

SPILLWAY

California Water,
Land, and People
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Vanity Vineyards Killing Navarro River

First of two parts
by **Roanne Withers**¹

Prologue

"Dear Editor," long-time Mendocino coast resident Tom Wodetzki wrote to the *Anderson Valley Advertiser* in Boonville in September 1992, "This past weekend my partner and I went to land we own along the Navarro River in Anderson Valley to spend a couple of days swimming and relaxing, as we have in past years. We camped out but were disturbed by the noisy drone of not one, but two big pumps down in the river sucking up water for nearby vineyards and orchards or whatever.

"In the morning water was flowing in a small channel down the otherwise dry, broad riverbed. But by evening, after a whole day of seemingly nonstop pumping through six-inch hoses, that channel had dried up so that no water was flowing! The river had dried up right before our eyes."

In 1992, Wodetzki filed complaints with State Water Resources Control Board (SWRCB) over the dewatering of the Navarro River he had witnessed. Supervised by one of the meanest nests of entrenched vipers in the arid state of California, SWRCB's powerful Division of Water Rights (DWR) distributes much of the state's water via decisions made "in-house" by staff.

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DWR staff, of course, ignored Tom's complaints.

Refusing to give up, he invited preeminent attorney, Stephan Volker (then of the Sierra Club Legal Defense Fund), for a look-see at the dewatering of the Navarro. Tom connected with the newly formed Anderson Valley environmental group, Friends of the Navarro — Diane Paget, Steve Hall, Bev Dutra, later joined and headed by Dan Myers —

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concerned about the "health of the watershed" and "lack of regulation."

Wodetzki's actions lay groundwork for a new public trust lawsuit against vanity vineyards and the state, which seeks to end rampant water consumption by vineyard development.

The case is probably the last chance for protecting and sustaining the Navarro River and its aquatic ecosystems.

Filed June 19, 2000, in Alameda County Superior Court (where the 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 (via Bob Baiocchi) are suing the SWRCB (which oversees the staff of DWR), and Navarro tributary reservoir/water diversion applicants and vineyard owners Ted Bennett and Deborah Cahn.

After nearly a decade of deliberate DWR mismanagement of the Navarro River watershed, winning the suit would make the state enforce its public trust responsibilities in all Northern California coastal watersheds on behalf of salmon (or "salmonids," representing a range of fish species classified as salmon varieties) and other aquatic species.

The Navarro River water lawsuit simply asserts that DWR violated the California Environmental Quality Act (CEQA), the state's Water Code, and the Public Trust

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Doctrine when it approved the Bennett/Cahn diversion and storage reservoir.²

Defending the Navarro's endangered salmon from the hoard of "liberal" vanity vineyard developers has not been at all easy. It is a battle — everywhere on the north coast of California — requiring us to marshal our weapons of law and science.

The Navarro River and its salmonids were almost fatally betrayed, but for efforts by one woman — Dr. Hillary Adams — to hold the line, keep people involved, and defend the Navarro River, at times single handedly, for nine long years.

Her unwillingness to surrender or compromise will save the Navarro River, its salmon spawning tributaries, and such salmonids that remain to spark future generations. Latecomer reinforcements such as myself, others filing protests, National Marine Fisheries Service (NMFS), and the heavy artillery from the state's science community would have nothing on the Navarro to fight with now, but for Dr. Adams' persistence.

The survival of all of the northern California endangered salmonids depends, in part, on the particular issues on the Navarro River addressed in this lawsuit.

Diversions Endangering Salmon

The Navarro River is a long-time favorite of Steelhead anglers. The river's mainstem and major tributaries traverse some 50 miles from its headwaters near Ukiah, through Anderson Valley and the small towns of Yorkville, Boonville, and Philo on its way to sea 15 miles south of the coast town of Mendocino. The 323 square-mile Navarro watershed is home to about 3,500 people.

Since 1992 oak rangeland in the Navarro watershed has been rapidly logged and converted to water-intensive wine grape vineyards.

Logging impacts — such as tree canopy removal (removing shade, raising water temperatures) and sediment filled pools (gumming up spawning areas, degrading water quality) — are key reasons salmonid populations dwindled. But still the fish hung on, at least until their water began disappearing into and onto grapes.

Where the Navarro meets the sea just beyond California Highway 1, a sand bar blocks its mouth for increasingly longer periods. Lacking sufficient flows to break through, ocean salt water gets trapped in the estuary behind it. Heavy salt water sinks to the bottom, forming a lens that intensifies the sun's heat. Many swimmers three or four miles up river now experience this phenomenon: the deeper water pools,

cool on the top, are feverishly hot on the bottom.

The Navarro's deep pools were once instinctive cold water homes to migrating salmon. To survive, salmon must now swim for long periods in the cooler strata near the surface where they are easier targets for predators.

Instream gauge records and first hand observation clearly indicate the Navarro and its tributaries are over-appropriated due to a combination of unregistered riparian water owners,

Owning riparian rights does not confer the right to take or pollute all the water, or otherwise harm public trust resources

too much water granted to licence/permit holders, and the nonpermitted diverters who are illegally drafting water.

"If you fly over the valley in an airplane, you can see all of the check dams tucked in the little feeder creeks" of the Anderson Valley, Friends of Navarro's Diane Paget told the *San Francisco Chronicle* in November 1992. "There isn't any regulation of the watershed, and we think there should be."

Several Navarro species are endangered now, according to the federal government, primarily coho and Steelhead salmon, but there are three listed frog species as well.³ Each has been decimated by the legal and illegal water diversions in summer and winter in the Navarro watershed, Salmon are a "keystone species," meaning their decline triggers cascading declines of many of the ecosystem's major food chains (for 137 known species).

The Navarro's Public Trust

Owners of land along streams in California also possess water rights to flows on or passing through their land under what is called a "riparian appropriation." To establish who is first in line for riparian water and how to divvie it up, DWR requires land owners wishing to divert water to file a Statement of Diversion. In some cases, diversions can be regulated through a license or permit.

Once an owner perfects the riparian right to divert water, actual diversions seldom go immediately from the stream to the spigot or crop; they must be stored. Landowners build reservoirs and ponds to hold the water for later use. These structures might be built on or off a stream channel, and are subject to regulation by DWR.

But owning riparian water rights does not confer the right

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to take or pollute all the water, or otherwise harm public trust resources downstream.

Yet DWR never considered public trust resources (fisheries, riparian access, for example) when it granted licenses and permits in the Navarro watershed, even though Anderson Creek was listed way back in 1967 as a fully appropriated stream from August 1 to September 30. DWR ignored the cumulative impact on salmonids of approving all the new water diversions on Navarro tributaries. And the illegal ones didn't seem to be on the agency's radar.

Moreover, until 1998 DWR did not even know how many licenses or permits it had granted in the Navarro watershed.

Forcing DWR to determine the exact diversion situation was the first step of the Navarro Coalition.

On August 26, 1994, Stephan Volker, attorney for the Navarro Coalition filed a formal "Complaint and Petition" with the SWRCB. Under the California Water Code and CEQA, the Coalition requested that SWRCB:

- identify and take enforcement action against illegal diverters from the Navarro River and its tributaries;
- declare the Navarro River and its tributaries over-appropriated;

Until 1998 DWR did not even know how many licenses or permits it had granted in the Navarro watershed.

- assure adequate stream flows bypassing storage to benefit fish; and
- adjudication of the instream water flows necessary to protect public trust resources (in which a court of law or SWRCB decides who gets how much water).

Navarro Sold Out

The California Water Code enables California citizens to file formal protests on applications for water diversions or storage. Friends of Navarro (and others) began "exhausting administrative remedies" under the Water Code in order to have later standing to sue (or as was later revealed, to create the illusion one might sue).⁴

The first water permit applicants, Scharffenberger, Hahn, Bennett/Cahn, Oswald and Savoy — "the Navarro 5" — were all vineyard owners. In the early 90s, there were a handful of similar water applications in line behind the

Navarro 5.

Separate from the Navarro groups, Hillary Adams and North Greenwood Community Association (located near the Navarro coastal estuary) also filed formal protests with DWR.

The California Department of Fish and Game (DFG) also complained to DWR over dewatering and illegal diversions and further protested the Navarro 5 applications.

Meanwhile, DWR was poised to approve the Navarro 5 water diversion/storage applications (existing illegal and

Volker advised the Navarro Coalition in late 1994: "Now is the time to sue."

proposed new), with almost zero environmental review and no review of either licensed or non-permitted diversions.⁵

Then-California water rights czar, DWR Chief Ed Anton responded in late 1994 to local protests and one from DFG by proposing "special" conditions for the Navarro 5 and all other water diversion/storage applications in the Navarro watershed. DWR also contacted Navarro water users asking that diverters voluntarily "take all reasonable steps to maintain stream flow during the course of any diversion in order to protect fishery resources."

Anton also pledged to "hold informal meetings in the area," stating, "It has been our experience that most effective solutions are produced through voluntary measures at the local level."

Attorney Volker (and dissident DWR staff) warned Friends of Navarro that SWRCB would continue to conduct "business as usual" (that is, illegal diversions would continue and water permits would be granted with no environmental review).

Volker advised the Navarro Coalition, also in late 1994: "Now is the time to sue."

But suddenly the Navarro Coalition was sold out by Friends of Navarro — through an old developer trick — due either to ignorance or deliberate intent, or perhaps both, but sold out just the same. It is a very old developer scheme: propose a much larger project than can be legitimately approved, then scale it down to appear contrite (while gaining media sympathy) for what was intended in the first place. The trick worked effectively in provincial Anderson Valley.

The first of the Navarro 5, the 1990 Scharffenberger Cellars diversion/storage applications proposed three

offstream reservoirs to store 180 acre-feet (an acre-foot is about 326,000 gallons) for irrigation and frost protection for 200 acres of wine grapes located 3/4 of a mile north of Philo. Water for this application would come from an unnamed stream feeding the Navarro.

Scharffenberger also proposed diverting 3 cfs (cubic feet per second) from Indian Creek for frost protection of his grapes.

(To give 3 cfs some context, the City of Fort Bragg pumps 2.7 cfs — up to 1.7 million gallons per day — from the Noyo River through a 10-inch pipe to supply water needs 6,000 residents and businesses.)

Scharffenberger withdrew his Indian Creek application for 3 cfs in 1992, when Connie Best of the Anderson Valley Land Trust negotiated from him a donation of water and development rights along a 3,000-foot stretch of Indian Creek to her Anderson Valley Land Trust. This grand compromise was paraded around the Anderson Valley to portray Scharffenberger (and other vineyards owners inclined to follow in his footsteps) as a concerned "steward of resources."

But the 3 cfs application was bogus. DFG had already protested a 0.33 cfs diversion from Indian Creek in 1965, because it is an important Steelhead spawning and nursery stream. Had Scharffenberger's 3 cfs riparian diversion

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proceeded with DWR, DFG and State Parks would oppose it, resulting in denial by DWR, or likely defeat in court.

In Anton's "special conditions" in late 1994, no water could be drafted from the unnamed tributary if the flow in the Navarro River measured less than 200 cfs; that the diversion would be limited to 2 cfs between November 15 and April 15; and a record of the diversion amount after it occurred would be filed with DWR.

Scharffenberger cut out one reservoir, dropping his storage capacity by half to 90 ac-ft. (He has since applied for more reservoirs and diversions in 1999, however.)

Based on DWR's flimsy environmental review, Friends of the Navarro (Paget, Hall and Dutra) concluded refill of reservoirs only in the winter was an environmentally sound "solution" to what they narrowly saw as the only problem in the Navarro watershed — diversions during the summer and fall low flows, ignoring the fact that salmonids normally spawn upstream in the winter time.

Still, Diane Paget went to all those who had filed protests on the Scharffenberger application and convinced most to withdraw them.

Members of the Navarro Coalition who clearly understood the need for winter flows for salmonids spawning — but had not themselves protested to DWR — were not only

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not consulted by Friends of Navarro, they felt hoodwinked. These groups lent their names and reputations to Friends of Navarro to give the smaller, mostly unknown group some statewide clout before DWR, some support in their community, and help in obtaining a nationally-recognized powerful environmental attorney's services.

In return, the Coalition expected that Friends of Navarro would be, at the very least, moderately responsible and forthright. They were not. Nor did they pay attorney Volker for his work.

DWR approved the Scharffenberger application in early 1995. This was a serious turning point. Friends of Navarro became hostile and secretive. Navarro Coalition members wondered: How could any environmentalist buy Anton's winter water special conditions? Without scientific review, how could one know that drafting 2 cfs between November and April did not place all winter water in the unnamed tributary into Scharffenberger's reservoirs? What about Steelhead spawning downstream?

Opening for Vineyards

And when Anton saw how easily the Friends of Navarro "opposition" collapsed on the Scharffenberger permit, and with stalking horse Connie Best portraying vineyard owners as reasonable compromisers, he thwarted the Navarro

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Coalition's 1994 complaint by further delaying the Water Board's answering it.

Vineyard owners saw their opening to cut more oak trees, plant more grapes, and install more illegal storage ponds. Withdrawal of Scharffenberger protests in the Friends of Navarro sell-out campaign, and approval of Scharffenberger's application guaranteed more water could be claimed for grapes by the time after-the-fact water applications came up for DWR review.

How many other reservoirs there were, DWR still did not know. But Dr. Adams re-doubled her efforts and Trout Unlimited's Stan Griffin started filing protests in 1995 on

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Russian River tributaries to the south where vineyard development ran rampant in the 1990s.

Meanwhile, Anton's "special conditions" and the vineyard owners took some discrediting hits from these protests and needed support.

They got it from the Navarro Watershed Restoration Plan, which was drafted by the Navarro Watershed Advisory Group. One of the group's key members was Connie Best of the Anderson Valley Land Trust.^{6,7}

In the Plan's "Statement Supporting Winter Diversions" were Anton's proposed "special conditions" almost verbatim: the Watershed Advisory Group stated its support for "the efforts of [SWRCB] to facilitate permitting of ponds that meet certain requirements.... Location of ponds off-channel or on ephemeral channels where there is no impact to existing fisheries.... Water will be diverted and stored only between November 15 and April 15 and then only when discharge at the USGS Navarro River gauge is above 200 cubic feet per second."

Notice "existing" fisheries in the statement, not "historic." Meaning: if there aren't fish present now, or the fishery was completely destroyed by capturing all the water in an illegal reservoir, the vineyard owner is home free. Apparently, Connie Best's Restoration Plan never intends for the watershed's fishery restoration to occur.

NEXT ISSUE: Part 2, Marshalling science to save Navarro fisheries.

NOTES

1. This article is revised from Roanne Withers' "Last Chance for the Navarro," Anderson Valley Advertiser, July 19, 2000, pp. 1, 12.

2. In the revolutionary 1983 Mono Lake decision (National Audubon Society v. Superior Court (1983) 33 Cal. 3d419) the Supreme Court ruled that public trust resources — fisheries, wildlife, and recreation — must be considered by DWR when granting appropriation permits for water from rivers and their water with fish and wildlife.

3. There are two federal Endangered Species Act (ESA)-listed frogs — the California Red-Legged Frog (*Rana aurora draytonii*), threatened (and a California Department of Fish and Game [DFG] species of concern); and the Foothill Yellow-Legged Frog (*Rana boylei*), species of concern (and also a DFG species of concern).

4. This larger group is called the "Navarro Coalition" here to make the important distinction between its activities and subsequent actions of some members of the local Anderson Valley environmental group, Friends of Navarro. The Navarro Coalition was composed of the Sierra Club, PCFFA, California Trout, Trout Unlimited, United Anglers, Friends of the River, and Mendocino Environmental Center.

5. Anton's actions catalyzed a mini-mutiny within DWR staff. He was publically charged through CalPEER (California Public Employees for Environmental Responsibility) that a memorandum he wrote ordered DWR staff to "ignore the California Environmental Quality Act (CEQA) and avoid written documentation of legal concerns," or else. Anton survived the charge until Gov. Davis took office, then was reassigned to a regional water quality control board. None the less, Anton's horrible legacy lives on at DWR.

6. Grants were obtained by the Navarro River Watershed Advisory Group (which included Connie Best among its active members) from several governmental funding sources, including SWRCB. Several rounds of contentious meetings occurred on the watershed's environmental impact issues aside from water diversions.

7. There were many complaints at the time about the Plan's purview, its management, and methodology by its Advisory Group members, including what I can only characterize as bizarre limitations placed on some of the science it obtained (lack of peer review, for example). Most in the Advisory Group formally withdrew or simply quit attending meetings.