

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

WR ORDER 2004-0040-DWR

**IN THE MATTER OF LICENSE 9615 (APPLICATION 9376)
CITY OF CALISTOGA
PETITION FOR TEMPORARY URGENCY CHANGE
IN PURPOSE AND PLACE OF USE**

SOURCE: Kimball Creek tributary to Napa River
COUNTY: Napa

ORDER DENYING TEMPORARY URGENCY CHANGE IN PURPOSE AND PLACE OF USE

1.0 INTRODUCTION

On July 29, 2004,

City of Calistoga
c/o Paula Whealen
444 North Third Street, Suite 325
Sacramento, CA 95814-6850

filed a Petition for Temporary Urgency Change with the State Water Resources Control Board (SWRCB), Division of Water Rights (Division), pursuant to the provisions of Water Code section 1435. The petition requests authorization to add a purpose of use and change the place of use to License 9615 (Application 9376) in order to supply irrigation water to a vineyard that otherwise lacks an adequate water supply. The request is denied because the SWRCB cannot make the requisite findings that the proposed change is urgently needed, that it will not unreasonably affect fish and wildlife, and that it is in the public interest.

2.0 SUBSTANCE OF PETITION

City of Calistoga (Calistoga) holds License 9615 (issued on March 9, 1971), which authorizes: (a) direct diversion of 0.74 cubic foot per second to be diverted from September 15 of each year to July 1 of the succeeding year; and (b) 315 acre-feet per annum (afa) by storage to be collected from November 1 of each year to May 1 of the succeeding year. The total amount of water to be taken from the source (direct diversion plus collection to storage) shall not exceed 606 afa per water year of October 1 to September 30. The total amount of water to be placed to beneficial use (direct diversion plus withdrawal from storage) shall not exceed 536 afa per calendar year of January 1 to December 31. The water is to be used for municipal purposes within the service area of the Calistoga municipal water system. The license does not contain any bypass flow requirement to protect public trust resources.

Calistoga's temporary urgency petition requests approval to provide 20 acre-feet (af) of water for irrigation of 65 acres of an existing vineyard and purchased rootstock owned by Rancho Alto Vineyards. Calistoga has previously provided water for irrigation of Rancho Alto Vineyards. However, in 2001 SWRCB staff inspected this project and concluded that the vineyard lands were not included in the License 9615 place of use. Further, irrigation is not a listed purpose of use for License 9615.

The petition states that the Calistoga water supply under License 9615 is the only adequate water source currently available. Rancho Alto Vineyards has a groundwater well that does not provide adequate water to irrigate the vineyard. The vineyard has an existing subsurface drainage system that may be used to fill a proposed, new offstream reservoir, as an additional water supply in the future. The petitioner asserts that the petition action qualifies as a temporary urgency because the vineyard and rootstock require water to survive this year. All facilities are in place to provide water to the vineyard.

3.0 OBJECTIONS TO THE PETITION

Department of Fish and Game (DFG) and the National Marine Fisheries Service (NOAA Fisheries) filed objections to approval of the petition.

3.1 DFG Objection

DFG requests that the petition be denied on the basis that: (1) there is no urgent need to make the proposed change; (2) the petition may result in an unreasonable effect on fish and wildlife; and (3) the proposed change does not appear to be in the public interest.

Urgent need:

DFG questions whether the need for water is urgent if Calistoga has knowingly neglected to secure a long-term water supply for the vineyard area for the past three years. DFG notes that Rancho Alto Vineyards has proceeded with development although it has no water provider and no water sources developed to support the vineyard on site. DFG asserts that this is not an urgent situation. Rather, this appears to be a planning error on the part of the end water user who proceeded without first securing an adequate water supply.

DFG asserts that in 2001, Calistoga knew that the place and purpose of use for Rancho Alto Vineyards was not authorized under the current license, yet it did not submit a long-term petition to serve the vineyard. DFG notes that the 2002 long-term change petition requests authorization to add 60 existing customers to Calistoga's place of use. The petition does not request to add irrigation as a purpose of use, nor does it request to add the Rancho Alto Vineyards to the place of use. From information available, DFG concludes that Calistoga has not exercised due diligence in pursuing a petition for change outside of the temporary urgency process.

DFG staff conducted a visual assessment of the site during the week of August 18 to 25, 2004, and most of the land was barren.

Unreasonable effect on fish and wildlife:

DFG states that Kimball Creek downstream of the Kimball Dam provides spawning and nursery habitat for steelhead, listed as "threatened" under the Endangered Species Act (ESA). This creek is a principal headwater tributary to the Napa River, which also supports this listed species and other native aquatic

resources. DFG believes there is insufficient water available to provide for the additional water allocation to the vineyard. The proposed change represents 6.3 percent of the stored water available under Calistoga's license (20 af of the 315 af stored, according to the notice). If Calistoga were to provide the required resource protection bypass flows from Kimball Reservoir and the additional water allocation to the vineyard, the domestic water supply for Calistoga might be jeopardized this fall.

Public interest:

DFG asserts that the petition is not being made to protect the quality or availability of a domestic water supply and thus, is not related to water used by the public at large. In addition, DFG points out that the petition is not related to the protection of instream beneficial uses. DFG questions how this change might be considered to be within the public interest rather than a change that solely benefits the needs of a private entity at the potential expense of the larger public interest.

DFG states that it reviews requests for temporary urgency changes with a great deal of deference to the petitioner, and most are legitimate claims. In this case, however, DFG is concerned that granting the petition may encourage claims of convenience, rather than urgency, for individuals who have fallen short of adequate planning for long-term water needs.

3.2 NOAA Fisheries

NOAA Fisheries requests that the petition be denied because the proposed change cannot be made without unreasonable effect on fish, wildlife or other instream beneficial uses.

NOAA Fisheries states that Kimball Creek provides important steelhead spawning and nursery habitat, and is concerned that Calistoga has not presented any information to show that no unreasonable adverse effect on steelhead would occur if the change were approved. The petition lacks information on whether the requested changes would result in increased diversions from Kimball Creek, and the petition does not propose stream flow monitoring to ensure that the volume of diverted water will not exceed the licensed volume for diversion. NOAA Fisheries notes that the license was granted prior to the federal listing of steelhead, and that the seasons of diversion extend beyond dates that recent SWRCB reports have identified as prudent to protect steelhead resources. The license does not provide any bypass flows for the protection of fisheries or other aquatic resources downstream from the diversion site.

NOAA Fisheries recommends that if the temporary changes are made to the existing license, then the licensed project should provide bypass flows for the protection of steelhead and the season of diversion should be limited to December 15 of each year to March 31 of the succeeding year.

In addition, NOAA Fisheries states that the status of the long-term change petition is unclear.

4.0 ENVIRONMENTAL CONSIDERATION

Pursuant to the provisions of the California Environmental Quality Act (CEQA), Calistoga issued a Notice of Exemption based on Categorical Exemption under section 15304 (Minor Alterations to Land). The exemption notice states that the vineyard has historically been served water from this source and the proposed temporary urgency change will not result in an increase in consumptive use allowed under License 9615 or a resultant increase in the amount of water diverted from Kimball Creek. In addition, the notice states that all diversion and conveyance facilities are in place to serve water to the Rancho Alto parcel so that no new construction would take place. Therefore, Calistoga concludes that the petition action will not unreasonably affect fish, wildlife, or other instream beneficial uses within Kimball Creek.

The SWRCB's denial of the urgency petition falls under the statutory exemption for projects which a public agency rejects or disapproves. (Pub. Resources Code, § 21080, subd. (b)(5).)

5.0 DISCUSSION

Under Water Code section 1435, the SWRCB must make the following findings in order to approve a temporary urgency change:

- The Permittee has an urgent need to make the proposed temporary urgency change.
- The temporary urgency change will not operate to the injury of any lawful user of water.
- The proposed temporary urgency change does not have an unreasonable effect upon fish, wildlife, or other instream beneficial uses.
- The proposed change is in the public interest.

1. Does the Permittee have an urgent need to make the proposed temporary change?

“Urgent need” means that the proposed change is necessary to further the constitutional policy that water be put to beneficial use to the fullest extent and waste be prevented. (Wat. Code, § 1435, subd. (c).) The SWRCB shall not find an urgent need if petitioner has not exercised due diligence in petitioning and pursuing a long-term change, if applicable. (*Id.*)

First, Calistoga has not shown that the proposed change presents an urgent need. Petitioner has not demonstrated an urgent need based on hydrologic or water quality conditions. Petitioner did not provide any information to indicate that the water year is below normal or critical in the Kimball Creek watershed, or that the petition should be approved in order to prevent an immediate degradation of water quality. Petitioner states that the vineyard has purchased rootstock, which requires planting immediately, yet the vineyard is mostly barren at this time. Thus, the petitioner's need is based solely on business considerations related to planting the vineyard as soon as possible.

Second, it appears that Calistoga has not exercised due diligence in securing a water supply for the vineyard outside of the temporary urgency change petition. The vineyard has proceeded with development although it has no water provider and inadequate water sources developed to support the vineyard at this time. Once the vines are planted, a long-term water supply is required. The vineyard cannot be served by License 9615 without violating the terms and conditions of License 9615. Calistoga filed a long-term change petition in 2002 to enlarge its place of use but did not include the vineyard in its petition. The Division's files indicate that the vineyard plans to develop a long-term water supply via collection of subsurface drainage from the vineyard area in pipes that will discharge into a proposed new, offstream reservoir. NOAA Fisheries questions the adequacy of the proposed long-term water supply, due to the flat gradient of the vineyard area. This effort does not demonstrate sufficient due diligence to secure an adequate water supply for this project. Accordingly, the SWRCB cannot find that the petitioner has an urgent need to make this proposed change.

2. Will the proposed temporary change operate to the injury of any other lawful user of water?

No objections on the basis of injury to any other lawful user of water were filed with the SWRCB. Nonetheless, without adequate measuring devices to monitor diversions under License 9615, including the increased proposed allocation, the SWRCB cannot find that the proposed change may be made without injury to any other lawful user of water.

3. Will the proposed temporary change have an unreasonable effect upon fish, wildlife, or other instream beneficial uses?

Kimball Creek downstream of the Kimball Dam provides spawning and nursery habitat for steelhead, a “threatened” species under the ESA. A temporary urgency change, if approved, is in effect for 180 days. During that time period, Calistoga would directly divert or collect water to storage in order to provide water for the vineyard, based on the diversion seasons in the license. The dates of the season of diversion and the lack of a bypass condition in the license are potentially harmful to steelhead. Any increased diversion, beyond the diversion needed to serve authorized uses under License 9615, has the potential to reduce instream flows with a resultant impact to public trust resources. There is no practical method to mitigate for this potential impact to steelhead, absent modification of the license to include a bypass flow regime that is protective of public trust resources.

NOAA Fisheries suggests that a diversion season limited to the period December 15 of each year to March 31 of the succeeding year would minimize impacts to steelhead. The petitioner proposes to use 20 af to serve the vineyard during the summer irrigation season. There is no practical method to either: (a) limit reservoir refill to offset the water used pursuant to the petition; or (b) limit direct diversion to serve the petitioned use, to the period December 15 through March 31, absent modification of the license diversion season. Modification of the license goes beyond the scope of the temporary urgency action. Accordingly, the SWRCB cannot find that the proposed change may be made without an unreasonable effect upon fish, wildlife, or other instream beneficial uses.

4. Is the proposed change in the public interest?

The proposed change may result in less water being available under License 9615 to serve domestic uses in Calistoga in the fall. Approval of the proposed change appears to benefit the individual vineyard only, an undertaking that proceeded with development without securing an adequate water supply in advance. It is against public policy to reward development of the state’s water resources that is out of compliance with the Water Code. Moreover, there is evidence that the proposed change may impact public trust resources. Based on the findings above, the SWRCB cannot find that the proposed change is in the public interest.

6.0 CONCLUSIONS

Based on the available evidence, the SWRCB cannot make the requisite findings required in order to approve Calistoga’s temporary urgency change petition. Accordingly, the petition must be denied.

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ORDER

NOW, THEREFORE, IT IS ORDERED THAT the petition filed for Temporary Urgency Change to add irrigation and a new place of use to License 9615 is **DENIED**.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY

Arthur G. Baggett, Jr.
Chair

Dated: September 17, 2004

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MAILING LIST

City of Calistoga
c/o Paula Whealen
444 North Third Street, Suite 325
Sacramento, CA 95814-6850

Steven Edmondson
NOAA Fisheries
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

Robert W. Floerke
Department of Fish and Game
P.O. Box 47
Yountville, CA 94599