

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2000-03

In the Matter of
Administrative Civil Liability Complaint No. 262.5-16
PHILLIP W. WASSON AND GENEVA WASSON

SOURCES: An Unnamed Stream tributary to Con Creek thence Anderson Creek
thence Navarro River

COUNTY: Mendocino

ORDER IMPOSING ADMINISTRATIVE CIVIL LIABILITY

1.0 INTRODUCTION

The Chief of the Division of Water Rights (Division) of the State Water Resources Control Board (SWRCB) issued Administrative Civil Liability (ACL) Complaint No. 262.5-16 on December 14, 1999, pursuant to Water Code section 1055, subdivision (a), against Mr. Phillip W. Wasson and Mrs. Geneva Wasson (Wassons) in the amount of \$2,000. The complaint was issued for the illegal diversion of water to storage at a reservoir located on their property (Mendocino County Assessor's Parcel Number (APN) 046-170-60). By letter dated December 16, 1999, Mr. Wasson expressed his intention to appeal the proposed civil liability specified in the ACL complaint. The SWRCB conducted a hearing on the matter in accordance with Water Code section 1055 on March 1, 2000. Staff of the SWRCB's Division of Water Rights (Division) presented testimony and other evidence supporting adoption of the proposed order. Mr. Wasson presented testimony and argument opposing imposition of civil liability. The SWRCB's findings are set forth below.

2.0 BACKGROUND

The unauthorized diversion or use of water subject to appropriation under division 2 of the Water Code (commencing with section 1000) is a trespass for which civil liability may be imposed in an amount not to exceed \$500 for each day in which the trespass occurs. (Wat. Code, § 1052.) Under division 2, a permit is required to appropriate water flowing in a natural channel, unless the water is diverted under basis of riparian or pre-1914 appropriative right or other valid right. (Wat. Code, § 1201.) Moreover, water may not be seasonally stored under basis of riparian right. (*People v. Shirokow* (1980) 26 Cal.3d 301, 307, fn. 7 [162 Cal. Rptr. 30, 605 P.2d 859].) Water Code section 1825 also provides the following general enforcement policy for the SWRCB:

“It is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of existing permits and licenses to appropriate water and to prevent the unlawful diversion of water.” (Emphasis added.)

2.1 WATERSHED INVESTIGATION PROGRAM

In 1998, the Division initiated a pilot watershed investigation program in three high resource-value watersheds to determine the extent to which illegal reservoirs are a problem. The watersheds selected for the investigation were:

- (1) Maacama Creek in Sonoma County,
 - (2) Navarro River in Mendocino County, and (3) Pescadero Creek in San Mateo County.
- The program focused on reservoirs which are shown on United States Geological Survey maps or on available aerial photographs and for which the Division has no record of an existing water right. The Division sent letters to the owner(s) of each identified reservoir and asked the owner to identify the basis of the water right for the reservoir, explain why the reservoir is not subject to the SWRCB's permitting authority, file a new water right application, or render the reservoir incapable of storing water.

Within the Navarro River watershed, Division staff identified 130 reservoirs that had no known water rights. The owners of 41 of these reservoirs filed water right applications for their reservoirs without the necessity of a field inspection; 6 reservoir sites are pending inspections; and 83 reservoir sites were inspected by Division staff to determine if a water right permits were required. Of the 83 sites that have been inspected, Division staff determined that water right permits were not required for 36 of the facilities; 2 reservoirs have been removed; and new applications were filed for 44 of the inspected facilities without further Division action. To date, within all three watersheds only Mr. Wasson has required Division staff to acquire an inspection warrant. The Wassons are also one of only five parties identified in the watershed investigation program to whom an ACL complaint has been issued to date.

2.2 CORRESPONDENCE AND FIELD INSPECTION OF MR. AND MRS. WASSON'S RESERVOIR

As part of the unauthorized diversion investigation within the Navarro River Watershed in Mendocino County, the Division identified a reservoir on the Wassons' property. The reservoir is depicted on a 1991 United States Geological Survey topographic map, Philo Quadrangle. On March 6, 1998, the Division initially contacted the Wassons by letter regarding the reservoir on their property (Staff Exhibit No. 1). No response was received. The Division then sent a letter by certified mail, dated June 23, 1998, to the Wassons, advising that the reservoir located on their property was not authorized by any water right known to the Division (Staff Exhibit No. 2). The letter requested them either to identify an existing water right, to file an application to appropriate water by permit for storage, or to render the reservoir incapable of storing water. However, the letter was returned to the Division by return mail and the envelope was marked "Unclaimed." Mr. Wasson provided evidence that confirms that he signed the certification card for receipt of the June 23, 1998 letter, but before leaving the Post Office, he returned the letter unopened to the Postal Service for return to the Division (Wasson Exhibit No. 2).

Division staff attempted to contact Mr. Wasson by telephone on March 8, 1999, to arrange an inspection of the reservoir. During this telephone conversation, Mr. Wasson

indicated that he would not agree to the inspection. On March 10, 1999, Division staff again spoke by telephone with Mr. Wasson in an attempt to arrange an inspection of the reservoir and of the direct diversions authorized under water right licenses held by the Wassons. Mr. Wasson stated he would not allow Division staff access to his property without a court order (Staff Exhibit Nos. 4 and 5).

The SWRCB subsequently obtained an inspection warrant from the Mendocino County Superior Court which authorized SWRCB staff to conduct an inspection of the property on July 27, 1999 (Staff Exhibit No. 7). Two engineers from the Division conducted the inspection, accompanied by Mr. Wasson and a Mendocino County Deputy Sheriff. The inspection found an existing reservoir with an approximate maximum capacity of 36 acre-feet, but at the time of the inspection it was about half full (18 acre-feet). An unnamed stream channel with bed and banks was found leading into the reservoir (Staff Exhibit No. 11, 1999 Reservoir Investigation of Navarro River Watershed, page 2 and Figures 2, 3, and 4 of said exhibit). Based on photographic evidence (Attachments 3, 4 and 5 of Staff Exhibit No. 6), the Division also concluded that water had been collected to storage in the reservoir during the 1998-1999 run-off season. The Division sent a letter to Mr. Wasson by certified mail, dated August 17, 1999, advising him of the findings of the July 27, 1999, field investigation (Staff Exhibit No. 14). This letter further advised him that unless an application for storage in the reservoir, or a proposed schedule to remove the reservoir, was received by the SWRCB within 45 days of the date he received the letter, enforcement action might be taken without further notice.

The Division received a letter from Mr. Wasson dated August 26, 1999, in response to the Division's August 17, 1999 letter (Staff Exhibit No. 16). In this letter, Mr. Wasson claimed that the reservoir was filled by a spring but otherwise failed to provide any

information or evidence that indicates that a permit is not required to divert water to storage in the reservoir. The Division sent a letter to the Wassons, dated September 16, 1999, that responded to Mr. Wasson's August 26, 1999, letter and stated that an application for storage or a plan to remove the reservoir was still required by October 1, 1999 (Staff Exhibit No. 17). The Division did not receive a reply from Mr. or Mrs. Wasson. On December 14, 1999, ACL Complaint No. 262.5-16 was issued against Mr. and Mrs. Wasson (Staff Exhibit No. 18).

3.0 THE MARCH 1, 2000 HEARING

On March 1, 2000, the SWRCB conducted a hearing to receive testimony and exhibits from Division staff and from Mr. Wasson. Division staff introduced Staff Exhibit Nos. 1 through 20 related to the project. Mr. Wasson submitted written testimony and his exhibits (Wassons Exhibits Nos. 1 through 7) during the course of the hearing. Mr. Wasson's exhibits were received after the deadline for submittal of written comments outlined in the hearing notice. Mr. Wasson testified that a spring located above Peachland Road and on a separate assessor parcel of land is the source of water for the water stored in his reservoir (Map, Wasson Exhibit No. 5). Mr. Wasson also testified that the reservoir does not spill off his property, but that he releases water from the reservoir into Con Creek through the reservoir's outlet pipe to keep the reservoir from spilling. Mr. Wasson stated that the reservoir is used for fire protection and wildlife enhancement purposes. He stated that he does not use the water stored in his reservoir for irrigation purposes. Ms. Jan Wasson-Smith testified that heavy storm events were the cause for the severe erosion conditions of the channel above the reservoir (Figure 4 of Staff Exhibit No. 11). Staff summarized the findings in the field inspection of Mr. Wasson's reservoir. Staff testified that the reservoir collects water from an unnamed stream that historically flowed into Con Creek before Wasson's construction of the reservoir. Staff testified that the unnamed stream now flows directly into the reservoir. Field observations by Division staff revealed a suspended pipe, downslope of the reservoir, that crossed Con Creek then went underground at the opposite bank of Con Creek (Figure 8 in Staff Exhibit No. 11). Beyond the point where the pipe crossed Con Creek, a pipe was seen emerging from the ground towards a vineyard (Figure 10 in Staff Exhibit No. 11).

However, Mr. Wasson testified that the pipe crossing Con Creek observed during the field inspection discharges water from the reservoir into the gravels in the far bank of Con Creek.

4.0 SWRCB CONCLUSIONS

The Wassons' reservoir located within the NE 1/4 of the NE 1/4 of Section 34, T14N, R14W, MDB&M on Mendocino County APN 046-170-060 is seasonally storing water from an unnamed stream subject to the permitting authority of the SWRCB. While the spring identified by Mr. Wasson as the source of water for the reservoir may contribute flow to the reservoir, it is not the sole source of supply, and it is on a separate parcel from the parcel which contains the reservoir. A 27-acre watershed above the reservoir also can contribute from 35 to 50 acre-feet per year to the reservoir under average rainfall conditions. In the absence of the reservoir, water from the unnamed stream would have historically flowed into Con Creek. Further, Mr. Wasson testified that he releases water into Con Creek from the reservoir to prevent uncontrolled spilling. The Wassons' diversion of water to storage without an appropriative water right permit is an unauthorized diversion of water and a trespass against the State subject to administrative civil liability under Water Code section 1052 et seq. Water Code section 1055.3 provides:

"In determining the amount of civil liability, the Board shall take into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator."

The unnamed stream which is diverted into the Wassons' reservoir would normally, in the absence of the reservoir, contribute seasonal flows to the Navarro River watershed via Con Creek and Anderson Creek. The Navarro River supports coho salmon, a species listed as threatened under the Federal Endangered Species Act, and steelhead trout, a potential candidate for listing.

Division staff has not investigated the environmental damage, if any, caused by this unauthorized diversion, but would be expected to review potential environmental impacts as part of processing a new water right application.

At a minimum, the violation was ongoing during the 1998-1999 run-off season. The violation likely has been ongoing for much longer, judging from the fact that the reservoir is depicted on a 1991 United States Geological Survey topographic map.

In addition, following notification of the violation, the Wassons have not taken any action to correct the violation, despite warning of potential enforcement action, after the Division's field inspection. Even after issuance of the ACL complaint, the Wassons failed to file an application to obtain a water right for the reservoir.

The \$2,000 liability proposed in the ACL complaint is based on the length of time over which the violation occurred and the lack of corrective action by the violator. The SWRCB's costs in this matter exceed the liability.

Water Code section 1052 authorizes imposition of administrative civil liability in the amount of up to \$500 for each day of violation. Having taken into consideration all relevant circumstances, the SWRCB concludes that imposing civil liability in the amount of \$2,000 is appropriate.

2. The Wassons shall file, within 30 days of the date of this order, either a water right application for the storage reservoir located on their property or a plan, acceptable to the Chief of the Division of Water Rights, that describes how and when the reservoir will be rendered incapable of storing water subject to the SWRCB's permitting authority; and

3. If the Wassons fail to remit the \$2,000 and to submit either the water right application and all necessary fees (\$100 fee to SWRCB and \$850 fee to the Department of Fish and Game) or the plan to render the reservoir incapable of storing water within the periods specified above, this will be cause for additional administrative civil liability.

CERTIFICATION

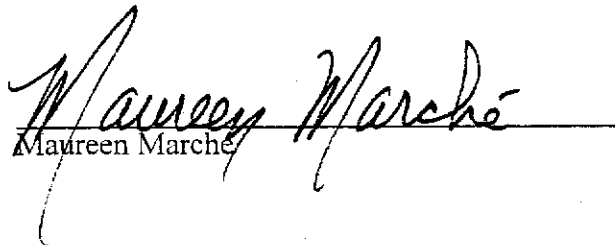
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 26, 2000.

AYE: Arthur G. Baggett, Jr.
Mary Jane Forster
John W. Brown

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marche