SPILLWAY

California Water, Land, and People

Winter 2000

Editorial

Monterey Agreement: A Bloodless Coup

by Tim Stroshane

Renewed public scrutiny awaits a little-known agreement negotiated quietly in 1994 by six water agencies and the California Department of Water Resources (DWR) to inaugurate California's statewide water market and restructure the State Water Project in the wake of a Sacramento Third District Appellate Court decision on September 15, 2000. The Court found the compact's environmental impact report (EIR) defective.[1] The Court also opens to further legal challenge DWR's transfer of a giant groundwater aquifer called the Kern Fan Element (KFE) to the Kern County Water Agency.

Dubbed the "Monterey Agreement" for the coastside city where it was consummated, the Agreement states "principles" for restructuring long-term contracts between the California Department of Water Resources (DWR) and local water contractors receiving water deliveries from the California State Water Project (SWP). The "principles" were intended to settle disputes that erupted over SWP financing and water allocation under the contracts during the drought years of 1987-92.

The "principles" contained in the Monterey Agreement are in reality fundamental policy changes to the California State Water Project. For instance, the Agreement transfers control, and in one case ownership, of SWP facilities illegally to regional water districts.

But more important, DWR's implementation of the Agreement through amendments to SWP contracts betrays a key "principle" of California's representative democracy: the people of California voted on the State Water Project expecting the Project would have long-term contracts whose policy basis could not be changed even by the Legislature (let alone the Legislature's agent DWR). Through the Monterey Agreement, the Department of Water Resources changed the SWP long-term water supply contracts without possessing the legal authority to do so.

"The Monterey Agreement is written to obfuscate the changes it makes in the state's water system, and we think it's illegal," says Carolee Krieger, a member of Citizens Planning Association in Santa Barbara, and an organizer of the lawsuit that stalled the Monterey Agreement. "The worst thing about it is it hurts the people of California."[2]

The people of California voted in 1960 to approve Proposition 1, a general obligation bond referendum to finance construction of the California State Water Project.[3] The referendum addressed water supply contracts, stating simply: "Such contracts shall not be impaired by subsequent acts of the Legislature during the time when any of the bonds authorized herein are outstanding and the State may sue and be sued with respect to said contracts."[4]

NEWS FLASH, 14 December 2000:
The California Supreme Court denied hearing appeals on *PCL v. DWR.*
The Appellate Court decision stands!

To allay public fears their water would be given away for private gain and help secure passage of the referendum, Governor Pat Brown "stipulated the water contracts could not be changed by the Legislature as long as [the SWP's general obligation] bonds were outstanding."[5] Brown circulated, and the Legislature accepted, specific "contracting principles" for SWP's long-term water supply contracts that would be signed by water agencies benefitting directly from the SWP.

The contracts:

• called for "take or pay" financing by the contractors, in which they would be responsible for paying annual charges to DWR, which would in turn pay interest to bond holders, operations and maintenance charges, and other costs, regardless of how much water the SWP delivered each year.

• addressed short-term water shortages by requiring agricultural contractors to forego water deliveries first, before urban contractors' deliveries are affected, and addressed long-term water shortages by enabling the state to declare a permanent water shortage and reduce all contractors' water entitlements by their pro rata share of the SWP's capacity to deliver water.

• allowed water use only within the geographic terrain of

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*Tim Stroshane is editor and publisher of **SPILLWAY**.*

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Bloodless Coup

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contractor's boundary.

• accounted for contractor payment responsibilities through "entitlements" (an accounting device) and separated these from actual deliveries of SWP water.[6]

The "take or pay" clause combined with the SWP's first long-term drought from 1987-92 to provoke economic, political, and ecological crisis in California's water system (see "Glimpsing the Future," this issue).

Once the Monterey Agreement came to light through the California Environmental Quality Act's full disclosure process in 1995, its negotiators presented the Agreement as a done deal that would resolve SWP financial crises and transform it into a marketing institution. The deal also keeps intact long-cherished speculative water allocation practices underwriting urban sprawl throughout California.

"California was one day away from the Monterey Agreement being a done deal" back in October 1995, says Rob Shulman of the Plumas County Counsel's Office in Quincy. "It was a stroke of foresight" by local Quincy lawyer Michael Jackson to find out when the agreement would go into effect. His action bought time for SWP contractor Plumas County, Citizens Planning Association (CPA) of Santa Barbara County and the statewide Planning and Conservation League (PCL) to formulate a lawsuit against the Monterey Agreement.[7]

The Agreement's 14 principles speak to five unspoken but interlinked objectives:

• greater control by contractors over SWP assets (water and facilities for storage and transport), including transfer by DWR of a giant groundwater aquifer called the Kern Fan Element (KFE) to the Kern County Water Agency[8];

• creation of a water transfer market[9];

• completion of all SWP facilities originally approved by California voters in 1960;

• shifting of water facilities costs from contractors to taxpayers; and

• restructuring how future water shortages are handled, partly by deleting Article 18(b) of the contracts, which addressed permanent water shortages in the SWP.

"The Monterey Agreement gives us the tools to reduce the cost of delivering water to the public," protests Tim Quinn, deputy general manager of MWD, who helped negotiate the original Monterey principles.[10]

The Appeals Court found that DWR should prepare the EIR (and not the Central Coast Water Authority [CCWA], which was not even a SWP contractor at the time!) and analyze an alternative in which permanent water shortage aligns SWP water "entitlements" more closely with average SWP water deliveries. The decision also enables the PCL coalition to continue a challenge to DWR's transfer of the KFE to Kern County interests.

> "The Monterey Agreement is written to obfuscate the changes it makes in the state's water system, and we think it's illegal."

DWR, together with CCWA, appealed to the state Supreme Court in October. (CCWA is a joint powers entity created to receive Santa Barbara County's only-recently inaugurated SWP water entitlement.)

Lawyers for Metropolitan Water District of Southern California, Alameda County Water District Zone 7, and the Kern County Water Agency also intervened with the state Supreme Court to protect investments in San Joaquin Valley groundwater storage projects, including the KFE, reliant on the Monterey Agreement.

While EIR issues are important, the Monterey Agreement's bloodless coup against representative democracy in California water policy should piss off everyone who cares about the state's rivers and equitable use of the California State Water Project. Major corporate agribusiness and developer constituencies in water entitlement-rich districts (north and south) profit handsomely from buying and selling water they don't own.

Outrages like water marketing mount in today's go-go California corporate capitalist culture. Since both the Bay-Delta Accord and the Monterey Agreement appeared in 1994, water for sale under the Agreement from the San Joaquin Valley has already been "sold" to new urban developments like Newhall Ranch and Dougherty Valley.[11]

Indeed, without a glimmer of irony, some environmental groups, the U.S. Bureau of Reclamation, DWR, and other CalFED-affiliated agencies advocate using such water "entitlements" as assets for an "environmental water account."[12] Just think: fish will have water bought for them at taxpayers' expense, when three generations ago the water

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was there in the rivers for free. Were the fish economic "free riders" in their own environment all this time?

In other spheres of life, this is known as property theft; in the water industry, this is called "water marketing." The new water industry promotes a con game on the public here, a water hustle dressed as ecosystem restoration. It's time to end this game.

> Just think: fish will have water bought for them at taxpayers' expense, when three generations ago the water was there in the rivers for free.

To repeat: by law, water is owned by all the people of California. That makes California water a common good. Since water is essential for all life, this is not a communist notion, but simply common sense for an arid land, written into state law.[13]

The Monterey Agreement usurps this common good for the benefit of elite constituents of water agencies with financial interests in profiting from selling water made available by the voters of California when they approved the State Water Project in 1960.

If the California Supreme Court upholds the Appeals Court decision, DWR will have to prepare a new EIR, buying time for California's public to learn more about the Agreement, to engage in an honest and open debate about the place of *real* water allocation — not "paper water," whose value as SWP "entitlements" the Appeals Court estimated as worth "a wish and a prayer" — in California's future.

Plaintiff attorney Antonio Rossmann hopes that "a collaboration among DWR, the contractors, other water agencies, the environmental community, and consumers and other stakeholders — with professional facilitation and funding of the public interest participation — could lead to a true consensus 'preferred alternative' on which the [new] DWR EIR can then be prepared."[14]

"CalFED II," anyone? Hopefully such a process could yield a referendum Californians could vote on, maybe even pass. What would the "stakeholders" have to fear from a democratic vote if they come up with a plan everyone could live with? In fact, voter approval might be necessary given the nonimpairment clause of the Burns-Porter Act.

But if the California Supreme Court reverses the Appellate decision, the Monterey Agreement will countenance buying and selling of the California public's water by water agencies and private corporations that don't own the water via an institution whose creation has never been tested in a vote by the California electorate, an institution Californians never got to vote on.

I can't think of a clearer wedding of democracy and ecology than the idea that water belongs to the people of California. But under continued implementation of the Monterey Agreement this idea will be dead in reality, if not in state law.

The Monterey Agreement also irresponsibly encourages development pressure on the state's water supplies, its farmlands, and its vulnerable aquatic ecosystems. There are ways to design a "monterey agreement" that might involve some water policy shifts made by the original framers of the "Monterey Agreement." But such changes must involve state legislators asking California's voters their approval; the legislators and DWR work for all Californians, not the other way around.

To do the most democratic thing — the right thing in this case — the California Supreme Court must deny hearing to the defendants of *PCL v. DWR* and let the Third District Appellate Court decision stand.

NOTES

1. Planning and Conservation League, Citizens Planning Association of Santa Barbara County, Inc., and Plumas County Flood Control and Water Conservation District v. California Department of Water Resources and Central Coast Water Authority*, Third District Appellate Court, Sacramento, California, filed 15 September 2000, C024576. Hereafter cited as* PCL v. DWR.

2. Carolee Krieger, Citizens Planning Association of Santa Barbara County, personal communication, 29 October 2000.

3. Readers should remember that in November 1960, Proposition 1 (the Burns-Porter Act referendum, now California Water Code Sections 12930-12944) won by a margin of just 174,000 votes out of a total electorate of 5.8 million voters. The margin of victory in Los Angeles County was 313,000, so that county alone put Prop 1 over the top. Prop 1 won only 13 counties (less than one-fourth of the total) in California: Butte (where Lake Oroville would be built).

4. California Water Code Section 12937 of the Burns-Porter Act of 1959, approved by referendum of the voters in November 1960.

5. See DWR News Office, Special Fall 2000 Edition, California State Water Project: Past, Present, Future*, p. 20.*

6. State of California, Department of Water Resources, Contract Between the State of California Department of Water Resources and the Metropolitan Water District of Southern California for a Water Supply*, November 4, 1960 (as amended to February 1, 1973). Available at California Water Resources Center Archives, University of California, Berkeley, and Boalt Hall School of Law Library, at KFC.790.A87.*

7. Rob Shulman, Plumas County Counsel's Office, personal communication, 22 November 2000.

8. The Kern Fan Element is part of a larger property, the Kern Water Bank, owned by DWR. The Kern Fan Element, once transferred to KCWA, was transferred days later to the newly-created Kern Water Bank Authority which owns and manages the Kern Fan Element lands.

9. Brent Haddad, Rivers of Gold: Designing Markets to Allocate Water in California*, Covelo, CA: Island Press, 2000, p. 156. Unfortunately, Haddad's treatise on designing water markets ignores great swaths of historical, political, and ecological context in developing his ideas. His soft-pedaling*

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A History of the Monterey Agreement

Glimpsing California's Future

by Tim Stroshane

California glimpsed an apocalyptic water future in the long drought of 1987-92.

To understand what that horror show meant in 1994 when the Monterey Agreement was negotiated surreptitiously by DWR and a small group of State Water Project (SWP) contractors, we must look to the past, to why things played out as they did in events leading to 1994.

But first, a digression on economics.

SWP contractors do not pay for water. Instead, they repay costs of building and operating facilities for collecting, storing, and distributing water, and those facilities by law must be paid for regardless of whether contractors receive water in any given year.

An economic analogy for what was set up with SWP beneficiaries goes like this: Suppose you take out a mortgage to buy a home with three bedrooms and two bathrooms. Then it turns out you don't have enough people in your family to keep the second bathroom and the third bedroom in regular use. You have to pay the mortgage back monthly regardless of whether you use the whole house or not.

Do you think your mortgage lender would sympathize or offer to adjust your mortgage based on your actual use of the house? No lender would, rest assured.

The contractors struck the same kind of deal with the state of California in 1959 when the Burns-Porter Act was passed, and which the voters approved in 1960: contractors agreed to pay for the project knowing there could be years when they might not get the water they wanted.

SWP contractors use a convenient fiction of "entitlements" to water as though they were a legal claim on the state to provide them with water. That fiction enables them (and indeed, some environmentalists) to speak of "buying" or "selling" water. But this conceptual sleight-of-hand hides the fact that "entitlements" are not legal rights to SWP water but merely an accounting device by which the facilities cost of water is allocated to different contractors based on the proportion of the facilities used to deliver water to each contractor.

Overdrafting Groundwater

In the 1950s, San Joaquin Valley agricultural and southern California urban interests pumped out far more groundwater than they recharged into their aquifers.

"Continued reliance upon the ground water overdraft would eventually exhaust the water supply and kill the economy of the area, thus establishing the need for supplemental water," writes southern California water lawyer Arthur G. Kidman. "Without ground water overdraft, California's development and prosperity probably would not exist as we know it today."[1]

Indeed, groundwater overdraft was used to justify planning and building the State Water Project (SWP) in the 1950s. SWP water was intended by state leaders like Governor Pat Brown to secure the state's water future and take pressure off overdrafted aquifers in the San Joaquin Valley and south of the Tehachapis in urban southern California.

But it didn't happen that way. New water facilities were relatively cheap at first, and the water they deliver is easy to bring to new lands for cultivating crops or subdivisions.[2] Once the SWP began delivering water in the late 1960s and early 1970s, the groundwater overdraft continued (as it does to this day), combined with land speculation in new crops and sprawling housing developments.

"Without ground water overdraft, California's development and prosperity probably would not exist as we know it today," says southern California water lawyer Arthur G. Kidman.

In the planning stage, SWP water was still expected to cost more than water provided through the federal Central Valley Project (CVP). Agricultural San Joaquin Valley contractors, led by the Kern County Water Agency (KCWA), openly worried about this high cost, insisting on and getting local tax-base subsidies for water and no acreage limitations on farmers receiving SWP deliveries.

In addition, the long-term contracts make available "surplus water" not requested by other contractors at just the cost of transportation charges. San Joaquin Valley contractors, especially KCWA, were historically the largest users of this subsidized "surplus water."[3]

Surplus water, however, was last available in the SWP system in 1987, the first year of the last drought. Resulting from the 1987-92 drought and a changed political culture, environmental decisions have further limited water exports from the Delta systems (both CVP and SWP). Coupled with changes brought about by the federal Reclamation Reform (1982) and Central Valley Project Improvement acts (1992), the era of cheap facilities for delivering seemingly unlimited quantities of water in California ended.[4]

The 1987-92 drought — the longest in California since the Great Depression — brought the economics of costly SWP water to a crisis point for its two largest contractors, KCWA and the Metropolitan Water District of Southern California (MWD).

In the SWP's early years, the average facilities cost of delivered SWP water was low, around $25 per delivered acre-foot to San Joaquin Valley contractors like KCWA. (In comparison, the contract cost of delivered water from CVP facilities was $8.) Then the facilities cost of delivered SWP

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water nearly doubled in the early 1980s when DWR signed new electricity contracts.

But in 1991, the worst year of the last drought, San Joaquin Valley contractors received just 45,556 acre-feet at an average facilities cost of $1,041 per acre-foot that year.[5]

MWD faced a similar but less extreme financial vise-grip. Where MWD's cost per delivered acre-foot had been $170 in 1982, it more than tripled to $548 in 1991 when MWD received just 19.5 percent of its 2 million acre-feet entitlement.[6]

Permanent Shortage Scenarios

Though SWP contractors were never promised any specific amount of water, permanent water shortages in California seemed both plausible and horrifying to water watchers (though water officials later denied this to the *PCL v. DWR* courts[7]).

> Since SWP deliveries were near zero for some farmers in 1991, "the banks have been reluctant to lend money. Their reasoning is that the farmers no longer have a reliable water supply, and so the land has virtually no value."

In late 1993, DWR received requests from SWP contractors for water deliveries totaling 3.8 million acre-feet, far more water than the SWP had ever delivered before. The department "felt the requests were unrealistic," reported public policy analyst Dennis O'Connor of the California Research Bureau at the time. "In response, they claimed authority under the contract to modify the initial requests." DWR then reduced the requests to the largest amount from each contractor delivered in the previous 10 years, establishing a modified initial request for 1994 deliveries of 1.56 million acre-feet, less than half of the contractors' original request.

At its December 1993 meeting, MWD's board of directors deferred approving their annual payment of $413.8 million to DWR, delaying its $67 million January payment, in hopes that its water bill strike would get DWR's attention.[8]

The California Research Bureau also reported that delinquencies in Kern County's SWP payments were a significant problem during and after the drought. Worse, since SWP deliveries were near zero in 1991, "the banks have been reluctant to lend money [to fund farmers' annual credit needs there]. Their reasoning is that the farmers no longer have a reliable water supply, and so the land has virtually no value."[9]

The worst case scenario for Kern County was that SWP contracts require KCWA to guarantee payment to DWR by levying a district-wide property tax sufficient to cover the bill. "Since farm land that doesn't have a dependable water supply is essentially worthless, the tax burden would ultimately be carried by the City of Bakersfield," observed O'Connor at the time.[10]

The California Research Bureau also pointed out an Armageddon scenario: "If environmental protection in the delta requires additional SWP delivery cutbacks in the 1/2 million to 1 million acre-foot range, a distinct possibility, there is a potential for widespread default among agricultural users."[11]

While probably exaggerated, let's return to our mortgage metaphor: They had trouble making the mortgage on SWP facilities. San Joaquin Valley interests clearly overextended themselves when they expanded cropped acreage in reliance on an at-best uncertain imported water supply rather than using the water to stem groundwater overdraft.

The SWP, which many of its critics also regarded as "a tremendous asset to the state," must have increasingly resembled a hydraulic Ponzi scheme verging on collapse as the events of 1994 crashed down.[12]

On one hand, the industry faced extended drought in which seven of the previous eight years (counting 1994) were considered critically dry (1993 being a wet year exception).[13]

On the other hand, in the midst of drought DWR planned the SWP to expand. Voters in Santa Barbara and San Luis Obispo County approved hooking their counties up to the SWP. Other areas, such as Butte County in the northern Sacramento Valley, were considering taking delivery of SWP water as well. San Joaquin Valley contractors were also urging then-governor Pete Wilson to have the State of California buy the giant Central Valley Project from the federal government.

Before such a thing as the CalFED record of decision (adopted this past September), not only was there little prospect of adding new reservoirs to the State Water Project or the Central Valley Project, but new water quality regulations and key biological opinions under state and federal endangered species acts promised to release more stored water for ecological uses, which would reduce yields of both the CVP and SWP from the Sacramento-San Joaquin River Delta.

> By making possible the sale of "paper water" entitlements, the Monterey Agreement propels construction of CalFED reservoirs and peripheral canals closer to reality as California's population grows.

Dry weather, low runoff, and depleted reservoir storage in 1994 only added to the pressure to restructure the SWP and somehow resolve the crisis.

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Glimpsing the Future

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No wonder California's febrile water wars were white hot in 1994.

That year was also marked by an overheated — and bipartisan — ideological drumbeat for privatization of government facilities (including water delivery facilities) blared widely in public discourse to herald a new age of economic "efficiency" through private sector "discipline" and unleashing an *enrichez-vous* ethic. Then-governor Wilson was its staunchest apostle at the time.

In 1991, the worst year of the last drought, the 45,556 acre-feet San Joaquin Valley contractors received cost an average of $1,041 per acre-foot that year.

In such a climate, DWR officials were placed on the defensive by the financial vise-grip of SWP payments on contractors. They offered little resistance under Wilson to contractors' claims to "entitlements," and refused to view litigation as a serious option in such a situation.

O'Connor reported that defaults could force the SWP into financial crisis and jeopardize its AA bond ratings with Wall Street, forcing taxpayers to bail out the system with infusions from the state budget so that the water system's bond payments were honored.[14]

To SWP contractors, cloudy SWP water supplies raised the specter of obscenely high water costs and meager deliveries, since their SWP contract payments would stay the same whether DWR delivered water or not.

As urban development creeps northward from Los Angeles to Tejon Ranch in the Tehachapis, it is also plausible that twin prospects of permanent water shortages and substantial public debt in the SWP clouded the dreams of San Joaquin Valley land owners and water agencies for converting their lands to urban uses and to be the water source for Valley cities of the future.

Article 18

As 1994's crises wore on, DWR's handling of short-term drought water allocations and the specter of DWR declaring a permanent water shortage in California led to furious disputes between SWP contractors and DWR.

DWR was empowered to act during drought conditions under the SWP contracts' Article 18. Two of Article 18's provisions address the short and long-term effects of drought, and how DWR is to allocate water to contractors in such situations.

Under Article 18(a), in years when water is temporarily short, DWR was to cut agricultural contractors' deliveries first by up to 50 percent, before cuts were required of urban contractors. Contractors disputed DWR's implementation of Article 18(a) during the 1987-92, according to O'Connor, when DWR based reductions on contractor requests rather than on entitlements as Article 18(a) specifies. Requests are typically lower than entitlements, so contractors got less water than allowed under Article 18(a) than in these dry years.[15]

Article 18(b) enables DWR to recognize a long-term shortage of water and, according to O'Connor, with five years' notice to all contractors, recalculate a reduced delivery capacity (the project yield) for the SWP, and reduce each contractor's pro rata share of entitlements under the new yield. (Keep in mind: legally speaking, entitlements are really an accounting device.)

In this charged setting, "we did do the Monterey Agreement behind closed doors," Tim Quinn, deputy general manager of MWD, admits. But, he claims, the agreement's principles "only affected who paid and who got water among the SWP contractors."[16] If it was only that simple (see "Bloodless Coup," this issue).

Redefining SWP Supplies

Though the Monterey Agreement was negotiated in secret, as the Third Appeals Court decision in *PCL v. DWR* bluntly states, the issues leading to the Agreement were aired.[17] In January 1994, 11 months before the Agreement was concluded, the California Senate Committee on Agriculture and Water Resources held a hearing on SWP financing. At the hearings, SWP contractors and other interest groups vented to legislators about the SWP's repayment system.

"The source of this dissatisfaction varied," wrote CRB's Dennis O'Connor at the time. "For some, it was how the Department of Water Resources allocated water during periods of water shortages. For others, it was the 'take-or-pay' aspects of the contracts. Still others expressed concern about the perceived misallocation of one of the State's most valuable resources."[18]

SWP critics felt the project "may never reliably deliver the official project yield" of 4.2 million acre-feet. SWP average costs were far higher than promised in the 1960s and varied wildly from year to year. Critics considered the "take-or-pay" financing arrangements economically inefficient and unfair.[19]

O'Connor laid out 20 "options for change" to the State Legislature addressing at least one of the issues SWP critics posed: changing short-term shortage provisions, permanently reducing the official project yield, setting a fixed price for water, promoting economic efficiency, reallocating environmental costs, changing SWP administration (including contracting out or privatizing SWP operations, proposals then in vogue for "reinventing" government functions leading up to the Republican Party's "Contract With America"), and changing technical features of the long-term water supply contracts.

O'Connor's report could have been a starting point for an Article 18(b) alternative analysis in the now-defective Monterey Agreement EIR. Published in August 1994,

months before completion of the Agreement itself, O'Connor says there were short-term equity problems with reduced entitlement deliveries implementing Article 18(b), but he saw that executing 18(b) would reduce the occurrence of long-term shortages, increase the availability of surplus water, and stabilize the cost per acre-foot of water.[20]

By invoking a permanent water shortage, the state could redefine the SWP supplies so they could be operated more reliably. But contractors would have to reduce their exposure to drought by diversifying their water sources. In 1994, they weren't so ready to do that.

The Agreement's framers and their EIR consultants ignored O'Connor's 18(b) explorations.

In the end, options that appealed to Monterey Agreement framers included buying and selling entitlements, using capital reserve funds to restructure SWP financing, and eliminating the agriculture-first contract provisions concerning drought.

The framers retained the SWP's project yield of 4.2 million acre-feet (an acre-foot is about 326,000 gallons of water). Now Monterey Agreement "paper water" entitlements are marketed to new sprawling developments like Newhall Ranch in Los Angeles County and Dougherty Valley in Contra Costa County. The Monterey Agreement thus propels construction of CalFED reservoirs and peripheral canals closer to reality as California's population grows.[21] The framers not only avoided choosing to invoke Article 18(b), Principle 2b of the Agreement deletes it.

"Some contractors claim that if Article 18(b) is reinserted and the Kern Fan Element transfer is invalidated, the signers of the Monterey Agreement will not sign a revised Agreement. But no one knows for sure," says Plumas County Counsel attorney Rob Shulman.[22] Plumas County is a plaintiff in the Appeals Court case that has stalled Monterey Agreement implementation.

"It's nuts to return the Kern Water Bank to the state," says MWD's Quinn, himself a Monterey Agreement negotiator. "If we lose, we'll go back to the Legislature to fix the problem."[23]

"I think the Legislature is actually where this matter belongs," counters Antonio Rossmann, attorney for the plaintiffs.[24]

NOTES

1. Arthur G. Kidman, "'Connections' Between Ground Water and Surface Water," in Making the Connections: Proceedings of the Twentieth Biennial Conference on Ground Water*, edited by Johannes J. DeVries and Jeff Woled, September 11-15, 1995, California Water Resources Center Report No. 88, p. 10. Overdraft in the Los Angeles region (where groundwater was overdrafted for municipal and industrial uses) was the justification for importing water supplies from the north in the 1950s. See William Blomstedt,* Dividing the Waters: Governing Groundwater in Southern California*, San Francisco, CA: Institute for Contemporary Studies Press, 1992, p. 104.*

2. Robert Gottlieb and Margaret FitzSimmons, Thirst for Growth: Water Agencies as Hidden Government in California*, Tucson, AZ: University of Arizona Press, 1991, Chapters 3 through 5.*

3. Michael Storper and Richard Walker, The Price of Water: Surplus and Subsidy in the California State Water Project*, Berkeley, CA: Institute of Governmental Studies, University of California, 1984.*

4. Gottlieb and FitzSimmons, op. cit.*, note 2, discuss "the end of cheap water." But this confuses the issue, since it is really water facilities that contractors pay for. Water is not for sale in this system.*

5. This average price of water is spread across six separate SWP contractors in the San Joaquin Valley: Dudley Ridge Water District, Empire West Side Irrigation District, Kern County Water Agency, Kings County, Oak Flat Water District, and Tulare Lake Basin Water Storage District. The bulk of water received by these contractors was for municipal and industrial customers served by KCWA. Kings County was the only contractor to receive no agricultural water that year. Cost per delivered acre-foot data calculated from California Department of Water Resources, Bulletin 132-95: Management of the California State Water Project*, November 1996, Table 5B (Annual Water Quantities Delivered to Each Contractor) and Table 23 (Total Transportation and Delta Water Charge for Each Contractor).*

See also Dennis O'Connor, Financing the State Water Project*, Sacramento, CA: California Research Bureau, June 1994, pp. 63-65. See especially Figure 5.H, which bears out O'Connor's remark about average SWP water prices heading skyward.*

6. Bulletin 132-95*,* ibid.

7. "There is then no question that the SWP cannot deliver all the water to which contractors are entitled under the original [long-term SWP water supply] contracts. It does not appear that SWP has ever had that ability. Nor do defendants suggest that full delivery of entitlement water is likely within the life of the contracts. Nevertheless, defendants [DWR and Central Coast Water Authority] dispute that a long-term shortage exists. Defendants argue that requests [for water deliveries] are the proper measure of shortage. They emphasize that the SWP had been able to meet contractors' actual requests for water every year except 1994, suggesting there is no water shortage, let alone a permanent shortage." See PCL v. DWR*, pp. 28-29.*

8. O'Connor, op.cit.*, note 5, June 1994, p. 53; California Research Bureau,* CRB Note*, v2,n3, 15 June 1994, p. 3.*

9. CRB Note*, ibid., p. 4.*

10. Ibid.

11. Ibid.

12. "...a tremendous asset to the state" quote from O'Connor, Financing the State Water Project: Options for Change*, Sacramento, CA: California Research Bureau, August 1994, p. 58. Hereafter cited as* Options for Change*. O'Connor's reports are available free of charge by calling the California Research Bureau at 916/653-7843.*

13. This five-year streak, incidentally, is previously unknown in DWR's records of unimpaired runoff in the Sacramento River basin. Prior to the four-year streak of wet years ending in 1998 in the San Joaquin River Basin's runoff record, the last four-year streak of wet years was from 1914 through 1917. See California Department of Water Resources, Preparing for California's Next Drought: Changes Since 1987-92*, Sacramento, CA, July 2000, Figures 4 and 5, p. 5.*

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"Political Science" on the Navarro River

Second of two parts
by Roanne Withers[1]

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 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 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.

> Since a 1996-98 enforcement investigation by the Division of Water Rights discovered illegal 130 reservoirs, some landowners tried to legalize them after the fact, but others hope to escape official notice.

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

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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 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.

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 Russian River tributaries.

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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Navarro 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

> Stan Griffin forced the Division 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 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

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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Bloodless Coup

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of the Monterey Agreement is perhaps his most egregious oversight. The issues in PCL v. DWR *are absent from the book. Good books on water marketing don't exist yet.*
10. Tim Quinn, deputy general manager, Metropolitan Water District of Southern California, personal communication, 17 November 2000.
11. Arve Sjovold,Citizens Planning Association of Santa Barbara County, personal communication, 10 November 2000.
12. Tim Stroshane, "Reframing CalFED," SPILLWAY *v1n1, Fall 2000, p. 5.*
13. Article 10, Section 5 of the California Constitution also states: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner prescribed by law." Following on the state Constitution, California Water Code Section 102 states in pertinent part: "All water within the State is the property of the people of the State..."
14. Antonio Rossmann, "Third District Court of Appeal Strikes Down Monterey Amendment EIR, Restores Public Role in State Water Project," California Water Law and Policy Reporter*, forthcoming, 2000.*

Glimpsing the Future

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14. Three law review articles were published simultaneously in Fall 1994 through the Hastings College of the Law Public Law Research Institute addressing legal aspects of nightmare scenarios: Peter Lee, "Modifying State Water Contracts: Constitutional Takings Issues"; Michael Kometani, "The California Water Resources Bond Act: Bondholder Security and the Contract Clause"; and David M. Call, "Legislative Impairment of Contracts Between the State Water Project and Its Contractors" Public Law Research Report, Fall 1994. These articles can be found at the Hastings College of the Law web site at http://www.uchastings.edu/plri/fall94/.
15. According to DWR data, the average annual deliveries of the State Water Project between 1967 and 1994 was 2.6 million acre-feet of water. Bulletin 132-95, op. cit.*, p. 133, calculated from Table 10-5.*
16. Tim Quinn, deputy general manager, Metropolitan Water District of Southern California, personal communication, 17 November 2000.
17. PCL v. DWR*, p. 8.*
18. As Dennis O'Connor described the brouhaha over the SWP in 1994 from interviews he conducted with water industry participants at the time, "Each person defines the problem(s) with the SWP's repayment system differently, depending on their own personal perspective." Dennis O'Connor, Options for Change*,* op. cit.*, note 12, p. 2.*
19. Ibid.*, p. 3.*
20. Ibid.*, pp. 17-21.*
21. See PCL v. DWR*, p. 32-33.*
22. Rob Shulman, Plumas County Counsel's Office, Quincy, California, personal communication, 22 November 2000.
23. Quinn, op. cit.
24. Antonio Rossmann, attorney at law, personal communication, 1 December 2000.

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