prove sufficient water use in past years. Note that the water used in hydraulic mining reentered the streams so that there was no notice downstream of reduced flow. The earlier use of water during the gold rush could be considered abandoned if it went unused for five consecutive years. Traditionally, California has valued the constant use of all resources and has a shorter abandonment period, five years, than other states. California considered idleness as bad and illegal. It was quick to call something abandoned to encourage use by others.
11. In the post-World War II period, local water districts took control of deteriorating and in many cases abandoned infrastructure. When these districts tried to argue their water rights with downstream users (like EBMUD), the downstream users were able to successfully argue that the use had been abandoned and they (the downstream users) had been using the water beneficially in the meantime (for more than 5 years). The consumptive use of the water in the upstream areas had declined and, therefore, could be considered abandoned. The upstream users were asked for evidence of continued use is in the 1870 — 1940 period. In many cases, the evidence was non-existent or had been destroyed. By contrast, public documentation from population records and county agricultural reports often demonstrated a low use of water.
12. The state recognized cases of partial abandonment where beneficial water use in upstream counties of origin continued, but at a lower level.
13. But, the legal argument is clear: abandonment leads to the loss of rights. For this reason, many upstream users like CPUD had to agree to what appears to be small allocations with huge downsizing of their allotments.
14. On the other hand, County was assigned a water use of 27,000 acre feet in 1927 which could be pulled off the shelf if properly handled. This point needs further research.
15. Anyone living in Calaveras or exploiting or protecting resources in Calaveras County can appeal to the State Water Resources Control Board (SWRCB) for a permit for the beneficial use of the water. The five unelected men on the SWRCB decide whether the use will go forward. Also, FERC (Federal Energy Regulatory Commission) has a say in the approval of water use.
16. Pat presented the case for creating or restoring the infrastructure to divert water from the Middle Fork through pipes laid in the Sandy Gulch canal to the Licking Fork and then to the South Fork where it could be pumped to the Jeff Davis Reservoir in the existing pump station at the confluence of the Licking Fork and the South Fork. In years of drought, this infrastructure could be used to satisfy CPUD customers who otherwise would be without water.
17. Tom thought the idea of arguing ‘drought preparedness’ for this project (along with other arguments such as recreational use and stream health) might be convincing to state authorities distributing money. Tom noted that each county has its own way of measuring what a ‘drought preparedness’ need is. Usually, it involves looking at past drought periods to establish targets that would avoid the depletion of water resources.
18. He says the July, 2014, deadline for the current grant process has been missed, but he thinks that if Proposition 84 passes, then other funding may become available.
19. Tom argued that to be successful the project should be presented to other downstream purveyors to avoid protests before the SWRCB. He predicted that San Joaquin County, EBMUD and other downstream users would make a fuss if not consulted beforehand. He proposes frontloading the process by assuaging possible opponents before the proposal comes before the Board. He says the Mokewise process is one venue for this activity.
20. Tom said that the Junior vs. Senior distinction for water users is not that relevant to deciding cases. One must demonstrate beneficial prior use of the water to win over the SWRCB.