Battle Creek Watershed Conservancy News

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Water rights *and wrongs…*

Do you stay awake at night worrying about your water right? Judging by comments by participants in Conservancy meetings, and by articles in the north-state press, a good many people do. This is nothing new in California, but the ever increasing water needs of Southern California, and the political power behind those needs, are reasons enough for increased vigilance.

This article is an attempt to summarize the threats to water rights in the Battle Creek watershed which should currently be of concern to us. We focus only on our watershed, as the general question of water rights in Northern California is far too big for our space or our comprehension (the general problem was the subject of two recent conferences in the area, at Bridge Bay in November and in Red Bluff in January – some of this material was gleaned from the meeting, and we thank the speakers).

Please note that water rights is not an exact science: there is much room for argument, which is what keeps water-rights lawyers in business. And this article represents just one, possibly flawed, opinion.

With this caveat, we proceed to consider five specific threats: the Bay/Delta problem, the doctrine of equitable use, the doctrine of public trust, the requirement for reasonable and beneficial use, and special considerations for hydro users.

The Bay/Delta problem: Who pays?

As we all know, the state and federal taxpayers have been kind enough to finance two amazing irrigation projects – the Central Valley Project (CVP) and the State Water Project (SWP) – which have turned the Central Valley into an agricultural factory and have fed the thirsty lawns and pools of Southern California. Unfortunately this massive water transfer has not been without its side effects.

For our watershed the important side effects are two: Shasta Dam blocks much of the ancient Salmon habitat, and diversions from the Delta cause damage to the fish populations and cause salt water intrusion into the Delta.

The cure for both of these problems involves water: more water for fish in Battle Creek, to increase the habitat available to salmon, and more water in the Delta, to reduce harm to the fish populations and to reduce salt-water intrusion.

Now one might suppose that the solution is quite simple: those who have taken our Northern California water south, and who have turned it into riches made from land and crops and subdivisions, should reduce their take slightly to cure the problem. After all, we in the Battle Creek watershed did not benefit from the water projects, even though we helped finance them, and even though we have been asked to provide additional salmon habitat to compensate for the damage done by the projects.

Well, this reasonable solution is actually in place: about 800,000 acre feet of water from the CVP and SWP have been used for Delta mitigation annually.

But the water needs of the southland are increasing, particularly since about 500,000 acre feet previously drawn annually from the Colorado River are going to return to their rightful owners (Nevada and Arizona), LA's take from Mono Lake has been reduced, and (believe it or not) more people are moving into LA.

The result of all this is that the State Water Rights Control Board (SWRCB) has been asked to reevaluate the mitigation measures in the Delta, and to determine who should supply the water required to help the fish and reduce the salt-water intrusion.

The SWRCB has evaluated seven alternatives, and produced a 1000-page "Draft Environmental Impact Report for Implementation of the 1995 Bay/Delta Water Quality Control Plan", which examines the problem from many angles. For

those with internet access it is available at www.waterright.swrcb.ca.gov.

The SWRCB will hold hearings starting March 9 to accept comments on these alternatives, and the Board expects to select one of the alternatives before the end of this year.

While all seven alternatives are of interest to agricultural interests drawing water from either of the projects, only three of the alternatives are likely to have any impact upon water rights in our watershed: alternatives 3, 4, and 5.

For our purposes alternatives 3 and 4 are identical. Under these two alternatives the water required in the Delta is obtained from all water rights holders in the Sacramento-San Joaquin watershed, using the present priority-based water rights scheme. That is, the required water would be obtained first from the most junior (latest in time) appropriative water rights. If, in a given year, drying up the most junior rights holders does not furnish enough water for the delta, then the next water rights in priority order would be taken, and so on.

The SWRCB has performed studies using computer models to estimate the impact upon various water rights, using a range of water years from wet to dry. For example, appropriative water rights holders of priority 1916 could expect their water rights to be curtailed in July in about 60% of the years. Pre-1914 water rights holders, on the other hand (and this probably represents most of the rights in our watershed), could expect their rights to be curtailed in July in only about 5% of the years.

Alternative 5 uses a quite different approach, the doctrine of "equitable apportionment," which does away with water rights priorities completely. Under this alternative the natural flow (in the absence of any diversions) from each tributary in the watershed would be estimated, and the required Delta flow would be divided up among the tributaries in proportion to their natural flows. Within each tributary the required flows would be taken from all water rights holders, in proportion to their rights, without consideration of priorities.

The equitable apportionment doctrine

Because alternative 5 includes an exemption for smaller water rights, alternative 5 may not be a threat in our watershed. But the fact that Alternative 5 is taken seriously by the SWRCB means that the doctrine of equitable apportionment may be taking root in California water law, under the support of interests in Southern California – and this is indeed a future threat, because this doctrine removes the protection of our pre-1914 water rights.

The doctrine of equitable apportionment was formerly applied only in inter-state water law (CA vs. AZ and NV, for example). Now, in addition to appearing as a legitimate alternative in the SWRCB draft EIR, this doctrine has been used in a water-rights case in Mojave, now on appeal. The California Farm Bureau and other parties are participating in this case, since they recognize that if this decision stands then the door is wide open for a massive assault on water rights.

The doctrine of "public trust"

Under this doctrine one argues that no matter what water rights have been awarded for a particular stream, there exists an underlying "public trust" obligation to protect the natural resources of the stream. This argument was successfully used against the Metropolitan Water District (MWD) in the Mono Lake case: the government had an obligation to protect the lake, which they failed to fulfill when they granted massive water rights many years earlier to MWD. Despite the fact that the MWD was using these state-granted rights, the court held that the rights must be reduced to correct the earlier error when the rights were granted.

This doctrine implies that current standards of protection to the environment may be used to revise old water rights, when these water rights are challenged. While this doctrine has not often been used, it hangs over many water rights decisions: for example, a water user may cooperate with an environmental agency by taking less water from a stream than allowed, just to avoid a legal challenge to the water right.

Reasonable and beneficial use

Water rights holders in California have always been required to make "reasonable and beneficial use" of their diverted water. Theoretically a holder of an appropriative water right can lose that right if the water is not used, and not used reasonably and beneficially, though this has not often happened. It is this requirement which gives people dreams of "filing on" their neighbors' unused water.

This is another case of a doctrine, not often used, which becomes a powerful tool when it suits the interests of the MWD. The prime example is the case of the Imperial Irrigation District (IID).

This district operates an extensive, and leaky, canal system in the Imperial Valley. The city of San Diego noticed the opportunity, pointed out the waste of IID water, and slyly offered to reduce the waste (through canal lining and other improved irrigation practices) if San Diego could have the water thus saved.

The IID was caught in a bind, because when water rights are challenged under the reasonable-use doctrine, the rights of the users are typically held to the amount of water *actually* used beneficially, plus losses only to the extent allowed by best current practices.

While this doctrine is a very serious threat to many of the water rights in our watershed, it is hard to argue against it, because it is so *reasonable*. We should not be wasting water, or diverting water and not using it.

If any of our watershed water-rights holders are not using all their water beneficially, they should consider leasing the water to someone who can. If they are not managing their water efficiently (lossy canals, over-irrigation,…) they should consider improving their irrigation practices. If they do not, and the time comes when water rights are challenged, then they can have their diversion rights reduced to the amount actually beneficially used. In any case, appropriative diverters should keep good records of diversion amounts and use.

Hydropower diverters

Water rights for hydropower production are a special case, because they are not consumptive rights. They are also special because the limitation of the right – generally specified as the amount of water required to be allowed to pass by a hydropower dam – are set by a federal agency (FERC), usually for a period of 50 years (an interim review is possible, but not common).

To take the case of PG&E as an example, in Battle Creek the power dams are required to pass from 3 to 5 cfs for fish maintenance, as last set in 1976. By modern environmental standards this is not enough, and through the agreement between PG&E and the California Department of Fish & Game described in the last issue of this newsletter PG&E is releasing approximately 30 cfs below Eagle Canyon Dam and Coleman Dam, so that the flows in both forks of Battle Creek are 6 to 10 times the flows required by FERC.

PG&E is reimbursed for part of this increased flow by the Bureau of Reclamation, but part of the flow (12.5 cfs) is provided voluntarily by PG&E.

Other diverters for power production may also voluntarily provide increased flows below their diversions, sometimes in the hope that this action will forestall a challenge to their FERC-mandated minimum flows by one of the many very active environmental groups which watch over hydropower operations.

At the present time the facts that PG&E diverts most of the water in Battle Creek (roughly 97% when based on the FERC mandates alone), and that nearly all the power diversions in the reach of Battle Creek proposed for improved salmon habit are PG&E diversions, work to protect the diversion rights of the other private power producers on Battle Creek. CDF&G has recognized that PG&E is the only practical source of water for their salmon restoration project, and has explicitly denied interest in the rights of other diverters.

However, for the future we must assume that hydropower licenses may be challenged (certainly at renewal, and perhaps earlier), and that the result will probably be increased FERC requirements for down-stream flows.

Summary

Some of these threats to our water rights can be ameliorated by individual action (good records, good water management practices), but most of these issues are political topics which are part of the changing public attitudes toward environmental protection, or part of the continuing water wars between the northern and southern parts of our state.

These larger topics are most effectively addressed through coalition politics, with our Conservancy joining with other similar organizations to gain a larger voice through concerted action. We need to learn more about these threats (and others of which we may not yet be aware), and then we should consider the best ways of making our point of view heard.

What is the U.S. Fish and Wildlife doing in Battle Creek?

(Contributed by Tricia Parker, Fisheries Biologist, USFWS)

The U.S. Fish and Wildlife Service (USFWS) has been very active in Battle Creek, particularly over the past few years. We are involved with releasing salmon and steelhead into it and as well as counting how many are there. Our involvement stems from our desire to improve fish populations in Battle Creek as well as the

Sacramento River. This is accomplished by conducting surveys to obtain a better understanding of salmon and steelhead life histories within Battle Creek so management choices will have the most benefit for fish and people. The purpose of this article is to provide you with some basic information on the what, where, and when USFWS activities occur in Battle Creek. At the end are names and phone numbers of people to contact if you want more information or want to participate in the activities.

Coleman National Fish Hatchery

Coleman National Fish Hatchery (NFH) is the nation's largest federal salmon hatchery and is located right in your back yard. Coleman NFH releases approximately 22 million Chinook salmon and 750,000 steelhead annually, most of which are released into Battle Creek (Table 1). The size, time, number and location of salmon and steelhead released from Coleman NFH was determined from results of various studies and mitigation responsibilities. The releases are intended to maximize survival of hatchery salmon and steelhead while minimizing effects on native stocks. Coleman NFH spawn salmon and steelhead beginning in October and generally continue through February, most spawning occurs in October.

Battle Creek Monitoring Activities

The USFWS's Northern Central Valley Fish and Wildlife Office (NCVFWO) located in Red Bluff has the responsibility of evaluating the effectiveness of Coleman NFH, which includes conducting surveys in Battle Creek. The NCVFWO counts salmon that pass the Coleman NFH barrier dam when it is not used to direct salmon and steelhead into Coleman NFH. The barrier dam is closed to fish passage from July through February to divert fall, late-fall and steelhead into Coleman NFH for spawning. The fish ladder is opened from March through June and this is when NCVFWO counts fish that pass. Fish are counted by either trapping them or watching them pass the ladder with the aid of a video camera. During this time most salmon observed are winter or spring-run.

At the end of May we begin snorkel surveys and continue them through October. These surveys are conducted below Eagle Canyon Dam on the north fork and below Coleman Diversion Dam on the south fork downstream to nearly the mouth. Surveys are conducted in this area because these dams remain closed in effort to localize salmon into an area where habitat is adequate while reducing losses due to entrainment. Snorkel surveys provide information on spawning, holding and rearing locations for winter and spring Chinook salmon. When possible, salmon carcasses are collected to obtain biological and genetic samples.

In the near future we hope to deploy a rotary screw trap in lower Battle Creek. This type of trap is used to capture juvenile salmon and steelhead as they emigrate from Battle Creek en route to the ocean. Occasionally we also do some beach seining, angling and electro-fishing to collect biological and genetic samples from juvenile salmon and steelhead.

California-Nevada Fish Health Center

The fish health center provides frequent checks on the general health of fish within Coleman National Fish Hatchery as well as intensive scrutiny for particular fish pathogens recognized as dangerous to fish, and applied research and monitoring of selected wild fish stocks.

For more information

If you are interested in becoming involved in salmon and steelhead monitoring in Battle Creek contact Steve Croci from the NCVFWO at (530) 527-3043. For more information about the Fish Health Center, please contact Scott Foott (530) 365-4271. To get more information on the topics discussed or if you have questions or suggestions for future contribution to the newsletter from the USFWS contact Tricia Parker at (530) 527-3043 or **Error! Bookmark not defined.**.

Table 1: CNFH release schedule (approximate)

- Fall Chinook: 12 million 2" fry released in the Sacramento River below Red Bluff during February/March
- Fall Chinook: 8 million 3.5" smolt released into Battle Creek during April
- Late Fall Chinook: 800,000 4.5" smolt released into Battle Creek during Nov-Jan
- Late Fall Chinook: 200,000 4.5" smolt released into the Sacramento Delta/Estuary during Dec-Jan
- Winter Chinook: 20,000-50,000 3" pre-smolt released into the Sacramento River at Redding during January
- Steelhead: 450,000 5-6" smolt released into the Sacramento River at Balls Ferry during Jan
- Steelhead: 150,000 5-6" smolt released into Battle Creek during January
- Steelhead: 200,000 2" fry released into N. and S. Forks of Battle Creek during May-June

BLM activities in the watershed

The Bureau of Land Management (BLM) met with Conservancy members in Manton on January 6 for a lively exchange of ideas. Feedback from this meeting and the BLM's own Bend Area Planning Team (which includes citizen input) has led the BLM to defer continued work on land acquisition on Battle Creek between Coleman Power House and the Manton Road crossing, pending further study.

The Conservancy is happy to report that the BLM is now participating in the Battle Creek Technical Advisory Work Group, the forum which is bringing a large number of agencies and interest groups together for technical input to the Battle Creek Restoration Plan. The Conservancy has asked to meet with the BLM again in the near future to discuss the best role for the agency in the watershed.

PG&E to dispose of plants?

PG&E is to inform the Federal Energy Regulatory Commission by March 2nd as to their plans for their hydropower system in this new era of power deregulation. According to PG&E they are studying three options: (1) keeping the plants as they are, as part of a regulated PG&E; (2) selling the plants to an unregulated PG&E power generation subsidiary; or (3) selling the plants to other power interests.

The PG&E decision will be of great interest to the watershed, as PG&E has been a "good neighbor" and many local citizens make use of PG&E's lakes and other facilities.

Battle Creek Restoration Plan

The Battle Creek Technical Advisory Work Group has drafted a "strawman" plan for the restoration of fish habitat in Battle Creek. While this plan is only a first attempt, and does not have the approval of PG&E or the agencies, at least we now have on paper a plan which can be studied, criticized, modified, and improved.

This plan provides a guess at what may happen over the next two or three years. The most prominent features of the plan include the removal of at least three dams (Wildcat Diversion Dam, Eagle Canyon Diversion Dam, and Coleman Diversion Dam) and two canals (Wildcat Canal and Eagle Canyon Canal).

This plan will be discussed at the next several Conservancy meetings – watch your calendar.

Correction…

The USFWS has suggested that we correct our description (the *News*, December 1997) of why the barrier dam at Coleman National Fish Hatchery is closed most of the year. We admit to some confusion on this issue. According to USFWS documents one reason is to prevent the fall and late-fall run salmon from going above the hatchery, and thus possibly allowing pathogens to reach the water supply of the hatchery, as we noted. We neglected to mention the obvious second reason – to allow the fall run salmon to be taken for spawning. Please note also (1) the barrier dam will not be removed, just opened for more of the year, and (2) the contract is between PG&E and the Bureau of Reclamation (not CDF&G), with USFWS and CDF&G as additional signatories to the contract.

This is a good point to note our corrections policy. While we strive for accuracy (and the article just mentioned was passed to the CDF&G for checking prior to printing), our volunteers don't have time to check everything with every agency. When we make significant errors we will be happy to correct them.

Conservancy Activities

Conservancy members have been busy attending meetings – the Battle Creek Technical Advisory Work Group, the BLM Bend Area Planning Team, the Spring-Run Workgroup, the Clear Creek CRMP meeting, the Northern California Water Conference, RCD meetings, as well as a Board meeting. The Conservancy held one public meeting, at Manton with the BLM and The Nature Conservancy on January 6.

Meetings are planned in February for lower Battle Creek, Mineral, Manton, and Shingletown. We will be calling people in the appropriate areas for these meetings, as well as posting the meetings. Keep your eyes and ears peeled!

We encourage you to contact us to offer help or suggestions, or to add others to the mailing list.

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January 28	Western Shasta Resource Conservation District meeting, USDA Service Center, Redding, 9:00 AM (246-5299)
February 2	Lower Reach Community Meeting: Introduction to the Conservancy, Coleman National Fish Hatchery, 1:00-4:00 PM (527-4231)
February 3	Conservancy bylaws committee meeting, Manton Elementary School, 9:00-11:00 AM (527-4231)
February 3	Mineral community meeting: "Garbage – what are the problems," location to be announced, 1:30-4:30 PM (527-4231)
February 4	Tehama County Resource Conservation District meeting, USDA Service Center, Red Bluff, 8:00 AM (527-4231)
February 9	Mineral community meeting: "Garbage – what may be the answers," location to be announced, 10:00 AM – 2:00 PM (527-4231)
February 11	Shingletown community meeting: "Watershed functions and processes," location to be announced, 1:00 PM (527-4231)
February 11-15	Salmonid Restoration Federation Conference, Santa Rosa
February 25	Western Shasta Resource Conservation District meeting, USDA Service Center, Redding, 9:00 AM (246-5299)
February 26	Holistic Resource Management Workshop for Landowners and Operators, Veterans' Hall, Los Molinos, all day, $10 includes lunch (527-4231)
March 4	Battle Creek Technical Advisory Work Group meeting, CDF&G, 601 Locust Street, Redding, 10:00 AM – 2:00 PM (527-4231)
March 9	Public hearings start on the draft EIR for the Bay/Delta water quality control plan, SWRCB, 1416 9th Street, Sacramento (916) 653-2516

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ADDRESS CORRECTION REQUESTED