

**STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS**

DIVISION DECISION 2000-01

**EDWARD T. BENNETT AND DEBORAH S. CAHN
NAVARRO RIVER WATERSHED
MENDOCINO COUNTY**

APPLICATION 29711

JANUARY 28, 2000

DIVISION OF WATER RIGHTS

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NAVARRO RIVER WATERSHED

1.0 INTRODUCTION AND OVERVIEW

The State Water Resources Control Board (SWRCB), Division of Water Rights (Division) has concluded that a water right permit should be issued to Mr. Edward T. Bennett and Ms. Deborah S. Cahn (Bennett/Cahn) that would authorize storage of 30 acre-feet per annum (afa) in an on-stream reservoir for irrigation and frost protection of 33 acres of vineyards and fire protection and recreation at the reservoir site. The reservoir would be located on an unnamed intermittent stream, tributary to the Navarro River within Mendocino County.

On October 15, 1997, the Division conducted a field investigation on this application (A29711 of Bennett/Cahn) and four other applications within the Navarro River watershed. The Division prepared and distributed a draft Division Decision, dated December 15, 1998, on the findings of the field investigation. The draft Division Decision included a detailed discussion of the Division's evaluation of the five pending applications. Except as otherwise indicated, the information, analyses, and findings contained in the draft Division Decision are incorporated herein by reference. This final Division Decision pertains only to A29711. The Division has or will prepare separate final documents pertaining to the four other pending applications that were the subject of the field investigation.

In addition, under the provisions of the California Environmental Quality Act (CEQA) the Division prepared and circulated an Initial Study and proposed mitigated Negative Declaration for A29711 on November 24, 1999. The Initial Study assessed the potential environmental consequences of the proposed project, including but not limited to the issues raised by the protestants.

Based on a review of all available information, the Division has concluded that the proposed diversion and use of water under A29711 is reasonable, beneficial, and will provide economic benefit. The Division has also concluded that, with consideration given to the flow needed to protect downstream prior rights and the flow needed to protect instream resources in the intermittent stream and the Navarro River watershed, adequate water is available for appropriation under A29711.

The Division intends to issue a water right permit that will include terms designed to protect Coho and other public trust resources within the Navarro River watershed. The terms will contain the following restrictions and/or requirements:

Season: Diversion will be limited to the season of December 15 through March 31.

Bypass: The permittee will be required to bypass 0.1 cubic feet per second (cfs) or the entire flow coming into the reservoir, whichever is less, during the authorized season of diversion.

Compliance Plan: The permittee will be required to submit a plan, acceptable to the Chief of the Division of Water Rights, that will ensure compliance with these terms.

Riparian Rights: The permit will restrict the permittee's diversions under claim of riparian right.

Land Management Plan: The permittee will be required to submit a plan, acceptable to the Chief of the Division of Water Rights, that will describe the specific measures to be taken to minimize erosion and sedimentation, protect the riparian corridor, and stabilize streambanks.

2.0 BACKGROUND

On April 4, 1990, Bennett/Cahn submitted an application for a water right permit requesting storage of a total of 60 afa, with a requested season of diversion from October 15 through April 30. The purposes of use were irrigation and frost protection of 33 acres of proposed vineyards (29 of which subsequently have been planted) and fire protection and recreation at the reservoir site. The amount of water was reduced to 30 afa upon a request from the applicant. Figure 1 shows the location of the water right application within the Navarro River watershed. Figure 2 is a topographic map that shows the location of the reservoir on the intermittent stream, the tributary drainage area and other features in the area.

The Division distributed a notice of this application to interested parties by Division Notice dated May 13, 1994, in accordance with sections 1300-1324 of the Water Code. Protests against this application were submitted by five parties: The North Greenwood Community Association, The Friends of the Navarro River Watershed, Mr. J. B. Neilands, Salmon Unlimited, and California Department of Fish and Game (DFG). The protests contended that approval of the application would have significant adverse environmental impacts to fishery and other public trust resources. The Division accepted all protests against this application.

During 1995 and 1996, Division staff held a series of meetings with the applicants, protestants, and staff from DFG in an effort to facilitate a resolution of the protestants' concerns. That effort

was not successful however, and the Division conducted the October 15, 1997 field investigation on the five applications in accordance with section 1345 of the Water Code. During the investigation, the applicants, protestants and other interested parties were allowed to offer comments and recommendations relating to the proposed water right applications. Subsequent to the field investigation, several parties submitted written comments that provided additional information relating to the applications or issues raised in the protests.

Division staff conducted a review of all available information and prepared the December 15, 1998 draft Division Decision. The draft Division Decision provided a detailed description of the applications, the protests, and the field investigation and also provided analyses of water

WATERSHED MAP (Not available at this time)

TOPOGRAPHIC MAP (Not available at this time)

availability, fishery resources, and the reasonableness of the proposed water uses. The draft Division Decision also described the rationale for the terms and conditions that are designed to protect Coho, Steelhead and other public trust resources. By letter dated January 8, 1999, the draft Division Decision was distributed to interested parties for review and comment. Several parties submitted written comments in response to the draft Division Decision. The Division's letter also directed the applicants to respond whether they agreed with the proposed permit terms. Ms Janet Goldsmith, the attorney representing Bennett/Cahn, and Mr. Nicholas Bonsignore, the engineering consultant representing Bennett/Cahn, agreed to the permit terms, as described in this final Division Decision, via correspondences dated March 23, 1999, March 24, 1999, July 7, 1999, and November 15, 1999.

3.0 HYDROLOGY

As described in the draft Division Decision, the Navarro River has an average annual runoff of 370,000 afa, with substantial variations in the yearly, seasonal and daily flows. Detailed descriptions of the methodology used by the Division to analyze the hydrology of and water availability within the Navarro River watershed can be found in the draft Division Decision. The Division further evaluated the impacts of Bennett/Cahn's diversion to water availability and peak flows at the project site, as well as at the location where the unnamed stream crosses Highway 128 and at the confluence of the unnamed stream and the Navarro River. A summary of the analyses is presented below while a detailed description of the methodology can be found in a

Division memo dated November 11, 1999 (and revised on January 19, 2000) contained in the Division's file for this application.

3.1 Water Availability As described in the draft Division Decision, the Division estimated that the watershed area contributing to the runoff at Bennett/Cahn's diversion point was approximately 35 acres. In an August 18, 1999 response to the draft Division Decision, the applicant's agent, Nicholas Bonsignore, disputed the 35-acre calculation for the watershed area, contending that the actual figure was approximately 46 acres. The exact determination of the watershed area is inconclusive due to the scale of the contour lines used in the topographic map. Division staff elected to preserve the 35-acre figure in the water availability calculations because it is the more conservative of the two figures.

The draft Division Decision included calculations of the annual runoff (approximately 60 afa) at Bennett/Cahn's diversion point using two different methods (i.e. rational runoff method and proration of areas). The draft Division Decision called for a bypass of 0.05 cfs past the diversion point during the season of diversion (and a total bypass outside the season of diversion) with a maximum rate of diversion to storage of 2 cfs. Upon further evaluation of the flashy nature of the intermittent stream and the contribution of runoff from the watershed area above the project site on peak flows below Highway 128 (see paragraph 3.2.2 below), the Division concluded that increasing the bypass to 0.1 cfs and eliminating the maximum rate of diversion to storage would ensure that the riparian corridor remains watered below the point of diversion and would result in less than significant impacts to downstream aquatic resources (see paragraph 4.0 below). Using a bypass requirement of 0.1 cfs, a conservative value for the average amount of runoff available during the season of diversion for appropriation for Bennett/Cahn's project is approximately 27 afa. Adequate runoff would be available to fill Bennett/Cahn's reservoir in wet and average water years; however, sufficient water would not be available for Bennett/Cahn to fill the reservoir in below normal and dry water years.

3.2 Peak Flow Analysis Peak flows are particularly important for maintaining acceptable geomorphologic conditions in the streambed and for providing sufficient flows in the Navarro River in order to breach the sand bar at the mouth of the river in the fall to allow for the upstream migration of anadromous fish. Accordingly, the Division evaluated the potential impact of the project on peak flows in both the Navarro River and the intermittent stream.

3.2.1 Flows Needed to Breach the Sand Bar As described in the draft Division Decision, the Division reviewed the stream flow data for the 46-year period of record as recorded by the U.S. Geological Survey (USGS) gage located on the Navarro River. During this time, the Navarro River has had peak flows of approximately 40,000 cfs on three occasions (1 in 15 years) and peak flows of approximately 10,000 cfs on 44 occasions, or an average of once in each year. Flows in excess of 5,000 cfs occur before December 15 in most water years. Flow in the intermittent stream at the project site reaches approximately 15 cfs once every 10 years. Consequently, Bennett/Cahn's proposed diversion would have less than significant impact on the peak flows needed to breach the sand bar.

3.2.2 Peak Flows in the Intermittent Stream The Division also evaluated the potential impact on peak flows in the intermittent stream that could result from Bennett/Cahn's diversion of water. Peak flows that would be expected to occur every 2, 5, 10, 25, 50 and 100 years were calculated, both at the project site and at the point where the intermittent stream crosses Highway 128, using the Regional Flood–Frequency equations developed by USGS and used by the California Department of Transportation. The Highway 128 crossing, located just downstream from the confluence of the west and east forks of the intermittent stream (see figure 2), was chosen to assess impacts to flows which may be important to fish migration on the east fork. The calculations, which are presented in Table 1 below, show that the peak flows at the project site contribute less than 7 percent of the peak flows occurring at the location where the intermittent stream crosses Highway 128.

Table 1

Peak Flows in the Intermittent Stream

	Trib	Peak Flows (cfs)						
Location	area	Rational	Regional Regression Method					
	(acre)	Method	Q₂	Q₅	Q₁₀	Q₂₅	Q₅₀	Q₁₀₀
Bennett/Cahn POD	35	17	7	11	15	20	24	27
At Highway 128	775	383	112	173	229	292	352	394
Percent impact		4.5%	6.2%	6.3%	6.5%	6.8%	6.8%	6.8%

The Division also evaluated the potential impact of Bennett/Cahn's diversion for typical wet, average and dry water years. Graphical representations of the impact on the peak flows at Highway 128 were made by superimposing the expected diversion to Bennett/Cahn's reservoir onto hydrographs of the intermittent stream at Highway 128. Reductions in flow to the peaks are shown as the dark shaded areas of Figures 3 and 4. It should be noted that in wet years, Bennett/Cahn's reservoir would fill early in the year and all flow that occurs after the reservoir is full would simply flow through the reservoir.

Based on these analyses, the Division concludes that diversion of water by Bennett/Cahn, as authorized by this permit, would have no significant impact to peak flows in the Navarro River and the intermittent stream, in areas where anadromous fish are affected.

4.0 ENVIRONMENTAL CONSIDERATIONS

CEQA requires that a public agency evaluate the environmental effects of proposed projects and identify ways that environmental damage can be avoided or significantly reduced. CEQA provides that a Negative Declaration may be adopted when an Initial Study indicates that there are potential significant effects on the environment if the project plans have been revised to avoid or mitigate the adverse effects to a less-than-significant level (Public Resources Code section 21080, subd. (c) (2)). The applicant agreed to mitigation, which should avoid or reduce potential impacts to a less-than-significant level.

On June 22, 1995, Division staff prepared and circulated an Initial Study and proposed mitigated Negative Declaration. This Initial Study identified potential impacts to fish and wildlife resources that are dependent on streamflow, sediment transport, and oak woodland resources. Division staff developed mitigation conditions that would reduce potential impacts to less than significant levels. This mitigation included a bypass condition that would maintain a minimum streamflow, a maximum rate of diversion to storage, a restriction in the diversion season, and a requirement to replant oak trees lost due to project development.

On December 15, 1998, Division staff prepared and circulated a draft Division Decision regarding five water right applications on the Navarro River (see paragraph 2.0). The draft Division Decision evaluated, in part, the hydrology and streamflow, geomorphology, and fishery resources of the Navarro River, and the Initial Study prepared in 1995. The draft Division Decision developed terms and conditions that should reduce potential environmental effects to less than significant levels.

The Division received comments from the applicants' representative, which sought relief from the diversion requirements proposed in the draft Division Decision. The comments indicated that the maximum rate of diversion limitation and the requirement to bypass peak flows would be an unnecessary burden on the applicant. Hence, Division staff prepared a new Initial Study that evaluated the revision in diversion methods and other aspects of the project.

FIGURES 3 AND 4 (Not available at this time)

On November 24, 1999, Division staff prepared and circulated a new Initial Study and mitigated Negative Declaration. The new Initial Study addressed streamflow, aquatic resources, soil and sedimentation, oak woodland resources, and archeological resources. The new Initial Study concluded that the applicant would have to bypass at least 0.1 cfs during the diversion season in order to reduce impacts to aquatic resources to less than significant levels. This flow was selected after evaluating the effect of the diversion, in combination with the bypass, on downstream flows. Further, the new Initial Study recommended that the applicant be required to enter into a stream or lake alteration agreement with the Department of Fish and Game.

Additionally, the Initial Study concluded that the Division should require a standard term to protect any undiscovered archeological materials.

The draft Division Decision and the November 24, 1999 Initial Study provide a detailed description of the hydrology, fishery and other public trust resources of the Navarro River. These documents also provide an analysis of the proposed permit terms that will be required to mitigate potential environmental impacts. These documents are incorporated herein by reference.

5.0 ENVIRONMENTAL CLEARANCE

As the lead agency pursuant to CEQA, Division staff prepared an Initial Study and proposed mitigated Negative Declaration for the proposed project under Application 29711. On November 24, 1999, the SWRCB staff circulated the Initial Study and proposed mitigated Negative Declaration pursuant to CEQA for public review and comment. Comments were received from the Department of Water Resources, the DFG, the North Greenwood Community Association, Dr. Hillary Adams, and the applicants' agent.

The CEQA requires the lead agency to consider all comments submitted in response to circulation of a proposed mitigated Negative Declaration prior to adopting the mitigated Negative Declaration. The Division considered the comments and determined that the proposed mitigation contained in the Initial Study is adequate to reduce potential environmental effects to less than significant levels.

Based on the whole record, there is no substantial evidence that the proposed project as mitigated will have a significant effect on the environment. The Division intends to adopt the proposed mitigated Negative Declaration prior to issuing a permit pursuant to this decision. At the time the mitigated Negative Declaration is adopted, the Division will file a notice of determination in accordance with section 15075 of the CEQA guidelines.

6.0 SUMMARY AND CONCLUSIONS

The proposed diversion and use of water is reasonable, beneficial, will provide economic benefit, and is in the public interest. Taking into consideration the amount of water needed to satisfy downstream water users with prior rights, and the instream flows needed to protect Coho and other public trust resources within the Navarro River watershed, the Division concludes that water is available for appropriation for A29711.

The following permit terms are substantially the same as those set forth in the draft Division Decision, with some minor changes. As discussed in paragraph 3.1, the bypass amount has been increased from 0.05 cfs to 0.1 cfs and the maximum rate of diversion has been eliminated. The term concerning the exercise of riparian rights has been revised to clarify that the Division Chief is authorized to approve or reject a proposal by the permittee to use water under basis of riparian

right on the permitted place of use, provided that the permittee submits reliable evidence of riparian use unrelated to the appropriation authorized by the permit.

A term that would have allowed the SWRCB access to the stream for purposes of conducting studies and implementing habitat improvements has been deleted because the Division has concluded that the term was unnecessarily burdensome. Other permit terms, including the bypass term, and the term limiting the season of diversion, coupled with the SWRCB's ability to enforce compliance with those terms, will be adequate to protect fishery resources and the riparian corridor.

ORDER

IT IS HEREBY ORDERED that Application 29711 is approved and that a permit be issued subject to the terms established in this order. The permit shall contain Standard Permit Terms 1, 2, 3, 4, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 43, 62, 114, and the following additional terms:

1. *The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 30 cfs to be collected to storage from December 15 of each year to March 31 of the succeeding year (permit term 5C).*
2. *During the authorized season of diversion, permittee shall bypass 0.1 cfs in the unnamed stream as measured at the point of diversion, or the actual flow, whichever is less.*
3. *Permittee shall not use more water under basis of riparian right on the place of use authorized by this permit than permittee likely would have used absent the appropriation authorized by this permit. Consistent with this term, permittee may not divert any water for use on the place of use authorized by this permit under basis of riparian right. With the Chief of the Division's approval, this limitation may be modified, and permittee may use water under basis of riparian right on the authorized place of use, provided that permittee submits reliable evidence to the Chief of the Division quantifying the amount of water that permittee likely would have used under basis of riparian right absent the appropriation authorized by this permit. The Chief of the Division is hereby authorized to approve or reject any proposal by permittee to use water under basis of riparian right on the place of use authorized by this permit.*
4. *This permit does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right, the permittee shall obtain authorization for an incidental take prior to construction or operation of the project. Permittee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this permit.*
5. *No diversion of water is authorized under this permit until the permittee has submitted a compliance plan that is acceptable to the Chief of the Division of Water Rights that describes the measures that will be taken to demonstrate compliance with the terms specified in this permit. The plan shall include a time schedule for implementation of the elements included in the plan. Permittee is not authorized to divert water under this permit until all measures are in place and are operating in accordance with the approved plan.*
6. *No diversion of water is authorized under this permit until the permittee has submitted a land management plan that is acceptable to the Chief of the Division of Water Rights. The plan shall describe the specific measures to be taken to minimize erosion and sedimentation, protect the riparian corridor, and stabilize*

streambanks. The permittee shall refer to measures described in the Navarro Watershed Restoration Plan dated June 1998. The plan shall include a time schedule for implementation of the elements included in the plan.

- 7. Should any buried archeological materials be uncovered during project activities, such activities shall cease within 100 feet of the find. Prehistoric archeological indicators include: obsidian and chert flakes and chipped stone tools; bedrock outcrops and boulders with mortar cups; and locally darkened midden soils containing some of the previously listed items plus fragments of bone and fire affected stones. Historic period site indicators generally include: fragments of glass, ceramic and metal objects; milled and split lumber; old trails; and structure and feature remains such as building foundations and dumps. The Chief of the Division of Water Rights shall be notified of the discovery and a professional archeologist shall be retained by the applicant to evaluate the find and recommend appropriate mitigation. Project related activities in the area of the find shall resume only after the completion of the recommended mitigation, as approved by the Chief of the Division of Water Rights.*
- 8. In accordance with Section 1601, 1603, and/or Section 6100 of the Fish and Game Code, no work shall be started on the diversion works and no water shall be diverted under this permit until permittee has entered into a stream or lake alteration agreement with the California Department of Fish and Game and/or the Department has determined that measures to protect fishlife have been incorporated into the plans for construction of such diversion works. Construction, operation, and maintenance costs of any required facility are the responsibility of the permittee.*
- 9. Permittee shall replant three oak trees for every one oak tree removed at the project site. The replanting shall consist of trees native to Mendocino County and can be either acorn planting or container seedlings. Permittee shall maintain replacement trees for a period of five years and insure a survival rate of 75 percent at the end of five years.*

Harry M. Schueller, Chief

Division of Water Rights

State Water Resources Control Board