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Court Reverses Frost Protection Ruling

By GLENDA ANDERSON
THE PRESS DEMOCRAT

An appellate court has upheld state rules regulating how hundreds of farmers in Sonoma and Mendocino counties divert water from the Russian River to ward off frost.

The rules, aimed at protecting fish, were struck down in 2012 by Mendocino County Superior Court Judge Ann Moorman, who declared the law to be “constitutionally void” and “invalid.”

The state's First Appellate District court reversed her decision in a ruling filed Monday.

The State Water Resources Control Board lauded the decision.

“The board is pleased with the court's unanimous decision upholding the Russian River frost protection regulations,” Michael Lauffer, the board's chief counsel said in a statement.

Mendocino County Farm Bureau Manager Devon Jones said the appellate court ruling is a disappointment.

“We felt there was a very good opinion,” she said of the overturned ruling.

State regulators created the rules to prevent endangered and threatened salmon and steelhead trout from becoming stranded and dying when farmers pump water from the Russian River to ward off frost. Water is sprayed on vines to create a protective ice shield when temperatures fall below freezing.

The goal of the state rules is to avoid the sudden drops in river flows that can be caused when farmers throughout the river system pump water at the same time.

Several incidents in which rapid declines in river flows caused fish to become stranded triggered the regulations. Fisheries officials estimated some 25,000 salmonids were killed in two April 2008 episodes, one each in Sonoma and Mendocino counties. The incidents coincided with freezing temperatures, state officials said.

National Marine Fisheries Service officials blamed the strandings largely on farmers, especially grape growers. Grape plants are particularly susceptible to frost damage when new growth appears in the

spring, the appellate court ruling noted. The Russian River watershed is home to more than 60,000 acres of vineyards. Of those, 70 percent are within 300 feet of salmonid habitat, the ruling said.

Following the 2008 strandings, federal fisheries officials urged the water board to regulate water diversions for frost protection. A task force was created and public hearings were held before the state water board adopted rules in September 2011. Rather than setting water diversions, the water board rules required that local agriculture groups be formed to study water flows and develop plans for managing their water diversions for frost protection. It included requiring that farmers install stream flow gauges and measure and report how much water is diverted for frost protection. Their plans would be subject to approval by the state water board.

But farmers, led by Redwood Valley grape grower Rudy Light, sued the Water Resources Control Board. The lawsuit alleged the science behind the regulations was vague; the state hadn't proved they are necessary; and that the water board overstepped its authority.

Moorman ruled in their favor in 2012, rejecting the state's frost protection rules. She said the board infringed on water rights and wrongly required farmers to gather information and create regulations themselves at great expense. She also said it appeared several factors, not just frost protection, contributed to the fish deaths.

Moorman additionally said the regulations were too sweeping and warned of economic devastation. She said the state's environmental impact report on the rules was inadequate because it did not sufficiently consider the impacts the rules could have on the economy, she said.

The appellate court disagreed with Moorman's conclusions, upholding the state's authority to implement the rules and its impact report.

Jones said affected farmers are still studying the new ruling and that she does not know whether an appeal is planned.

Nick Jacobs, attorney for the Sonoma County farmers, Russian River Water Users for the Environment, said he is still evaluating the ruling and does not yet know whether his clients will appeal.

But he was critical of the ruling.

“The trial court judge found the regulation and supporting environmental impact report to be invalid for eight separate reasons — it is hard to understand how less than two years later a different panel of judges can come to the opposite conclusion on each of the eight reasons,” he said.

Jacobs also said the same appellate court 40 years ago came to a different conclusion in a similar case in Napa County.

“It is difficult for lawyers and clients to assess the state of the law when Courts of Appeal change the law after four decades.”

Light and his attorneys could not be reached Tuesday for comment.

State water officials said many wine grape growers already have begun coordinating their frost protection diversions and taking other steps to avoid harming fish.

“When the (court) decision is final and the regulations restored, the board anticipates a Russian River-wide system of plans that will afford protections to endangered species while continuing to allow growers to protect wine grape crops from frost in a coordinated manner,” Lauffer said.

You can reach Staff Writer Glenda Anderson at 462-6473 or glenda.anderson@pressdemocrat.com

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By DEREK MOORE
THE PRESS DEMOCRAT

Environmentalists' Warning Irks Grape Growers

North Coast grape growers are weeks away from having to make crucial decisions about how much water to use for frost protection, but already are facing what is widely interpreted as a threat of being sued by environmental groups over potential harm to fish habitats.

Three Sonoma County organizations, including one with a long history of filing lawsuits, sent letters to hundreds of growers and vineyard managers in Sonoma and Mendocino counties outlining concerns about water draw-downs harming federally protected salmon and steelhead.

The four-page letter notes that many vineyard managers are “working diligently” to prevent extinction of fish species. But it also addresses concerns about placing “profit above compliance with the law” and states growers who are “known” to violate federal law will be publicly identified on the website for California River Watch, or sued by the organization.

Sebastopol-based River Watch has a controversial history of suing companies, cities, sanitation districts and individuals for environmental reasons. But Jack Silver, an attorney who founded the organization in 1996, said Friday the letters sent to growers should not be viewed as a threat of litigation.

“I understand farmworkers don't like someone telling them their business, but at the same time, if they're not violating the law, they shouldn't be looking at this as a threat,” he said.

But many growers, who feel pressured by historic drought conditions to save their crops while also protecting the environment, took exception to the letters, which were mailed earlier this month.

“People are upset and probably insulted because of the work we've done and the leadership we've shown,” said David Koball, vineyard director for Fetzer and Bonterra wineries in Mendocino County.

Several members of the Sonoma County Board of Supervisors denounced the letters this week.

“My only wish is that we all work together to balance the needs of people and the environment,” said David Rabbitt, the board's chairman. “I think there are better ways than sending threatening letters.”

West county Supervisor Efren Carrillo also was critical, saying environmentalists and farmers should be able to “work together rather than pointing fingers and tossing lawsuits back and forth.”

Still, Koball was not personally offended by the two letters he received from River Watch — one for his work at the wineries and the other related to a pond he is building on 15 acres he and his wife purchased in Ukiah.

“You need to take emotion out of the whole thing and look at your own actions,” he said.

He said he's not concerned about Fetzer, Bonterra or his “teeny little vineyard” running afoul of any laws.

Silver could not provide an exact number of growers who were sent letters, but he said it was in the hundreds. Alan Levine with Coast Action Group and Larry Hanson with Forest Unlimited also signed the communications.

River Watch obtained the names of Sonoma County growers through a California Public Records Act request with the county's Agricultural Commissioner, who keeps records of growers who file frost protection management plans.

“I don't think growers are taking this too lightly,” Ag Commissioner Tony Linegar said Friday.

Linegar declined to provide The Press Democrat with a list of growers whose names were obtained by River Watch and referred the matter to the county counsel.

The letters drew a mixed response from other environmental groups.

Don McEnhill, executive director of Russian Riverkeeper, a conservation nonprofit agency, said he interpreted the letters as “mostly being helpful in providing information and alerting the growers” that they are being watched. He said that strategy is “better than waiting until after a fish kill and then filing a lawsuit.”

He said the Riverkeeper's board of directors opted for a different strategy, which is “engaging directly with the industry.”

“The environmental community needs to make a good-faith effort to reach out to the industry and address their problems in a positive way,” McEnhill said.

Victoria Brandon, chairwoman of the Redwood Chapter of the Sierra Club, said the organization would never threaten to sue without the intention of actually doing so.

“I would never put that in a letter without firm legal backing or plans to follow through with it,” she said.

Silver, however, made the case that groups such as River Watch are providing enforcement actions that state and federal agencies are incapable of because of staffing shortages.

The environmental group most recently settled with the Town of Windsor for alleged violations of the Clean Water Act related to sewer overflows and leaks. As part of the agreement, the town is paying River Watch \$45,000 in attorney's fees.

In past lawsuits, River Watch defendants also have agreed to fund small environmental restoration projects, water testing programs and studies documenting the health of waterways.

The letter to growers encourages people to report potential violations of the Endangered Species Act to any number of organizations, including the Sonoma County District Attorney's Office or state Department of Fish and Wildlife.

“We're not intending to file a lawsuit. We're trying to get agencies to bring actions,” Silver said.

Levine, with Coast Action, said the message is to “encourage people to be good,” and to employ better water-use techniques, although none are specified in the letters. Levine gave as an example growers taking water only when it is plentiful and to store it for future use.

“I would hope the letter would encourage that, but some people just don't want to go there,” he said.

Many growers say they already are taking such measures.

Doug McIlroy, director of winegrowing at Rodney Strong Wine Estates, said the letters are “telling us what we already know.”

The wine industry has been motivated to change its water ways in part because of lingering fallout from fish-threatening drain on the Russian River that occurred in 2008 and 2009, when growers turned on their sprinklers to protect their vines as temperatures dropped below freezing.

In 2011, state regulators took aim at the practice of diverting water from the Russian River for frost protection, which federal officials cite as a primary cause of mass strandings for federally protected

salmon and steelhead runs in the river. Growers, who contest those claims, challenged the rules in court. The case currently is on appeal.

Growers say they've spent millions of dollars on building reservoirs, sinking new, deeper wells and buying wind machines to avoid taking water in ways that impact the Russian River during cold spells.

Koball said Fetzner, which has about 950 acres in the upper Russian River watershed, has spent about \$800,000 on measures that include building two ponds. He said Fetzner has about 20 acres dependent on river water for frost protection, and that if drought conditions persist, the winery is "fully prepared to let those acres go."

Dozens of growers gathered Friday at the Sonoma County Fairgrounds in Santa Rosa to discuss ways of saving water, and their crops. A similar workshop was held two weeks ago in Cloverdale.

"It is unfortunate in these extreme drought times that it appears some people would rather wait to see if something negative happens versus working towards a positive or at least a collaborative solution," said Karissa Kruse, president of Sonoma County Winegrowers.

Silver said River Watch is concerned only with a "handful of bad players" he said will flout the rules no matter what.

"They're not going to care about education, or about outreach," he said. "All they care about is the bottom line and their profits."

The full text of the letter can be found at ncriverwatch.org/legal/current/index.php.

(You can reach Staff Writer Derek Moore at 521-5336 or derek.moore@pressdemocrat.com. On Twitter @deadlinederek.)

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Photograph: Sprinklers coat a Russian River Valley vineyard with water in an effort to protect the vines from freezing temperatures. The practice has come under fire because of the potential harm to fish habitats caused by drawing down Russian River water. (KENT PORTER / *The Press Democrat*, 2010)