

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of Applications 29323 and 29324,	)	ORDER:	WR 97-07
)		
CHARLES AND ANNA KLUGE,	)	SOURCES:	Adobe Creek
	)		tributary to
Applicant and Protestant,	)		Clear Lake and
	)		Unnamed Streams
and	)		tributary to
	)		Adobe Creek
Applications 29355 and 29356, Petition to Change)		
Permit 16684 (Application 24336), and Petition to	)	COUNTY:	Lake
Change License 12125 (Application 26123),)		
)		
DONALD R. EUTENIER,)		
)		
Applicant, Petitioner and Protestant.)		
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ORDER DENYING PETITION FOR RECONSIDERATION

BY THE BOARD:

1.0 BACKGROUND

On August 21, 1997, the State Water Resources Control Board (SWRCB) adopted Water Rights Decision 1637 approving Applications 29323 and 29324 of Charles and Anna Kluge (Kluge); and approving Applications 29355 and 29356, petition to change Permit 16684, and petition to change License 12125 of Donald R. Eutenier (Eutenier). Approval of the applications and petitions for change are subject to conditions specified in Decision 1637. In Decision 1637, the SWRCB also finds:

- a. There are 50 acre-feet (af) of water available in Adobe Creek Reservoir between elevations 1434.0 and 1436.5 feet above mean sea level.
- b. Of the 50 af of water available in Adobe Creek Reservoir, Kluge should be allocated 27.6 af and Eutenier should be allocated 22.4 af.
- c. The applications should be given equal priority.

On September 19, 1997, Charles Kluge filed a timely petition for reconsideration (petition) of Decision 1637.

2.0 THE LAW GOVERNING RECONSIDERATION

Water Code section 1122 provides for reconsideration of SWRCB decisions or orders upon the SWRCB's own motion or upon petition filed within 30 days by any interested person. Title 23, California Code of Regulations, section 768 provides that an interested person may petition for reconsideration upon any of the following causes:

- "a. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- "b. The decision or order is not supported by substantial evidence;
- "c. There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- "d. Error in law."

Requirements for petitions for reconsideration are set forth in Title 23, California Code of Regulations, section 769. Subdivision (c) of section 769 provides that petitions for reconsideration shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition.

Actions which the SWRCB may take on reconsideration are set forth in Title 23, California Code of Regulations, section 770. The SWRCB may refuse to reconsider the decision, deny the petition, set aside or modify the decision, or take other appropriate action.

3.0 SUMMARY OF KLUGE'S PETITION

In his petition, Kluge contends that:

- a. The allocation to Kluge of 27.6 af of the 50 af of water available in Adobe Creek Reservoir between elevations 1434.0 and 1436.5 is an abuse of discretion, is not supported by substantial evidence, and is an error in law.
- b. The SWRCB's finding that there are 50 af of water available in Adobe Creek Reservoir between elevations 1434.0 and 1436.5 is not supported by substantial evidence.
- c. The prohibition against diverting water from the reservoir when the water level falls below 1434.0 feet above mean sea level should be changed to a lower elevation.
- d. Assigning equal priority to the applications is an error in law and is not supported by substantial evidence.

4.0 DISCUSSION OF ISSUES RAISED IN KLUGE'S PETITION

4.1 Allocation of 27.6 af to Kluge

Kluge contends that the allocation to him of 27.6 af of the 50 af of water available in Adobe Creek Reservoir between elevations 1434.0 and 1436.5 is an abuse of discretion, is not supported by substantial evidence, and is an error in law. Kluge further contends that:

- a. He should have been given an allocation for 13 acres of walnuts in existence at the time his application was filed rather than 9 acres.
- b. Eutenier should not have been allocated water for 31 acres of grapes because "his actual acreage in vineyard, as shown by vine count, amounted to only 27.3 acres."
- c. The SWRCB should have taken into account Eutenier's appropriative right to directly divert 2.2 cubic feet per second (cfs) from Adobe Creek for frost protection when allocating the water from Adobe Creek Reservoir.

No legal authority was cited nor did a statement of points and authorities accompany the petition in support of his contention that there is an error in law regarding the SWRCB's finding that Kluge should be allocated 27.6 af from Adobe Creek Reservoir.

Consequently, the contention that the SWRCB's allocation to Kluge is contrary to law should be dismissed for failure to include a statement of points and authorities in support of his argument.

4.1.1 Acreage Planted in Walnuts and Irrigated From Adobe Creek Reservoir at the Time the Applications Were Filed

In Decision 1637, the SWRCB allocated water from Adobe Creek Reservoir to Kluge and Eutenier based on the acreage irrigated at the time the applications were filed, water duty for the specific crops grown (2.7 af per acre for walnuts and 2.3 af per acre for grapes), and existing alternate supply available as storage. Each party was then allocated a pro-rated share that each has to the total demand. The SWRCB found that Kluge had 9 acres of walnuts and 10 acres of grapes at the time he filed his applications in 1988.

Kluge contends that at the time his applications were filed, he had 13 acres of walnuts, not 9 acres as found by the SWRCB. In his petition, Kluge states that he removed four acres of walnuts in 1996 which he intended to plant in grapes and that at the time of the hearing he had 9 acres of walnuts.

Kluge's testimony at the SWRCB's hearing contradicts the arguments he makes in his petition. Kluge testified that he had 9 acres of walnuts at the time he filed his applications. Eutenier Exhibit 7 is an aerial photograph taken in 1992 which shows, among other things, Kluge's acreage planted in walnuts and in grapes and Eutenier's acreage planted in grapes. Kluge testified that the area shown in orange on Exhibit 7 accurately depicted his walnut acreage at the time his application was filed and that there are 9 acres in the area shown in orange. (T,25:20-25; 26:5-9; 31:3-5; 39:23-40:19.)

Although his testimony is confusing at times, it did establish that there were 9 acres of

walnuts at the time his applications were filed. Accordingly, there is substantial evidence to support the finding that Kluge had 9 acres of walnuts at the time he filed his applications. There is no abuse of discretion in finding that Kluge had 9 acres of walnuts in 1988.

4.1.2 Allocation Based on Acreage as Opposed to Vine Count

Kluge contends that the SWRCB should not have allocated water to Eutenier for 31 acres of grapes which existed at the time his applications were filed. Eutenier testified that he had 31 acres of grapes at the time the applications were filed. (T,112:6-10.) Kluge did not contest Eutenier's testimony regarding his acreage.

In his petition, Kluge states that "[t]he evidence showed that the Eutenier vineyard had 12,399 vines, which when planted at 12' by 8' spacings amounts to 454 vines per acre, which is the equivalent of only 27.3 acres in plantings." In the footnote to this statement, Mr. Kluge states "[i]t appeared that the Eutenier Vineyard had 12,399 vines during the years of the partnership, i.e., before the applications were filed. (T,84:1-85:9; 115:4-6; 130:20-131:16)."

It cannot be determined from the evidence how many vines each party had at the time the applications were filed. Both parties admit to increasing the number of vines by "double planting" or "interplanting" since their applications were filed. Further, there is no evidence in the record that Eutenier's vines are planted at 12' by 8' spacings, nor is there any evidence in the record that there are 454 vines per acre. The citations to the transcript of the SWRCB hearing given by Kluge do not support his contention that Eutenier had 12,399 vines at the time the applications were filed. Kluge testified that he had "somebody" count "each and every space" but the record does not show who counted the "spaces," when the count was made, or whether the "spaces" were actual vines. (T,131:3-16.) There is also no correlation between vine count and acreage for Kluge's parcel; he wants acreage used for himself but vine count used for Eutenier.

Because the vine count and number of vines per acre of each party at the time their respective applications were filed cannot be determined from the record; the number of vines have increased over time; and the water duty for each plant has not been determined, especially where double planting has occurred, the SWRCB found that it is inappropriate to use a vine count as the basis for an allocation of water from Adobe Creek Reservoir. This finding is supported by substantial evidence and is not an abuse of discretion.

4.1.3 Consideration of Available Alternate Supply in Determining the Allocation to the Parties

Kluge contends that in determining the allocations of Adobe Creek Reservoir water, the SWRCB should have taken into account Eutenier's Permit 16684 for direct diversion from Adobe Creek for frost protection. He argues that it is unfair for the SWRCB to base the allocation of reservoir water on the basis of the parties' relative needs for irrigation.

In the staff analysis, staff concluded that an equitable allocation of the water in Adobe Creek Reservoir should be based on acreage irrigated at the time the applications were filed, water duty, and available storage in other reservoirs. It did not include Eutenier's existing Permit 16684 to directly divert water from Adobe Creek for frost protection as a factor in the allocation. In his request for hearing, Kluge objected to his allocation on the basis that his access to Elston Reservoir had been revoked and that the number of vines rather than acreage should be used. He did not object to the lack of consideration given to the need for water for frost protection in the allocation nor did he object to using alternate supplies available as storage for irrigation as a factor in the allocation.

At the hearing, Kluge testified that he gets "adequate frost protection" from ponds that he has on his property although the source of the water in these ponds is unclear. (T,60:12-16.) He did not request that alternate sources of water for frost protection be considered

Kluge testified that extensive tule growth caused siltation which reduced the volume of the reservoir but he offered no evidence to support his conclusion that "there is barely 50 af" available. (T,27:6-18, 28:4-16, 56:1-57:2.) Eutenier testified that he does not "believe" that there are 50 af available but he offered no evidence to support that belief. (T,99:9-11.)

Without any evidence other than lay opinion to the contrary, it was appropriate for the SWRCB to rely on the conclusion in the staff analysis. There is substantial evidence to support the SWRCB's conclusion that there are 50 af of water in Adobe Creek Reservoir between elevations 1434.0 and 1436.5.

4.3 Prohibition Against Diverting Water From Adobe Creek Reservoir When the Water Level Drops Below 1434.0

In the staff analysis, staff concluded that it is necessary to maintain the water level in Adobe Creek Reservoir at 1434.0 feet to protect the wetland. Staff also concluded that Kluge and Eutenier should be required to cease pumping from the reservoir when the water level reaches elevation 1434.0 to protect the wetland. Consequently, in Decision 1637 the SWRCB prohibited diversions from storage in the reservoir when the water level dropped below 1434.0.

Water Code section 1347 governs the issues to be considered at a hearing on a minor protested application. Section 1347 states:

"A request for a hearing shall specify the issues unresolved among the parties, and the board shall restrict any hearing to consideration of such unresolved issues."

(Continued)

was to determine the topographic elevation at the edge of the tules. Also, as stated in the memorandum, volumetric measurements were based on the area-capacity curve shown on drawing 7-E-20137, Sheet 2 of 8.

Neither Kluge nor Eutenier objected to the staff analysis conclusion that it is necessary to maintain the water level in Adobe Creek Reservoir at 1434.0 feet to protect the wetland. Neither Kluge nor Eutenier objected to the staff analysis conclusion that they should be required to cease pumping from the reservoir when the water level reaches elevation 1434.0 to protect the wetland. In accordance with section 1347, the hearing was restricted to the four issues unresolved among the parties. Since the two conclusions regarding the water level required to protect the wetland and the pumping restrictions tied to elevation 1434.0 were not among the four issues unresolved among the parties, they were not included in the SWRCB hearing. It is contrary to section 1347 to raise issues related to the water level required to protect the wetland and pumping restrictions tied to elevation 1434.0 in a petition for reconsideration. Therefore, the elevation level should not be changed and it is inappropriate to further consider this issue.

4.4 Priority of Applications

In Decision 1637, the SWRCB gave equal priority to Applications 29323, 29324, 29355, and 29356. Kluge contends that the SWRCB should have allocated all of the available water in Adobe Creek Reservoir to him because his applications were filed before Eutenier's applications. He argues that the granting of equal priorities is an error in law and is not supported by substantial evidence.

Water Code section 1450 states:

"Any application properly made gives to the applicant a priority of right as of the date of the application until such application is approved or rejected. Such priority continues only so long as the provisions of law and the rules and regulations of the board are followed by the applicant."

When it is in the public interest, the SWRCB is authorized to adjust the priorities of water right applications. (SWRCB Decision 1618 at 22-24; *see* Wat. Code §§ 1253, 1257; *United States v. SWRCB* (1986) 182 Cal.App.3d 82, 132, [227 Cal.Rptr. 161, 189]; SWRCB Order WR 88-26 at 7.)

Kluge's points and authorities, included in his petition, do not contain any support for his contentions that the granting of equal priorities in this case is an error in law and is not supported by substantial evidence. He cites SWRCB Decision 1618 as support for his position because in that decision:

"[T]he Board stated that the public interest considerations took into account historical use, relative needs of the applicants, and availability of alternative water resources. In this case, Mr. Kluge actually filed his application first, historical use is clearly on his side, and his need for the water is greater given the alternative supplies available to Mr. Eutenier."

In Decision 1618, the SWRCB found that "several factors should be considered in this case" (p. 26, emphasis added) and five factors were listed, not just the three mentioned by Kluge in his petition. However, applying the three factors cited by Kluge in his petition (historical use, relative needs of the applicants, and availability of alternative water resources), it is clear that the public interest considerations overwhelmingly support the SWRCB's decision to assign equal priority to the applications. The considerations in support of equal priority are listed below with the factors cited by Kluge shown in parentheses:

1. Both Kluge and Eutenier have been using the water from Adobe Creek Reservoir and Adobe Creek for decades without a legal basis of right. (Historical use.)
2. At one time, both were partners in the joint development of the vineyards. (Historical use.)
3. Kluge continued to expand his vineyards after filing his applications knowing that he was making an unauthorized diversion and using water for which he had no legal basis of right. (Relative need.)
4. Both parties have existing vineyards which are dependent on an existing supply of water. (Relative need.)

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration filed by Charles Kluge is denied.

CERTIFICATION

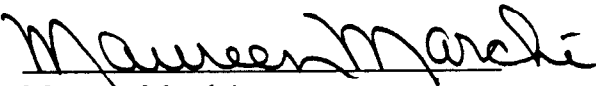
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 18, 1997.

AYE: John Caffrey
 James M. Stubchaer
 Marc Del Piero
 Mary Jane Forster
 John W. Brown

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board

as a factor in allocating the water from Adobe Creek Reservoir nor did he provide any evidence regarding how much water he needs for frost protection.

In Decision 1637, the SWRCB found that the general methodology used in the staff analysis was fair although the testimony of the parties established different facts than those relied on by the staff in preparing the staff analysis. The allocation methodology used by the SWRCB subtracted existing alternate supply available as storage for irrigation as testified to by the parties. The revocation of Kluge's access to Elston Reservoir was taken into account in the allocation.

In response to the fairness issue raised by Kluge, the SWRCB notes that there is not enough water available in Adobe Creek Reservoir to meet total demand and, as stated in the staff analysis, there are alternate means available for frost protection.

4.2 Availability of 50 af of Water in Adobe Creek Reservoir Between Elevations 1434.0 and 1436.5

In the staff analysis, staff concluded that there are 50 af of water in Adobe Creek Reservoir between elevations 1434.0 and 1436.5. The conclusion was based on the area-capacity curve shown on drawing 7-E-20137, sheet 2 of 8, for Adobe Creek Reservoir and the survey of the reservoir conducted by Division of Water Rights (Division) staff. Both Kluge and Eutenier objected to this conclusion and the issue was included in the Notice of Hearing in accordance with Water Code section 1347.

No evidence was offered at the hearing to show that this conclusion is erroneous. Neither Kluge nor Eutenier surveyed the reservoir or took any other measurements to determine the capacity of the reservoir between the two elevation levels. The only survey that the parties are aware of is that which was done by Division staff.¹ (T,99:9-11.)

¹ The survey done by Division of Water Rights staff is described in a Memorandum to Files written by Carl Henriet dated March 23, 1993. (Staff Exhibit 1.) As stated in the memorandum, the purpose of the survey (Continued next page)