

"Political Science" on the Navarro River

Second of two parts
by Roanne Withers¹

A recent public trust lawsuit seeks to end mismanagement of the Navarro River. If successful, the suit could check nearly a decade of abusive water diversions not only in Anderson Valley (the Navarro's watershed southwest of Ukiah in Mendocino County), but in all Northern California salmonid coastal watersheds by forcing the state to fulfill its public trust responsibilities on behalf of salmonid and other aquatic species.

Filed last June in Alameda County Superior Court (where the state Attorney General has an office), the Sierra Club (via its Mendocino/Lake Group), Navarro Watershed Protection Alliance (Dr. Hillary Adams), and California Sportsfishing Protection Alliance (CalSPA, via Bob Baiocchi) sued the State Water Resources Control Board (which oversees the staff of the Division of Water Rights), and vineyard owners Ted Bennett and Deborah Cahn.

The lawsuit simply asserts that the State Water Resources Control Board, Division of Water Rights (the Division) violated the California Environmental Quality Act (CEQA), the state's Water Code, and the Public Trust Doctrine when it approved the Bennett-Cahn winter water diversion and storage reservoir.

In the last *SPILLWAY*, readers will recall that, with legitimating help from the Anderson Valley Land Trust and its developer-friendly Navarro Watershed Restoration Plan, vineyard owners in the Anderson Valley and along Navarro River tributaries unleashed a rash of vineyard expansions with mostly illegal water diversions for storage. However, a handful of committed Navarro River advocates kept hope alive for the river's recovery.

After allowing summertime de-watering of the Navarro River and its tributaries for years, the Division of Water Rights proposed to permit only new diversions for winter water. But diverting wintertime flows prevents coho and Steelhead salmon from migrating upstream to spawn.

In this concluding segment on the Navarro River, *SPILLWAY* presents a still-unfolding story of "political" science in the effort by community-based activists defending the Navarro River, with an eye towards eventually restoring it.

Consider the Devastation

Once a prolific salmon spawning river, the U.S. Environmental Protection Agency now considers the Navarro an impaired water body because of its high water temperatures and large sediment loads.

These conditions reflect damage in the Navarro's

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watershed from timber harvesting, agricultural practices, and the river's over-appropriated state.

For much of the last generation, year-round water diversions on rural northern California streams and rivers have been all but unregulated by the Division of Water Rights of the California State Water Resources Control Board in Sacramento.

Broad earthen dams are sometimes built across spring-fed streams that flow(ed) year-round, but more often they block intermittent streams (that is, those that flow in the winter and spring). Some reservoirs were built by "old settlers" as small domestic use or stockwatering ponds. Most of these historic ponds were illegally enlarged by newer

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vineyard owners. New reservoirs are often built small in size (15 to 90 acre-foot capacity) but in quantity (2 to 5) in order to avoid dam safety regulation by the state's Division of Dam Safety (in the state Department of Water Resources), or to capture the maximum amount of water possible as a reserve for a drought season.

While some vineyard owners requested permits to store water in the early 1990s, almost all had illegally constructed one or more storage reservoirs without permits (about 30 small lakes). A 1996-98 enforcement investigation by the Division of Water Rights (hereafter, the Division) discovered 130 illegal reservoirs.² Since then, several new illegal storage reservoirs were built. Some landowners filed permit applications to legalize them after the fact, but others hope to escape official notice. (Not on anyone's radar screen are the numerous under- 10-acre-foot reservoirs exempt from public input and rubber-stamped by the Division.)

A few reservoirs in the Navarro River watershed are truly offstream ponds, but these still can and often do capture nearly all flows of nearby streams through pumps and pipes that historically contributed water to downstream salmon-spawning tributaries, and to the mainstem Navarro River, or one of its major tributaries (Anderson Creek, Rancheria Creek, and Indian Creek).

The Navarro 5

The first Anderson Valley vineyard applicants to seek water permits from the Division were Scharffenberger, Hahn, Bennett/Cahn, Oswald and Savoy — "the Navarro 5." In the early 1990s, a handful of similar water applications lined up behind the Navarro 5. Most applicants planted several hundred acres of irrigated grapevines and built their dams

and reservoirs to water the vines several years before applying for permits to divert and store water.

In one case, Richard Savoy bulldozed the entire length of stream on his property in 1998, forcing the stream into a pipe that runs under his vineyard and out the other side. According to his neighbors, Savoy (owner of famous Green Apple Bookstore in San Francisco) also dug a trench under State Highway 128 and purchased an easement on the other side in order to claim riparian water rights to the Navarro River itself.³

In another case, applicant Oswald completely captured an entire coho spawning stream in one onstream reservoir. The federal National Marine Fisheries Service (NMRFS) is considering a court action against them on a "take of endangered species."⁴

To date, Anderson Creek grape grower Phil Wasson was recently fined \$2,000, the sole individual fined out of 130 illegally constructed onstream reservoirs.

Most of the additional pending applications are as bad, if not worse. Now 30 applicants are in line with another 100+ waiting in the wings. So far, Navarro advocates have found only one applicant who did not plant wine grapes and dig an onstream reservoir before filing an application.

Protesting Water Permits

The state Water Code enables California citizens to file formal Protests on permit applications for water diversions or storage, but the protest process burdens protestants unfairly.

Filing a water rights protest is a lengthy and complex process requiring submissions of evidence and legally precise arguments. By comparison, the water rights application is simply filled out by the landowner, and is not reviewed by Division staff for accuracy. The application is usually abbreviated and sometimes deliberately misleading.

Protestants must state their specific objections to the water diversion or storage project described in the application in writing to the applicant and Division staff. The applicant is required to respond to the protestant in writing and an effort must be made by both to "work things out."

If protestants raise enough concern, a field investigation is called by the Division. In field investigations, landowners must allow protestants to enter their property with Division staff and the Department of Fish and Game to examine the project.

Protestants must then state if their original concerns were satisfied or not, or if additional concerns were revealed after viewing the project in the field. If protestants do not attend the field investigation or their continued objections are unsupported by law and evidence, the Division dismisses the protest.⁵

Protests filed on the Navarro 5 applications originally complained that there was not enough water available for the diversion/storage reservoirs without ruining spawning habitat of endangered salmonid populations.

In April 1997, just after release of the "Statement Supporting [winter] Water Diversions" in the Navarro

Watershed Restoration Plan, the Division notified the protestants of the remaining four applications in the Navarro 5 (Hahn, Bennett/Cahn, Savoy, and Oswald) that their protests would be dismissed because of a "water availability analysis," which concluded that indeed water was not available in the summer, but plenty of "winter water" could be diverted for all onstream reservoirs. But the Division withheld the analysis on which their dismissal was based.⁶

After numerous letters and phone calls, the Division staff finally admitted to an outraged Hillary Adams that the winter water availability analysis "was not adequate" and "needed to be re-worked" before it was circulated to the protestants. The Division also told Adams that the protests would be

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dismissed in any event. Dr. Adams contacted legislators and Water Board members. Five months later, the Navarro protests were reinstated, thanks to Dr. Adams' single-handed effort.

The Division then called for a "field investigation" in accordance with the next requirement in the protest process.

One field investigation on the Hahn, Savoy, and Bennett/Cahn applications on October 15, 1997, was well attended. Attorney Volker submitted lengthy legal points and authorities for the Navarro Coalition and Dr. Adams. However, Volker was directed shortly thereafter by his lead client in the Navarro Coalition, the Friends of the Navarro, to withdraw its name from all concerns about "winter diversions."

Together, Dr. Adams (not affiliated with the Navarro Coalition) and CalSPA (of the Coalition) were the only protestants to actually maintain complete Water Code and CEQA standing in these originally summer, now winter, water permit applications.

Scientific Malpractice

Unable to dismiss the Navarro protests, the Division changed rivers. Some seventy miles away from the Navarro, the Division began approving winter-water onstream storage reservoirs on the Russian River tributaries. Trout Unlimited's Stan Griffin, a particularly feisty retired corporate executive and sports fisherman, protested on Russian River vineyard applications, forcing the Division to finally come up with a scientific basis to defend its stream bypass flows and plan to allow grape growers to divert all the winter spawning tributary water in the Russian River watershed.

The Division's "science" is called the "Russian River

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Protocol," based on the Tennant Method, developed to sustain fish flows in Montana, Wyoming, and Nebraska rivers. The Tennant Method uses reservoirs to trap winter and spring flows (from melting snow pack), which are then gradually released in drier times of year. Intending to apply this snowmelt method to all California salmon spawning rivers, the Division ignored the fact that northern California coastal rivers are fed by rainfall, not snow. Nor are anadromous fish present in east slope Rocky Mountain rivers where the Tennant Method was developed and applied.

Incensed over this scientific malpractice, Adams raised \$5,000 and hired Dr. Robert Curry (a respected hydrologist in salmonid science) to review the Russian River Protocol/ Tennant Method as applied to the Navarro River.⁷ Trout Unlimited hired Arcata-based Dr. William Trush (the independent scientist hired by the Court to determine the amount of water needed for fish in the tributaries to Mono Lake).⁸ Both Curry and Trush found that gradual release of water under the Russian River Protocol-Tennant Method will increase temperatures, turbidity, and sediment in the Navarro and Russian rivers and their tributaries. Anadromous fish (coho and Steelhead) are very sensitive to these factors.

Secret Science

On December 15, 1998 the Division issued a "Draft Division Decision" for the Navarro Watershed using the disputed Tennant Method, including a promise to declare the entire Navarro River watershed fully appropriated from April 1 to December 14. Applicants must prepare a scheduled plan to minimize erosion, stabilize streambanks, protect riparian corridors, and measure and record diversions. On specific applications, applicants must also get streambed alteration permits from Fish and Game for onstream reservoirs (CEQA review is also required). Oak trees taken out for vineyard development are to be replanted.

Under this slightly tightened regime, an applicant like Savoy will have to give up his year-round Navarro River water access tunnel under Highway 128 if he wants to store water on his property. Sounds pretty good, huh?

Not according to Dr. Adams.

The Division used its draft decision as a blanket environmental impact review for pending Navarro applications. If allowed to approve enough Navarro applications under the draft decision, the Division could overcome Griffin's strong resistance on the Russian River through the sheer weight of new precedents.

Next in line was the Bennett-Cahn application for a 30 acre-foot onstream storage pond for 33 acres in grapes.

But then NMFS, with federal jurisdiction over the endangered salmon, entered the Russian River fish fracas, adamantly criticizing the Division's science and mitigation measures.

NMFS thoroughly documented its scientific challenge to the Division's Russian science (the same science as in the

Navarro River science/Draft Decision used to support the Bennett-Cahn environmental review) stating the Division's science did not leave enough "peak" water in the tributaries to maintain the salmonid winter habitat (flush sediment and gravel downstream) and for flows necessary for salmon to travel up tributary to spawn in the winter.

In response, the Division called an "invitation only" meeting between the Division, NMFS, Trush, Stan Griffin and Trout Unlimited's attorney, the engineers and agents for the Navarro applicants, and an independent Science Review Panel consisting of fisheries biologist Peter Moyle (from University of California at Davis) and hydrologist Mathias Kondolf (of UC Berkeley), both tops in their fields. Moyle and Kondolf were charged with reviewing all methodologies.

NMFS offered an alternative methodology.⁹ Trush advanced a methodology similar to NMFS's but which left still more water for the salmon still. Both provided more wintertime flows for fish in the Navarro watershed.

Navarro protestants, their attorney (Stephan Volker), and their scientist (Dr. Curry) were neither told of nor invited to this apparently secret meeting.

Unbeknownst to the Navarro advocates, included in this secret meeting and subsequent Science Panel review was a detailed environmental review for the Bennett-Cahn onstream reservoir by the Division as an actual project for the Science Panel to use in reviewing the Division's process and methodology. Bennett-Cahn's agents submitted a lengthy paper to the Science Panel stating public reaction to the Navarro 5 applications was hysteria "based on speculation, not fact."

The Bennett-Cahn onstream reservoir application and its environmental review was approved by Division Chief Harry Schueller, a month after the secret meeting but before the Science Panel had concluded its review of the Bennett-Cahn project and science methodologies.

Herself still unaware of the ongoing science panel review, Adams and CalSPA appealed Schueller's approval to

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the Water Board. Schueller also did not tell the state Water Board of the ongoing science panel review, testifying at the appeal hearing that all was fine with the Bennett-Cahn project and Division science. The Water Board unanimously denied the Navarro advocates' Petition for Reconsideration.

On June 19th, the Sierra Club and Navarro advocates filed their public trust lawsuit.

A few weeks later, in July, Navarro advocates discovered the secret meeting, and that the Science Panel had completed its review of Bennett-Cahn and fish-flow methodologies to

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Methodologies to the Division and participants on June 12.¹⁰

The Science Panel's recommendations state, in part: "...the unknown cumulative effects of legal and illegal diversions, and the scarcity of data on headwater streams are sufficient reasons to justify deferring approval of any new water rights... until information is developed that shows that the diversions can be conditioned to avoid unacceptable risk of harm to listed species or other public trust resources."

"Impounds should not be approved on seasonal or perennial streams using negative declarations.... For example, we are concerned about compliance problems with by-pass conditions such as those for Application No. 29711 (Bennett-Cahn), because it appears that inflow to the impoundment will be much less than capacity in dry years, when the need for the water will be the greatest."

The state's top scientists confirm Hillary Adams' suspicions that the Bennett-Cahn reservoir would capture all the Navarro tributary water in low rainfall years.

NOTES

1. This article is excerpted and updated from Withers' "Last Chance for the Navarro," Anderson Valley Advertiser, July 26, 2000, p. 1, 12. Part 1 appeared in SPILLWAY v1n1, Fall 2000, p. 1.
2. See State Water Resources Control Board, Division of Water Rights, "Report of Investigation on the Navarro River Watershed Complaint in Mendocino County," July 1998.
3. Richard A. Savoy, Application No. 29910 & 29911, filed 4/14/91. Permit information is now available on the Division's website <http://www.waterrights.ca.gov/>.
4. Hugo and Beatrice Oswald, combined Application No. 29810, filed 8/29/90 and Application No. 30792, filed 10/9/98.
5. When a protest is dismissed, the protestant loses legal standing and is unable to sue for the Division's violations of the Water Code after California Environmental Quality Act (CEQA) review of the project is completed. Moreover, during the CEQA review process protestants must submit their

concerns all over again, whether or not their protests were dismissed or retained, in order to have standing to sue for violation of CEQA if the project is approved.

6. Absent environmental review, the Friends of the Navarro withdrew their Protests on the Scharffenberger application and it was approved in 1995.
7. "Review of Tennant Method as Applied on the Navarro River and in Coastal California Watersheds," Stacy Li, Robert Curry, and Brett Emery, 1998.
8. "A Commentary on the SWRCB Staff Report: Russian River Watershed, Proposed Actions to be Taken by the Division of Water Rights on Pending Water Right Applications Within the Russian River Watershed," McBain & Trush, 1998.
9. "Draft Recommended Guidelines for Maintaining Instream Flows to Protect Fisheries Resources in Tributaries of the Russian River," NMFS 2000.
10. "Fish Bypass Flows for Coastal Watersheds: A Review of Proposed Approaches for the State Water Resources Control Board," Peter B. Moyle and G. Mathias Kondolf, June 12, 2000.

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