Yuba River Accord: Lessons Learned in Moving from Controversy to Consensus

Hastings Law Journal

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol57/iss6/9

This Symposium is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
Yuba River Accord: Lessons Learned in Moving from Controversy to Consensus

Moderator
Paul Bartkiewicz, Bartkiewicz, Kronick & Shanahan

Panelists
Chuck Bonham, Trout Unlimited
Banky Curtis, Department of Fish & Game
Jerry Johns, Department of Water Resources

BARTKEWICZ: I'm Paul Bartkiewicz, of Bartkiewicz, Kronick and Shanahan. I'm General Counsel for the Yuba County Water Agency. Our panel today is on the Yuba River Accord: Lessons Learned in Moving from Controversy to Consensus. I've been practicing water law for thirty years—I didn't take water law in law school but probably should have. I want to commend all the law students here—it's a great practice area. I don't foresee any shortage of business in the coming decades, and it's very professionally challenging. The folks you work with, all the water lawyers, biologists, and engineers are first class—very professional, very collegial, and great people to work with. And so I recommend it to any of you who are considering that.

Professor Brian Gray, in his welcome address, mentioned Adolf Moskowitz and I was really happy to hear that. I worked with Adolf for thirteen years, and he was a gentleman, a great friend, and a mentor. As a practicing lawyer, there is rarely a day that I don't recall something I learned from Adolf. So I remind us lawyers to remember the mentoring obligation that we have. Adolf certainly exemplified it.

Let me get to our panel. Each panelist played an integral role in developing the Yuba River Accord. We have with us Banky Curtis, Deputy Director and Chief of the Habitat Conservation Division for the Department of Fish and Game; Jerry Johns, Deputy Director of the

Department of Water Resources; and Chuck Bonham, California counsel for Trout Unlimited, the nation's leading cold-water fisheries conservation program.

We're going to talk about the Yuba River Accord. To give you an overview, we're going to talk about a path to solving or addressing a controversy that's gone on for many years, and how two years of negotiations involving seventeen parties resulted in three complex, interrelated agreements. I'm going to give you an overview and then each of our panelists will have about fifteen minutes to talk about their perspectives on not only the Accord, but also on the process of developing it. Maybe there was some success here that we haven't been able to achieve in other controversies.

By way of overview, the Accord proposal was approved in April 2005. It generally addresses in-stream flows on the lower Yuba River that were the subject of state board proceedings as well as extensive litigation. The basic concept of this settlement is to provide higher incentives for in-stream flows for the benefit of fisheries, at least through the year 2016 when the current Federal Energy Regulatory Commission license expires. We hope it will extend into the term of the new fishery. Now these highest in-stream flows are available by increasing storage releases for this purpose. That could lead to water deficiencies in Yuba County in some years, so we have a second element of the Accord: a comprehensive, conjunctive use program within Yuba County to use groundwater resources within the sustainable yield of the aquifers to supplement the deliveries for storage. And then, finally, the third element is a carefully structured water-purchase program. The higher in-stream flows will produce water not only for environmental benefit on the lower Yuba River but, downstream, will increase the water supplies in ways that meet the county rules under water transfers. That will provide significant additional quantities of water and, also importantly, revenues to make the Accord work.

There are three phases of the Accord process. First, the development of the proposal in 2005. We're now in an environmental review and public information phase. These environmental documents are extensive, and we're hoping that this phase will be completed by the end of this year or maybe early 2007. We hope to have the Accord implemented in 2007. Today, I'm going to provide background information and a little more detail on the key provisions of the Accord and the next steps to implementing the Accord.

2. The Yuba Accord was approved April 21, 2005 by the Yuba County Water Agency Board, in cooperation with sixteen other local, state, federal and environmental organizations. Yuba County Community Development Department, http://www2.co.yuba.ca.us/yubacomdev/ycwa/default.asp (last visited Apr. 16, 2006).
First, some quick information on the Yuba County Water Agency.\(^3\) It is a special district created by the California Legislature.\(^4\) It's involved in flood storage, water supply, significant power generation, fisheries investment, and recreation. Some of the key facilities include the New Bullards Bar Reservoir, which is about a million acre feet (comparable to size of the Folsom River Reservoir near Sacramento), Englebright Reservoir, put in by the U.S. Army Corps of Engineers for reef control, and Daguerre Point Dam, another small reef control facility where Yuba diverts water to the north of the river and the south of the river to eight local irrigation districts.

Just by way of history, in the 1850s during the Gold Rush, incredible amounts of material were diverted into the river system while miners were looking for gold. It has significantly affected the ecology and fisheries in the stream systems. In 1907, Daguerre Point Dam was built by the U.S. Army Corps of Engineers, and in 1941, Englebright Dam was built. Later, the Yuba River Development Project was contemplated and developed. New Bullards Bar Dam forms a pretty big reservoir. It's really significant in the power grid. It produces 360 megawatts of hydroelectric power that goes into the Pacific Gas and Electric (PG&E) system.\(^5\) PG&E has a contract for this power through the year 2016. PG&E pays the bonds that we sold to build the project, pays the rental and interests on those bonds, pays the costs to operate and maintain the project, and gets a benefit from the power revenue.

Let me mention the fisheries. I know Banky and Chuck will get into this, but this is a very important river for wild native Chinook salmon and steelhead. There is no fish hatchery on the Yuba River because they are in Oroville and Folsom. Again, this is significant for that reason. Also, there are major flood vents. I mention these because controlling floods is important to the mission of the Yuba County Water Agency and was a really significant factor in developing the Accord. I'll get into more detail.

There was a major flood in 1950. That was really the catalyst for developing the Yuba River Project in 1969. But even after New Bullards Bar Dam was developed, we saw a major flood in 1986. In 1997, all the litigation was settled and the State of California paid almost $500 million to settle those claims. So flooding is still a problem on the Yuba and there is a lot of work to be done. These pictures I am showing are not of the Gulf Coast following Hurricane Katrina. These are pictures of Yuba County following the 1986 flood. You can see that it was pretty

\(^3\) For more information, see Yuba County Water Agency Fact Sheet, http://www.ycwa.com/factsht.htm (last visited Apr. 16, 2006).
devastating. There was a need for about $300 million worth of flood projects on the Yuba River. This was more than new storage stands; this involved improving and restoring levees and providing new setback levees. It’s really expensive and at least thirty percent local costshare was required to obtain funding for $300 million worth of projects. Yuba County Water Agency is the primary local contributor for this costshare. I emphasize this because flood control is very important and revenues that are generated by this Accord will provide significant assistance in meeting local costshare for local flood activities.

The settlement is about the state board proceeding. Looking at the timeline on that, we can see that it has been going on for a long time. We’ve spent a lot of time before the state board and a lot of time in court. A couple of lawyers in our firm wrote a law review article about the legal issues. So I won’t go into more detail about what the shooting’s about for those issues, but let me focus instead on the state board’s two decisions: Water Right Decision 1644 and, subsequently, Revised Water Right Decision 1644. There are interim flow requirements under this decision that are currently in effect. These are basically the flows that were proposed by Yuba County Water Agency. They’re in effect until April 2006. After that, a much higher in-stream flows will move into effect. For clarity, I’m referring to the current flows as the interim flows, and to the higher flows as the long-term flows. Long-term flows are problematic for Yuba County Water Agency because they have significant impacts on water supply and liability for the agricultural districts in Yuba County. Agriculture is the main industry in Yuba County. In addition, Yuba has been a major player in the water transfer market over the years, and the long-term flows from the state board decision would basically eliminate Yuba’s ability to transfer water in dry years, when there is typically a market for it. That would take away revenues that could be used for conjunctive use programs and, maybe more important, have been used so far for participation in flood control projects.

That’s the controversy; here’s the consensus. We’ve got an agreement for new in-stream flows that will provide equivalent, or greater, levels of protection for all Yuba River fisheries. This will

---

improve local water supply reliability. The water from these increased in-stream releases will be transferable. I should mention that a portion of the water that is transferable will be transferred and compensated for—additional water being released for the fisheries, however, is not transferable. The revenues will be used for $6 million of fishery studies, habitat enhancement programs, groundwater pumping, management of the conjunctive use program, and the flood control program.

Here's the overview of the basic structure of the agreement. We've got the Fisheries Agreement, the Water Purchase Agreement and the Conjunctive Use Agreement. They overlap. They are three separate agreements, but the court can't go forward with just one or two agreements, it has to have all three to work. These agreements will run through 2016. We hope, and all parties hope, that the agreements will then be incorporated into the process as we go forward.

Here are the parties to the Fisheries Agreement. These are the state and federal agencies and environmental groups that participated in the proceedings before the State Water Resources Control Board, except for one. The California Sport Fishing Protection Alliance has at this point chosen not to participate in the Accord. I'm a Red Sox fan, so I'm optimistic by nature and occasionally my optimism is rewarded. I'm optimistic that they will eventually join in the Accord. And of course, Banky is here, representing the Department of Fish and Game, and Chuck's here for Trout Unlimited.

I'm not going to get into much detail. Here are the major elements. I will point out that there are different flow schedules depending on hydrology. There's a real important element here, and that is the River Management Team that Chuck and Banky will talk about so that the conservation groups and state and federal agencies that have a real stake in the River are at the table and participating on a real-time basis in management decisions and also managing how that $6 million is spent. We need to get a state board order approving and implementing the Accord because the Accord flow is going to substitute for the flow proposed by the state board. We are going through the environmental process. I mentioned the PG&E Agreement. PG&E has certain rights under contract as to how the Yuba Project is operated, and PG&E has given preliminary consent to some of the revisions that will help us implement the Accord.

I'm not going to get into the benefits. I think Chuck and Banky will talk more about those. This Accord will also address some ESA issues.

Let me get to the Water Purchase Agreement.12 These Accord flows will generate increased water supplies that will be purchased for the Environmental Water Account.13 Also, in dry years when the deliveries for the State Water Project14 and Federal Central Valley Project (CVP)15 will be cut, some water will be provided by the Accord to make up for the cuts in those years.

A significant amount of water is generated by the Accord. The yield from the Accord is really comparable to the enlarged Shasta Dam proposal, but the cost of the Accord is significantly less. I’m not going to get into detail among the different components of water that are developed by the Accord. It’s fairly complicated, but there’s different components. The Environmental Water Account gets some water every year, and then these other components are triggered by other things.

A really important part of the Water Purchase Agreement is page after page of accounting rules that make sure that the water supply is transferable and also to account for potential impacts when the reservoirs are refilled. Jerry’s going to cover the Water Purchase Agreement’s key benefits.

Let me just briefly go through the Conjunctive Use Agreements.16 Again, these are the irrigation districts in Yuba County that are participating. We have all but one that has agreed to participate at this point and, again, I am optimistic that the final one will participate as well. The basic rule here is that the water districts will agree to provide groundwater and Yuba surface water, when needed, to implement the Accord. They’ll be compensated for that. The Accord revenues will help make that happen.

There is one other tangential issue that’s really important. We’ve got a frustrating issue on that Daguerre Dam diversion area that I mentioned earlier, and the Accord contains a process for resolving that.

We also have litigation pending. We’ve asked the court to stay that litigation while we work through the Accord. We’ve got a 2006 pilot program that we’re really excited about. I think it will be a way to

implement the Accord in 2006 by implementing the new fishery flows in place of the flows required under the state board decision. We had a hearing before the state board in January and we’re expecting a decision sometime in March. That’s a key thing necessary for the Accord to go forward. The environmental process is extensive, and we expect to have a draft environmental document out in the next few months.

Here on the slide is the CEQA compliance timeline. Eventually, we need the state board to have a hearing and issue an order to implement the Accord.

With that, I’m going to ask our panelists to come up here. They’ll talk about their perspectives and some of the more important lessons learned as we developed the Accord. Thank you.

CURTIS: I appreciate the chance to be here. In fact, I never thought this day would occur—to have me speak before a water law symposium was something that was never my dream job. First, I’m not a lawyer. Second, I don’t know squat about water law. But I have learned some things through this process and those are the things I’ll try to share. My agency and myself as an individual have gone through a number of changes since I went to work for this outfit, and I think some of those could be helpful.

I went to work for the Department of Fish and Game thirty-six years ago. Our job at that time as a department was to make fishing and hunting better. We were what was classified as a “hook and bullet” agency. If you couldn’t drag it around by its lips, or blow holes in it with lead, we really weren’t interested. Our main focus was growing fish at hatcheries. We had a lot of game farms. We had wardens who protected over-limits and poaching. In fact, it was just a few years before I came to work for the Department that they actually did away with bounties on mountain lions. That gives you an idea of perspective.

So we started going through some changes. Soon after I came to work some laws were passed that gave us some different tools. CEQA was passed. The California Endangered Species Act was passed. The Lake and Streambed Alteration Regulations were passed. Those were all new for the Department and we had to learn how to use those. The Water Resources Control Board (Water Board) also got a lot more authority. So we had all these new tools and we actually went from a “hook and bullet” agency to what we call a “regulatory agency.” Now, that’s pretty scary. And it has a lot of connotations to it. As we learned,
we adjusted on how to use these tools, and it really became a cultural change for our department.

There were many people in the Department who were frustrated with some of the environmental injustice that had gone on, and now, with regulatory authority, we had our chance to get even. So we got these clubs and we began to wield them on different folks at different times. We did lots of different things.

The Yuba River is a gorgeous river. We have spring-run salmon. We have fall-run salmon. We have steelhead. It's just an absolutely wonderful river, and we grew concerned about it. It's an important component of the whole anatomy of fisheries out of the Sacramento system. So as we grew concerned about that in the 1980s, we did what any good agency would do: we put together a plan.

We also filed a protest before the Water Board requesting that they change the water rights so that certain flows were provided for our fish. The result was a series of very complicated hearings. We went through many days of legal proceedings. We presented our case and the Water Board said they would think about it. Well, they thought about it for a number of years—five, seven, eight years. Because it wasn't a very popular decision for them to make, they really decided just to think about it for a long time. We finally got their attention again and said, "Well, we need you to make a decision." They said, "Well, the information's all changed, let's have another series of hearings." And of course, we did. And so we went through thirty to forty days of hearings.

The thing that struck me about the whole process was how nasty things could get. People called each other names, they argued about points, and there were strong emotions. It got kind of bitter and very controversial.

Finally, Kurt Akins, the Assistant Manager for the Yuba County Water Agency, came up to me one day and said, "Whatever the Water Board decides, we're going to have to work together, aren't we? We need to not let this stuff get in our way." And that was a wise thing for him to say. I began to think about that and I realized that, as you go through these hearings, you go through the acrimony that's involved with these legal proceedings, and sometimes it's very difficult after that to work on a cooperative basis. So I began to think about that and the bigger picture.

Finally, Decision 1644 was issued. I was crushed. I had worked really hard on that. I had a team that had worked really hard and I felt like the Water Board had ignored us and that they were just too generous to Yuba County Water Agency. When I talked to Kurt about it, I was shocked to hear that he felt the same way. He felt that the Board had ignored them and had found in favor of us and that the long-term flows
were ones they absolutely could not live with. And then we sat down and began to think about that. Now, how could that be? We’ve got this decision that nobody likes. Immediately after that decision a series of lawsuits were filed by both sides in a number of venues. So we decided the best thing to do was to see if we could do better than the Water Board. Could we sit down in a settlement process and try to figure out a better set of flows than those that came through the acrimonious, controversial process before the Water Board?

It was very difficult at first. I remember we had a lot of meetings. And when you have these meetings people need to posture, threaten, rattle their sabers, and try to make their point. We went through a lot of that and, frankly, that wasn’t much fun. The progress was really slow. But somehow, in that process, some things changed. And that’s what I’d like to talk about.

What made that process change from a group of people who really didn’t like each other, didn’t like working together, and had completely different perspectives on what ought to happen to the flow in the Yuba River into a group of people who could work together and come to a consensus on what ought to happen in the Yuba River? It really was a cultural shift, and very difficult. We felt, and we’ve always felt, that if we did it right there was probably enough water in the Yuba for everyone’s goals to be met, but we couldn’t seem to reach an agreement on how to do that. So we went through quite a process.

One of the things that had to happen is we had to each explain what our points of view were and what we really needed. We had to come to understand each other and probably the most important thing was that we had to admit to ourselves and each other that everybody in the group had a legitimate place in the table; that everybody had a valid part of the income at stake. Yuba Valley Water Agency takes care of farmers, and all these wonderful things. For them to say that the fisheries are equally important was a difficult adjustment. But think about us! I mean, we’re a Fish and Game Agency. We take care of fish for posterity, for generations to come. We had to sit down and say, “Your needs for the water are relatively equal and you’ve got a legitimate place here too.” That was difficult for us. But all of the people were able to do it. And that was really good. At one time it got so bad we hired a facilitator to deal with some of the controversy.

One of the things that helped unify the executive team was when we decided to fire the facilitator—not that the facilitator wasn’t good, but it was something we all agreed to. The first major agreement we ever came to was that we didn’t need a facilitator and we were better off without one. Facilitators are good—I’m not bashing facilitators—but once in a while you need to make some decisions that unify the opposing sides.

The other thing we did was set up a technical team to look at the
flows. What flows are really needed? We had biologists representing all the groups, all the seventeen parties, and they spent a lot of time doing a lot of difficult work. What was it that the fish really needed in the way of flows? What were the flows that were needed for out-migration, in-migration, everything you could imagine? They worked that out. They came up with six flows, and all of them could sit there as a group and say, “Yes, these flows are there. The fish are going to be better off.” Well, that was tremendous because that became the scientific foundation that made the settlement possible.

Once we knew those were the flows, then we had to work out how to achieve those flows. Which of those flows would be required as public trust flows, and which would be available for water sale and transfer? It took some time to work through that. We came through a process. You know, I did a survey of the fish involved and the majority of them didn’t seem to care whether the water was being sold after they got done with it or not. It just didn’t matter. As long as they got the water they needed, when they needed it, it didn’t matter to us whether it was sold or not. So, that was really good. That was a really important part of the process.

Then we had to get the water through the delta. And that’s why we had to deal with Jerry Johns and the Department of Water Resources. Once we got the flows down through the Yuba, we had to get it through the delta so that it could be sold. But somehow during this process strange things happened. People began to trust each other. You develop something like trust. You start to work together. You share ideas. You begin to understand that what they want isn’t to hurt the fish. We came up with a group goal: We wanted to take care of the fish, provide for flood control, address the sale of water, and satisfy Yuba County’s obligations now and in the future. When that group goal became our focus, instead of our individual goals, we really began to make a lot of progress. It really began to make a lot of sense and we were able to work together.

We had to follow through with what we committed to do when we had information. It had to be honest and it had to be straightforward. In some of the hearings, each side had a tendency to shade the information in there. We had to be honest and straightforward with that. That’s what really developed the trust.

In summary, even though there is a strong place in water law for regulations and for regulatory authority, sometimes it’s not the best way. Sometimes you can get beyond that. Sometimes it’s really important to look at other tools in the toolbox. When I went to school to study wildlife, they taught us a lot about biological needs, animal needs, and fish. They taught us how to speak and how to write, but they never really taught us how to collaborate. How do you work with a group of folks who have diametrically opposed views? I remember I was working with a
bunch of off-road vehicle people, and one of the people said, "You have to learn to accept that they have legitimate points of view in this settlement." It was a different settlement, but for me to accept that off-road vehicles had a legitimate part in wildlife habitat was a very difficult thing. But you really have to be able to do that and to work with people who have very different agendas.

I don't know how many professors or law school folks are here, but I think it's important that you receive training in this area. How do you work on a collaborative basis? How can you get your points of view across and achieve your goals while helping other people achieve their goals at the same time?

The other issue that I think is extremely important in this settlement, and one of the reasons I'm strongly supportive of it, is that it provides a level of long-term stability. When Decision 1644 was issued, there was a decision—but immediately there were lawsuits. I would be willing to bet that, over the years, there would have been lawsuit after lawsuit and really that the stream would never get a chance to stabilize because we would be going back and forth. One would win and then the other would win. When you reach a negotiated settlement, agreement, or accord, then you're able to maintain some long-term stability. And I think that's an important part. I'm grateful to have been a part of this process. I appreciate that. And the other benefit out of this is that, after a while, when you’re done, you get to have friends who once stood as enemies. And that's a lot better. Thank you very much.

JOHNS: I've worked for the Water Control Board for about twenty-seven years and came to the Department about three or five years ago. I worked for three years in the Water Transfers Office, and I have been the Deputy Director for the last couple of years. So all of us have about the same amount of experience here doing water stuff.

Basically, in my career, I've been working on water stuff. I've been both a regulator and a kind of an implementer. I use to joke, when I worked for the Water Board, that every time you talked to the public they got confused between the Water Resources Control Board and the Department of Water Resources. We do really different things. The Water Board regulates things: they regulate quality and water rights. The Department implements things. I used to joke about that, but there really is a difference. The Department really does do a lot of stuff and a good chunk of the Department that I work with has a lot of things going on currently, some of them controversial and some of them good.

One of the better things is the Yuba Accord that we've been working on for so long. Our role, and my role specifically in this negotiation was with the water transfer piece. As the Department's 21. See generally California State Water Resources Control Board, http://www.swrcb.ca.gov (last visited Apr. 16, 2006).
representative, I was principally representing the interest of the Environmental Water Account.

Now, I'm going to tell you a little bit about that so you get an idea of what our interests are. When the Accord was entered into, they looked at the amount of water that was being allocated for fishery purposes and they said, "Don't we want to do something better than that?" We couldn't agree on how that was going to get done. So we developed a rather innovative program to provide water above a regulatory baseline that they've called the Environmental Water Account. The Environmental Water Account provides additional tools to fish agencies to basically cut exports at times when they feel that need to be cut above the regulatory baselines. So we provide better protection for fish. Then the idea is to repay that water to the water guys at a later date. It's like every good problem in California—you can fix almost anything if you slather enough public money on it. So they provided for a four-year test of how this might work and they provided public funds to fund it. And it's not cheap. We've been spending thirty or forty million dollars a year buying water to make this thing work. Now, we're hoping it's having benefits, and I'll get to that later on. Anyway, it has forced the water agencies and the fishery agencies to work very closely together.

There are five agencies involved with this program: the "water guys" are the Department of Water Resources and the Bureau of Reclamation; the fishery agencies are the U.S. Fish and Wildlife Service, Department of Fish and Game, and the National Fishery Services. The deputies get together once a week to work out operations using the delta, and one of the bigger deals is what to do about the Environmental Water Account and how to change something in order to better protect fish. And staffs meet at least once or twice a week to discuss detailed issues. This is a big deal and collaborative effort and it's been very successful over the last four years. If nothing else, we've got a much more collaborative approach for resolving delta issues.

The Environmental Water Account builds upstream and purchases water for downstream of the delta to make up for these export cuts that they are taking above the regulatory baseline. We're buying 200,000 to 300,000 feet a year in the water market, and it's difficult for a lot of us because we're bureaucrats. We're dealing with people who have done water as a business their entire lives. They're negotiators and they're good at it. It puts us in an interesting place, but it's been able to work.

One thing that the Department has just finished is our water plan on the Internet, by using their program and developing a water plan. It uses three basic fundamental principles: water conservation, proving and protecting water quality, and also environmental stewardship. The Department of Water Resources has never talked about environmental stewardship. You will never find a water plan over the fifty or so years
the Department has been in business where the Department of Water Resources has talked about the environment and the importance of environmental stewardship in California. So that piece is an important part to the water plan.

And then we have these initiatives. What we have in the Yuba County Water Agency is basically a local system developed to address local problems and how they might fit into public statewide issues. The idea of using conjunctive use programs to be able to aggressively pump groundwater and use that as another reservoir, in conjunction with the service water reservoir, is a tremendous opportunity in California. And Yuba County is an area where you can do that very effectively. The yields out of this program are dramatic. We're currently evaluating the building of new reservoirs in California.

Why wouldn’t you want to use what you currently have, instead of, or maybe in conjunction with something new? The Yuba deal to us was a very important example of taking a local problem and looking at its statewide implications. We have a lot of interest in trying to make this work.

I'm going to talk a little bit about how we got into this and the difference between inter-space negotiations and what’s called position-based negotiations. The difference is that when you’re dealing with inter-space negotiations—like working with a neighbor, resolving a problem with the fence or with the barking dog—you have to work it out. You have to live with the neighbor forever. In the water business, we're neighbors and we’re going to be working together on a long-term basis, so inter-space negotiations work pretty well in this area, as opposed to position-based negotiations which is like buying a car. I hate buying a car.

In one case, you are trying to build a relationship where you can deal with people long-term. In the other case you are trying to get the best you can.

The other difference is that you need to develop mutual respect, and Banky talked about that. In the Yuba case, we’ve been dealing with Yuba County agencies since the 1980s when water transfer started. So there was a good basis of working relationships over time and that helped a lot in making this work.

Plus you need to be fair in principle when you’re doing inter-space negotiations. In a project we worked on in Napa with water contractors, the term intellectual honestly came up at one point. We realized that we were taking advantage of another party. We knew that there was something that we had to bring up to them that they hadn’t thought of. Part of the issue with Yuba was that there were several times when we didn’t want to have a “gotcha” at the end. So, at several times, we talked to each other to make sure that the deal was fair and it had stability.
because we’re going to have to be doing this for a long time. We had some very honest, frank discussions. Some of them were very difficult. Not so much with the Yuba guys, but with the water guys, and I want to talk about that very quickly too.

Initially Yuba talked separately to the water community, dealing with three separate parties: First are the CVP contractors, which include big farmers south of the delta who buy water. Second is the State Water Project. They are our customers, and include agencies like the Metropolitan Water Industry and Kern County water. Then there is the water account. Initially, we wondered who would get the best deal. So we got together at one point in time and said, “We should really work as a group here and see if we can’t work out a package that works for all of us.” In effect, when we were talking to Yuba, we were working as a team: it was Yuba and the three of us, the three sides—our contractors, the Bureau of Reclamation, and the Department—all working as a group. And we worked out, I think, a pretty fair deal in that process.

The next issue was who would pay for this deal. How would we split up the water and who would be responsible for paying how much? That was very difficult. That was the hardest part in my opinion. It was very difficult, and we had another set of frank and open exchanges, along with some shouting matches, swearing, and walking out of rooms. But we got through that and we all still talk to each other because we’re in the water business and that’s something you have to continue doing. We worked through that process and I think we did it in a pretty good way.

For me, the deal had to be fair. From the water point of view: some of the parties basically wanted to suck the drier water out of this deal and have the public pay for it. Well, that wasn’t going to happen, so we had a lot of debate. The way it works now is what I consider a fair deal.

To really make this work properly we need to be purchasing water even in the wet years. The problem with that is you can’t get that water across the delta very effectively. But we can in many years get water across. Last year, we got water across the delta because we were pumping for the State Water Project the entire time. There was no capacity to move extra water across the delta. But in a lot of years, even when our contractors don’t need water, there’s capacity to move water across the delta if we can, if our contractors can work. In extremely dry years, their contractor allocations are like twenty-five or thirty percent. They want that dry water, and providing that water to the environment isn’t something that goes down very easily. So we had to work on how that was to be distributed and who would pay how much.

So when the Environmental Water Account was negotiated, I wanted a “melded” price every year. I wanted one price that represented all the water that we were purchasing, and we were able to negotiate a
relatively good price, but not too good because we could be buying water as well. Classically, water has not been sellable here. If you are in the water selling business, north of the delta, you can sell water maybe once every three years. To have a consumer buy water every year we can move it is a pretty good deal.

Yuba got a deal out of it. They got a customer to buy water every year and we got the water at a relatively good price. I think that part of the Accord worked out pretty well. If you look at the averages, in normal and above years, most of the water goes to the Environmental Water Accounts. Most of the water is going to the environment one way or the other and a small amount of that goes to the CVP Water Project. On average it's about half and half. A little more for the environment than the water folks.

In drier years, the Environmental Water Account will get about forty percent of the water that's there and the State Water Project will distribute the last thirty percent. And the CVP gets the remainder. Each gets about a third in drier years, so on average it's about equal.

I think the environment came out pretty well on this. The idea was to pay for this water up front with a big chunk of money that we have sitting in the bond funds for this purpose. We could make that money available for this and avoid having to purchase it annually. So we get an upfront payment and fixed price over a long period of time.

BONHAM: Good afternoon, my name is Chuck Bonham from Trout Unlimited. I wear many different hats. For the Yuba Accord I wear the hat of California counsel. We're the nation's leading and largest cold water fisheries conservation organization. We have about 130,000 members nationwide, about 13,000 of which are here in California. Our mission is to protect, conserve, and restore North America's native salmon and steelhead trout in their habitats.

Mark Reisner once remarked that, in the West, where water is concerned, logic and reason have never figured prominently in the scheme of things. Hang on to that thought, because I'm going to come back to that at the end of my presentation.

I'm going to spend a little bit of time talking about three important concepts which I believe made the difference between producing the solution in the Yuba River and having the solution die on the vine: joint ownership and shared efforts, civil discourse, and putting the fish on equal terms.

The simple fact of the matter is that water matters to every single stakeholder in the Yuba River basin. If it didn't matter to so many disparate interests, the water rights dispute would have ended long ago.

---

The norm has always been litigation. I did a quick tally right before coming over today and I found twenty-seven days of hearings, at least three state agency draft decisions, two full rounds of briefs and closing arguments, extensive public meeting and public comment opportunities, one preliminary injunction request, and all of that spread over fifteen years and counting.

In the Yuba River negotiations, once we put down the litigation, we found the shared interest. That shared interest was displeasure with the Water Board's water rights decision. And we moved towards developing a joint project, and that became the negotiations and the discussions both Banky and Jerry referred to.

Let me connect that principle to an even bigger purpose today, and describe to you what I think is fundamental for our future as Californians together, and that is a shared vision. That vision has to be commensurate with the importance of water to each one of us. In this vision there's no room for good or bad, or us or them. There can't be. We cannot continue in the State of California on the old path of polar interests pitted against each other.

This dialogue has been going on for a long time in the West. In 1889, John Wesley Powell went to the Montana Constitutional Convention to advocate that the state organize itself as a watershed commonwealth. Now, leaving aside the feasibility today of re-mapping our lands, the spirit of that recommendation was that we all stand together. We have joint ownership and our livelihood rests on figuring out what to do with our shared hydrological circumstances. In dry years, we all suffer. In wet years, we just suffer less. We ought to figure out our future together.

The next concept that I think was significant in the Yuba River Accord was something I'll call civil discourse. The Yuba River has always been an important resource from Trout Unlimited's members' perspectives. It's very true that litigation has been the norm in this basin. It's also true that a lot is at stake. We're talking about some of the most lucrative water transfers in the State of California. We're talking about invaluable salmon runs and a historical agricultural community.

In my experience, when we fail to be respectful of each other, our energies move to perpetuate conflict rather than to solve problems. When our collective future and our natural resources are at stake, we owe it to ourselves to hold a respectful dialogue. And that, in my opinion, promotes the space for us to think about solving problems. And I think this happened in the Yuba River Accord.

Two very important things are the relationships of people to their landscape and of people to each other. I would add that, in California, it's also about our relationship to each other and our relationship to water. Relationships matter. If we can think about civil discourses I think
we're moving down the path towards problem solving in California.

The last concept that I think mattered in the Yuba River Accord is one that, I will confess, I'm always a little nervous about. But at this symposium, I sense I might be on more comfortable ground, especially since there are several aspiring water law or public interest attorneys in the room. The last concept that I think that mattered in the Yuba River Accord was putting the fish first. Let me explain what I mean.

Former Secretary of the Interior Bruce Babbitt once remarked that fish have no fixed address. They teach us that we must see the entire landscape. Water management under traditional California water law can also serve as a lynchpin to seeing our entire water state. If we do it better, we can stop the decline of our aquatic species and provide for ways to meet our consumption needs. I think that there are some commonsense solutions out there, but I don't know how long we have to work together to find them. I don't know how long we have to let division be our cornerstone rather than unity. It doesn't have to be the same old worn out approach.

After World War II, Winston Churchill went on a speaking tour around North America. He was at Washington University in St. Louis, and he got to on the podium and he said something to the effect of, "You know, I love America. Great place. I love visiting it. I love Americans even more." He went on to say, "The reason why I love Americans so much, is you can be counted on to do the right thing, after you've tried everything else!"

The lower Yuba River wild Chinook population is one of the most significant remaining populations in the entire Central Valley. It is also home to one of the last naturally self-sustaining steelhead populations.

Banky's agency has concluded that the lower river supports essentially the only wild steelhead fishery remaining in the Central Valley. This fact alone underscores the immense value of this public trust resource. I don't need to tell this audience about the tension between consumption use and in-stream fisheries. The challenge is, we let the dialogue become one where those two interests are pitted against each other. We allow our dialogue to become one of "either/or." Let's change it to "and." This happened in the Yuba River largely because of the leadership of the Yuba County Water Agency.

Banky described this technical team. The negotiators asked this technical team to go off into a separate room. They went off into that separate room for roughly a year, and they changed the order of the questions they were asking. The first question they asked was how much the fish needed in an optimal situation. They put the fish first. Then they asked, "Can we make the fish objectives and the water use objectives mesh?"

That change in order, I think, was dispositive for the entire Yuba
River Accord negotiations. As a result, we have the proposed Yuba River Accord. It's got a fisheries agreement, it's got a transfer agreement, and it's got a conjunctive use agreement. At the end of the day, logic and reason are going to prevail here. We might have proved in this Accord that it's possible to figure out a way to make water do as much as it can to satisfy as many beneficial uses as it can through a physical solution. I think that's pretty remarkable. The way we got there was shared efforts, civil discourse, and putting the fish first.

Where are we today? We're at the starting line. Oddly, implementation looks to be as or greater of a challenge than creating the deal. We've got environmental review processes under way. We look forward to that concluding.

I'm going to wrap up here and say that, in my opinion at least, our salmon, steelhead, and trout are some of the glue that binds our earth together. Think about the life journey that these fish take. It's awe-inspiring. For many people they are sacred things because of those life journeys. And that journey gives us a sublime sense of peace, which I think is sorely needed in today's world.

By the same token, working the land and putting water to consumption has always been a part of our historical fiber in the State of California. Water gives us all of that life.

This is the theme I take pretty much anywhere I go in the State of California. It doesn't have to be about conflict. One of our state's great westerners, Wallace Stegner, once wrote that we should strive to create a society that matches the majesty of our scenery. Right before he passed away here he also wrote that, "[We need] a sense of bigness outside [our]selves." We all need something to take the shrillness out of us.

I believe that the Yuba experience provides us with some useful examples for doing just that. Thanks.

**Bartkiewicz:** We have time for some questions.

**Audience Member:** A big focus of the Accord is quantity. Is there a quality element in the Accord?

**Bonham:** That's an excellent question. I think one of the unique kind of forward-looking points of interest in California water law is the relationship between quantity and quality. As to the Accord, a motivator for the fish flow regimes was temperature. Temperature is a water-quality characteristic and, if you look in detail at the flow regimes, you'll see that higher quantity in later summer is one of the major fish benefits and the reason is to directly address temperature concerns in those months.

---

CURTIS: Let me add just a little bit to that. Outside the Accord process, we identified some capital outlay projects on the Yuba River that needed to be done. One of the key ones was putting a bypass around one of the power plants that allowed flows of cold water if that power plant went down. One of our major concerns was that we had spring-run salmon spawning in the river. If that power plant went down and the water got too warm, we needed a way to deal with that. Through the mutual support of all the agencies in Yuba County, we were able to put the money forward to start on that process. I think that also helped unify the Yuba. That was basically designed to deal with one of the water quality issues, so Chuck is right. Water quality is an extremely important part of any agreement. It was a major part of this one.

AUDIENCE MEMBER: What have you learned from the Accord that you can pass on to law students in terms of the changes in the practice of water law?

BARTKIEWICZ: When I was in law school, there may have been classes on alternative dispute resolution. If there were, I didn’t take one. I don’t recall it being offered. Banky touched on this as well. The old way of doing things was if we all hired the best lawyers we’d be fine, and we would just take positions and litigate until our client runs out of money. That’s not the way to do it. That’s not productive and it’s not efficient. As a lawyer, I can tell you it’s quite unsatisfying professionally. It’s much better to look for enduring solutions. And enduring solutions are the kinds of processes that we talked about today. And to make sure all of the interests are protected.

I mentioned at the beginning what a mentor Adolf Moskowitz had been to me as a young lawyer. One of the things he taught me as a young lawyer was that we have a duty to every client in the room, not just our own, and that all the interests ought to be represented and resolved in a fair way. That’s something I’ve always taken to heart. I think that really was the foundation for what we tried to accomplish in the Accord, so I suggest that a lot of future water lawyers just keep that in mind. We’re litigators sometimes and advocates others, but look for enduring solutions.

CURTIS: One of the interesting things that the executive team did was to give the assignment to the technical team. Once we worked out the concept of the agreement, we gave it to the legal team and said, “Make it so.” Now, that was a real challenge. This was the same group of folks who had litigated against each other and thrown rocks and mud and tomatoes at each other for a long time. What they had to do was take the concepts that the executive team came up with, based on input from the technical team, and make it a legal document that protected all of the appropriate clients. This was a real challenge. Maybe they should teach that skill set—the ability to work with people in the settlement once it’s done, how to put that into words that really make sense. That was the
part that I don’t think any of us talked about, but I would certainly like to give thanks to the legal team. I think they did an outstanding job with an essential part of this whole process.

**BONHAM:** The word that is critical for law students to grasp is “multi-party.” I think, based on my experience in water, it would be less likely in the future that these things are resolved through traditional plaintiff-defendant resolutions. If we’re talking about natural resources, particularly water or air, it’s more likely that it will be resolved by some sort of multi-party effort to figure out how to use that shared resource. And to me, in that climate, the topic is more like decision making or game theory analysis. To the extent they might be in your curriculum, those could be useful classes.

**BARTKIEWICZ:** Just one closing thought on that. You also have to have a client or a group of clients willing to go through this kind of process. Litigation is expensive and it’s probably cheaper to settle than to litigate. That does not mean it’s cheap to settle.

**AUDIENCE MEMBER:** To what extent does the Accord anticipate and provide for changing conditions?

**CURTIS:** I think Paul mentioned that there is a fund set up to do further studies. There’s a very strong adaptive management component to this settlement. I think that’s a part of almost every settlement that’s going on now, but what we’ve done is agreed upon a series of studies that will provide us with essential information. It didn’t take us very long to determine that we didn’t know all the answers. We needed to know more to make some of the decisions that needed to be made. So we set up a process where those decisions can be made. Probably one of the key things is the involvement of a group of biologists representing all the different parties involved that will analyze the decisions and make joint decisions or modifications in the future. I think adaptive management is an important part of this and I think it’s going to be an important part of any future settlements or agreements of this type.

**BONHAM:** Indeed, I’d go as far as to say, generally speaking, there’s structural flexibility built into this agreement. For example, parties could acknowledge that in 2016 there’s a mandatory federal proceeding for the re-licensing of federally licensed hydroelectric dams on the River. Between now and then, we would create this six million dollar fund for the purpose of monitoring the actions we take to determine if we’ve reached the desired objectives we all want to reach. That information would funnel into that mandatory federal effort in 2016.

**JOHNS:** We talk about adaptive management, which is like learning from the environment, re-modifying the environment, and receiving feedback on it, but the other part is the idea of management adaptability. We’re talking about some things that are changing around us. Global
warming is a particular issue. The infrastructure issues are being redone. Not only is the environment changing but the resources we have available to us continue to change. As managers, or people who are going to be managers in the future, you’ve got to develop the ethic of being flexible and being able to adapt your management style to the environment as the environment changes around you. That’s a challenge for some of us who are getting older in our years.

BARTKIEWICZ: That’s going to conclude our panel. Thank you all.