

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

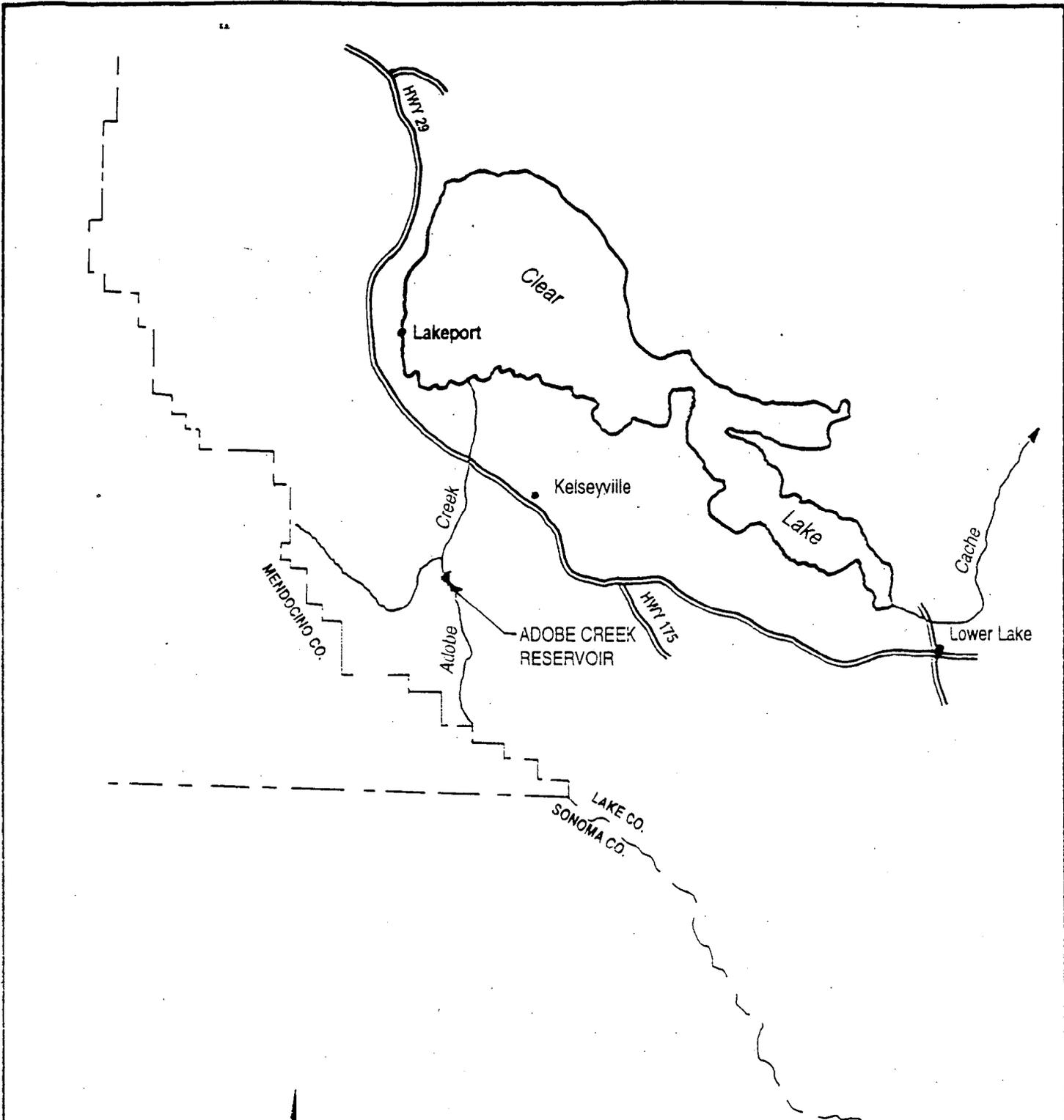
In the Matter of Applications)
29323 and 29324,)
)
CHARLES AND ANNA KLUGE,)
)
Applicant and Protestant;) DECISION: WR 1637
)
and) SOURCES: Adobe Creek
) tributary to
) Clear Lake and
Applications 29355 and 29356,) Unnamed Streams
Petition to Change Permit) tributary to
16684 (Application 24336), and) Adobe Creek
Petition to Change License)
12125 (Application 26123),)
) COUNTY: Lake
DONALD R. EUTENIER,)
)
Applicant, Petitioner,)
and Protestant.)
_____)

DECISION APPROVING APPLICATIONS AND
PETITIONS FOR CHANGE SUBJECT TO CONDITIONS

BY THE BOARD:

1.0 INTRODUCTION

Charles and Anna Kluge (Kluge) and Donald R. Eutenier (Eutenier) have filed competing applications to appropriate water to storage in and directly divert water from Adobe Creek Reservoir, located approximately seven miles upstream of Clear Lake in Lake County (see Figure 1). Eutenier also filed applications to divert water to storage in Eutenier Reservoir and to directly divert water from Adobe Creek, Adobe Creek Reservoir, and Eutenier Reservoir; and filed petitions for change regarding a permit and a license. Only the applications regarding the diversion to and withdrawal



STATE OF CALIFORNIA
 STATE WATER RESOURCES CONTROL BOARD
 DIVISION OF WATER RIGHTS

FIGURE 1
 LOCATION MAP

SCALE

MILES 0 1 2 3 4 5 5 7 8 9 10 MILES

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from storage in Adobe Creek Reservoir were at issue in the hearing.

Kluge and Eutenier filed protests to each others' applications. Protests were also filed by the California Department of Fish and Game (DFG) and the Yolo County Flood Control and Water Conservation District (Yolo).

Following receipt of protests, staff of the Division of Water Rights (Division) of the State Water Resources Control Board (SWRCB) conducted a field investigation and prepared a staff analysis pursuant to Water Code section 1345. The staff analysis recommended approval of the applications and petitions for change subject to conditions.

Kluge and Eutenier objected to some of the findings in the staff analysis and requested a hearing pursuant to Water Code sections 1346 and 1347. The SWRCB held a hearing on March 19, 1997. The hearing addressed the objections to the findings in the staff analysis. The parties were notified that all of the staff analysis findings which were not objected to were final and would not be further considered by the SWRCB.

Based on a review of the evidence and the applicable law, the SWRCB concludes that the applications and petitions for change should be approved subject to the conditions set forth at the end of this decision. The findings concerning the applications and petitions for change are set forth below.

2.0 BACKGROUND

2.1 Substance of Applications and Petitions for Change

2.1.1 *Application 29323 of Kluge*

Application 29323 was filed on August 22, 1988, to authorize diversion of 50 acre-feet per annum (afa) to storage in Adobe Creek Reservoir from November 1 to April 15 for irrigation and frost protection of walnuts and grapes on 27.5 acres within the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 29 and 11 acres within the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 29, Township 13 North, Range 9 West, Mount Diablo Base & Meridian (T13N, R9W, MDB&M). (See Figure 2.) Application 29323 was modified to delete diversion of 20 afa to offstream storage in Elston Reservoir from an unnamed stream tributary to Adobe Creek.

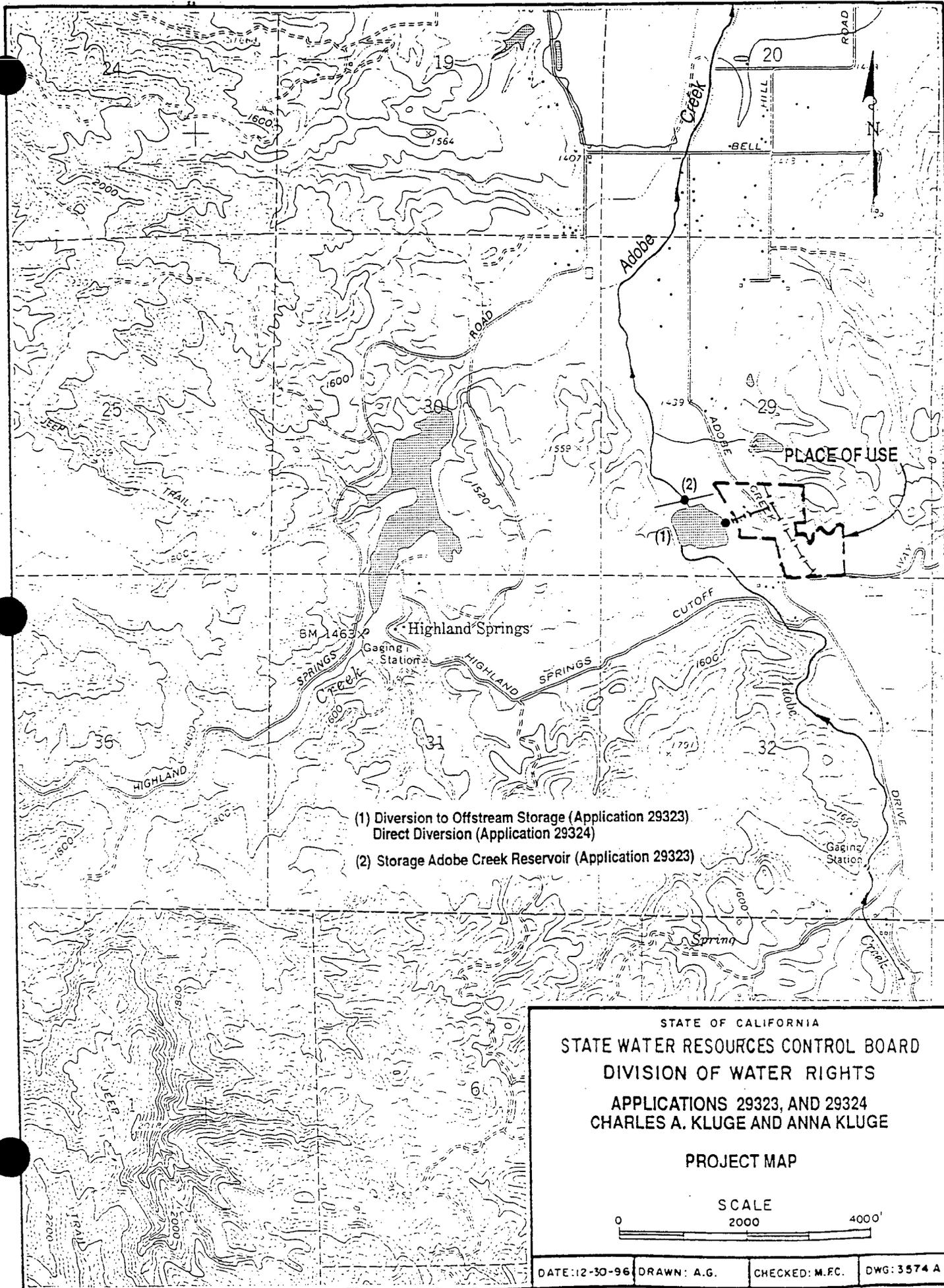
2.1.2 *Application 29324 of Kluge*

Application 29324 was filed on August 22, 1988, to authorize direct diversion of 3.0 cubic feet per second (cfs), not to exceed 36.1 afa, from Adobe Creek Reservoir from March 15 to April 15 for frost protection on 27.5 acres within the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 29 and 11 acres within the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 29, T13N, R9W, MDB&M (see Figure 2).

2.1.3 *Application 29355 of Eutenier*

Application 29355 was filed October 17, 1988, to authorize diversion of 90 afa to storage in Adobe Creek Reservoir and 33 afa to storage in Eutenier Reservoir. Eutenier also proposes to replenish 14 afa of storage in Eutenier Reservoir using water diverted from Adobe Creek Reservoir or Adobe Creek. Diversion to storage would occur from November 1 to April 15. Eutenier proposes to directly divert 1.0 cfs from April 1 to April 15 and

Figure 2



from November 1 to November 30, not to exceed 73 afa, from Adobe Creek, Adobe Creek Reservoir, and Eutenier Reservoir for irrigation of grapes. The place of use includes 15 acres within the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$, 46 acres within the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$, and 14 acres within the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 32, T13N, R9W, MDB&M (see Figure 3).

2.1.4 Application 29356 of Eutenier

Application 29356 was filed October 17, 1988, to authorize direct diversion of 2.0 cfs, not to exceed 29 afa, from March 15 to April 15 from Adobe Creek, Adobe Creek Reservoir, and Eutenier Reservoir for frost protection of grapes on 15 acres within the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and 19 acres within the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 32, T13N, R9W, MDB&M (see Figure 3).

2.1.5 Petition to Change the Place of Use for Permit 16684 (Application 24336) of Eutenier

Permit 16684 authorizes use of water on 20 acres. The petition to change the place of use was filed to authorize increasing the place of use from 20 acres to 34 acres as follows: 15 acres within the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and 19 acres within the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 32, T13N, R9W, MDB&M. The total amount of water diverted and used would not change.

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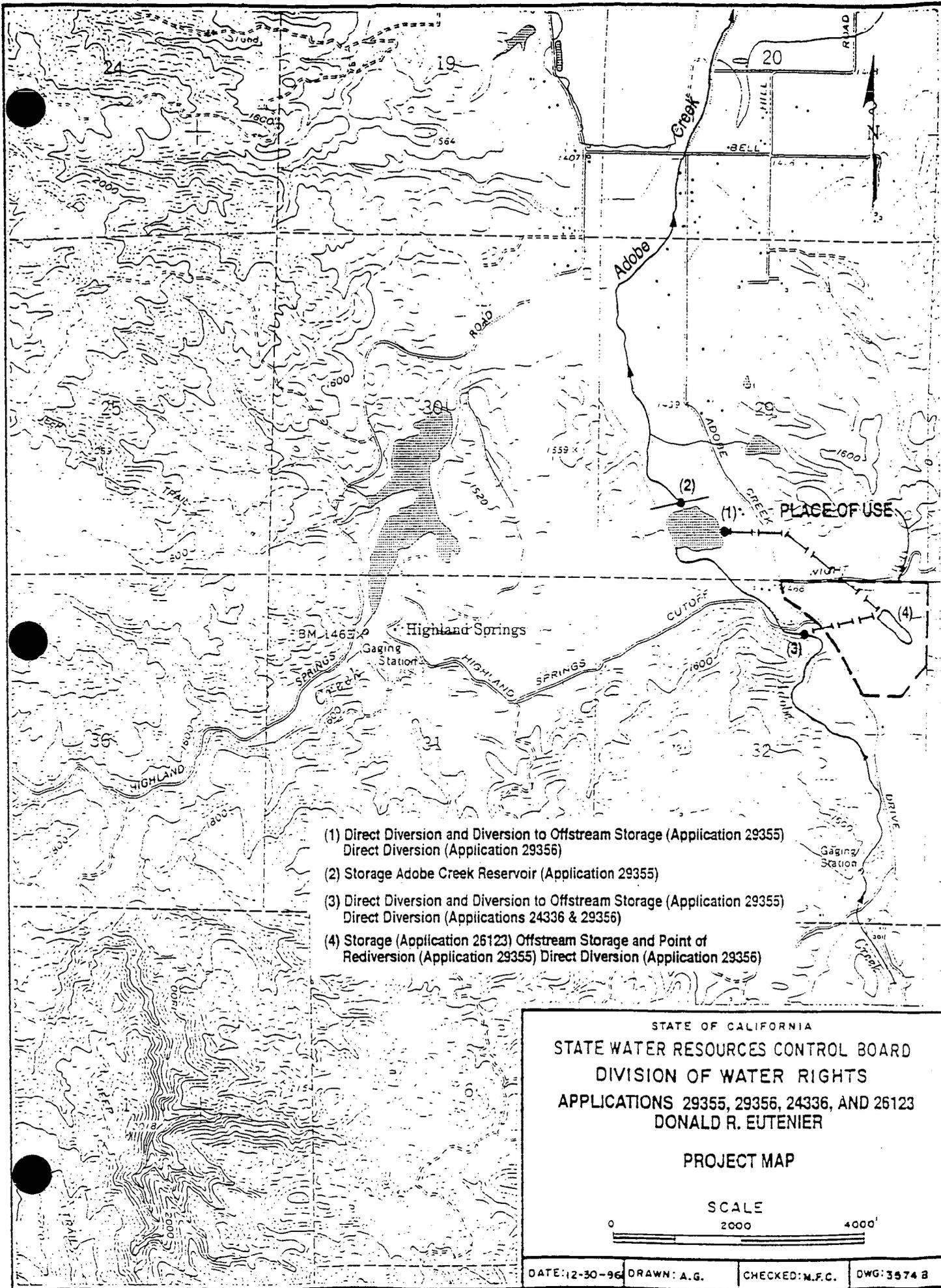
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Figure 3

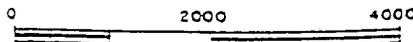


- (1) Direct Diversion and Diversion to Offstream Storage (Application 29355)
Direct Diversion (Application 29356)
- (2) Storage Adobe Creek Reservoir (Application 29355)
- (3) Direct Diversion and Diversion to Offstream Storage (Application 29355)
Direct Diversion (Applications 24336 & 29356)
- (4) Storage (Application 26123) Offstream Storage and Point of
Rediversion (Application 29355) Direct Diversion (Application 29356)

STATE OF CALIFORNIA
 STATE WATER RESOURCES CONTROL BOARD
 DIVISION OF WATER RIGHTS
 APPLICATIONS 29355, 29356, 24336, AND 26123
 DONALD R. EUTENIER

PROJECT MAP

SCALE



DATE: 12-30-96

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2.1.6 *Petition to Change the Place of Use and Add Points of Diversion for License 12125 (Application 26123) of Eutenier*

License 12125 authorizes use of water on 30 acres as follows: 15 acres within the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and 15 acres within the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 32, T13N, R9W, MDB&M. The petition to change the place of use was filed to authorize increasing the place of use to 34 acres as follows: 15 acres within the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and 19 acres within the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 32, T13N, R9W, MDB&M.

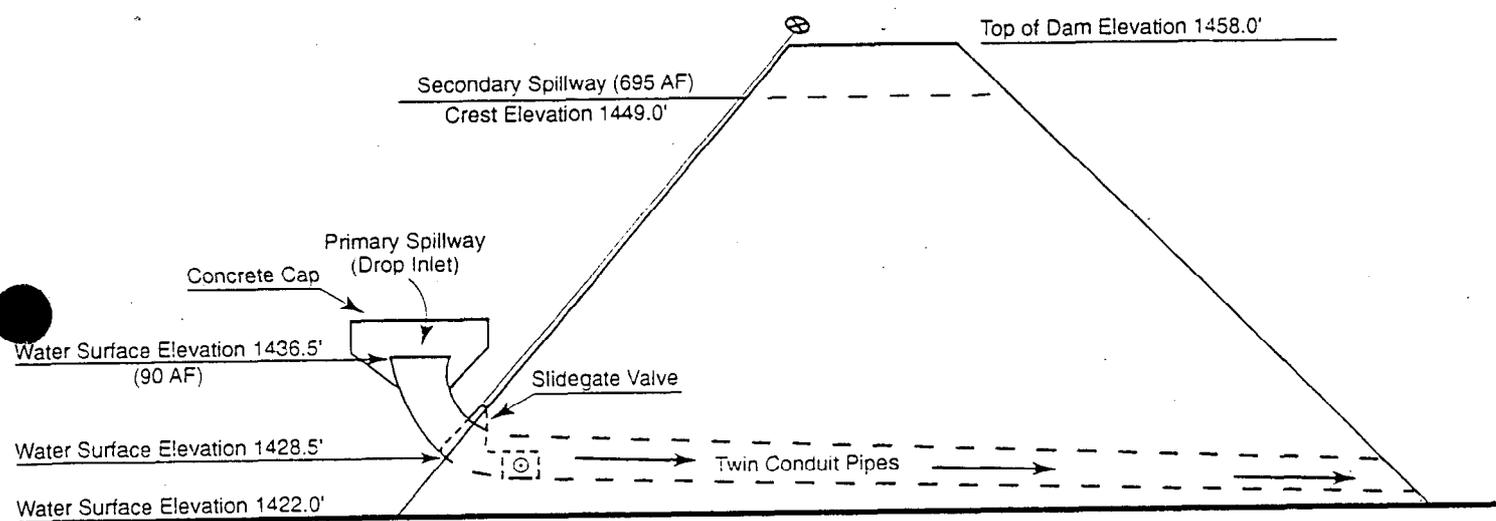
License 12125 authorizes one point of diversion at Eutenier Reservoir. In his petition, Eutenier proposes to add two points of diversion; one at Adobe Creek Reservoir and one on Adobe Creek.

2.2 Adobe Creek Dam and Reservoir Operation

Adobe Creek Dam is a 36 foot high earth dam which was constructed in 1962 for flood control. It is owned and operated by Lake County Flood Control and Water Conservation District (Lake Co. FCWCD). The dam is equipped with a drop-inlet type primary spillway for releasing flood water through the dam and a higher secondary spillway for bypassing flood water over the dam (see Figure 4).

The drop-inlet spillway functions like an open drain to prevent storage of water above its level. There are no restrictive mechanisms inside the spillway piping which would allow for any storage above this level. Flood water temporarily collects above this level only when inflow greatly exceeds outflow. Water

SCHEMATIC OF ADOBE CREEK RESERVOIR CONTROLS



(Not to Scale)

falling into the drop-inlet passes through an elbow and is then channeled through the dam by means of twin outlet conduits.

The capacity of Adobe Creek Reservoir at the drop-inlet primary spillway crest is 90 acre-feet (af) at elevation 1436.5 feet above mean sea level.¹ The capacity of the reservoir at the secondary spillway is 695 af at elevation 1449.0. The 90 af pool was designed to function as a sediment basin for the reservoir.

A slidegate valve is positioned adjacent to the primary spillway with the lowest point of the valve opening located at elevation 1428.5. The purpose of the slidegate valve is to provide a way to drain most of the reservoir. This valve is operated only by Lake Co. FCWCD.

Historically, Lake Co. FCWCD has allowed water to remain in the reservoir at elevation 1436.5 to maintain the 90 af pool.

Lake Co. FCWCD tests the slidegate valve once a year by opening it to make sure it is operational, then it is closed for the remainder of the year.

2.3 Pending Litigation

Kluge and Eutenier are in litigation regarding their use of water from Adobe Creek Reservoir, among other things. (*Eutenier v. Kluge*, Lake County Superior Court No. 23757.) Further proceedings in the litigation have been deferred until after a determination by the SWRCB on the pending applications.

(Eutenier Exhibit 5.)

2.4 Protests

¹ All elevations are expressed in feet above mean sea level.

2.4.1 Protests to Applications 29323 and 29324 of Kluge

Applications 29323 and 29324 of Kluge were protested by Eutenier, Yolo, and DFG. Eutenier protested the applications based on unavailability of unappropriated water to satisfy both his needs and Kluge's needs. He requests that the supply available in the reservoir be equitably apportioned between them and that they have equal priority. Yolo protested the applications based on injury to prior rights. DFG protested the applications alleging that the appropriations would adversely affect the fishery resources in Adobe Creek during the spring through fall and would adversely affect the wetland which is supported by the storage of water in the reservoir.

2.4.2 Protests to Applications 29355 and 29356 of Eutenier

Applications 29355 and 29356 of Eutenier were protested by Kluge, Yolo, and DFG. Kluge protested the applications based on injury to prior rights (claimed riparian and pre-1914 rights) and contends that his pending applications have a higher priority based on Water Code section 1450.² Kluge also protested based on adverse environmental impacts, alleging that Eutenier's diversion from Adobe Creek would dry up the creek and kill spawning bass and perch. Yolo protested the applications based on injury to prior rights. DFG protested the applications alleging that the appropriations would adversely affect the fishery resources in Adobe Creek during the spring through fall and would adversely

² 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."

affect the wetland which is supported by the storage of water in the reservoir.

2.4.3 Protest to Petition to Change Permit 16684 of Eutenier
Yolo protested the petition to change Permit 16684 of Eutenier based on injury to prior rights.

2.4.4 Protest to Petition to Change License 12125 of Eutenier
Yolo and Kluge protested the Petition to Change License 12125 of Eutenier based on injury to prior rights.

2.5 Field Investigation and Staff Analysis Pursuant to Water Code Section 1345

On April 9, 1992, Division staff conducted a field investigation for all of the pending applications and petitions filed by Kluge and Eutenier in accordance with Water Code section 1345. All applicants and protestants were in attendance.

During the field investigation, both Kluge and Eutenier agreed to the following protest dismissal condition proposed by DFG:

"Permittee shall screen all pump intakes with 5/32-inch mesh. In lieu of screening, perforated pipe or plate, with holes 5/32-inch or less in diameter may be used. Screens and/or perforations shall be regularly cleaned by permittee or otherwise designed so that approach velocities at the intake do not exceed 0.33 feet per second."

During the field investigation, Eutenier agreed to the following condition on Application 29356 to protect fish and wildlife resources:

"For the protection of fish and wildlife resources, permittee shall during the period:

From March 15 through March 31 bypass a minimum of 5 cfs and from April 1 through April 14 bypass a minimum of 3 cfs at the point of diversion on Adobe Creek. The total streamflow shall be bypassed whenever it is less than the designated amount for that period."

No other agreement was reached among the applicants and protestants at the field investigation. Subsequent to the field investigation, both Kluge and Eutenier executed agreements with Lake Co. FCWCD authorizing access to the Adobe Creek Reservoir diversion facilities.

A staff analysis was issued in May 1996. (Staff Exhibit 1.) In the staff analysis, staff concluded and recommended the following:

1. Water is normally available for appropriation from November through mid-April in the Clear Lake watershed, although there will be years when any water diverted by Kluge and Eutenier will be adverse to the prior rights of Yolo.
2. Yolo has pre-1914 rights to store water in Clear Lake in accordance with the Gopcevic Decree.

3. Water is not available for appropriation in water years when the elevation of Clear Lake does not reach 7.56 feet as measured at the Rumsey Gage, provided that water has not been discharged from the lake to reduce the lake level.
4. Kluge and Eutenier should enter into a contract with Yolo to compensate for any diversion of water which is adverse to Yolo's prior rights.
5. Kluge does not have either a pre-1914 appropriative right or a riparian right to divert and use water from Adobe Creek or Adobe Creek Reservoir.
6. Adobe Creek Reservoir has a useable storage capacity of 90 af, but there is no legal basis of right to store water in the reservoir.
7. Of the 90 af of capacity, 40 af is needed to maintain the existing wetland and 50 af is available in most years for appropriation by Kluge and Eutenier.
8. The wetland is protected when the water level in Adobe Creek Reservoir is maintained at an elevation of 1434.0. This provides storage of 40 af and a surface area of 13 acres.
9. Kluge and Eutenier should be allowed to withdraw a total of 50 afa from storage in Adobe Creek Reservoir but should be

required to cease pumping from the reservoir when the water level reaches elevation 1434.0 to protect the wetland.

10. Water retained in storage below elevation 1434.0 should be considered as water that is allocated to fish and wildlife enhancement and would not be available for consumptive use downstream under prior rights.
11. Of the maximum of 50 afa of water that is authorized to be withdrawn from storage in Adobe Creek Reservoir, 35 afa should be allocated to Kluge and 15 afa should be allocated to Eutenier. Factors considered in this allocation include acreage irrigated at the time the applications were filed, water duty, and available storage in other reservoirs.
12. Kluge and Eutenier should be given equal priority to the water withdrawn from storage in Adobe Creek Reservoir and to water directly diverted from Adobe Creek.
13. Kluge's permit on Application 29323 should authorize collection to storage of 50 afa in Adobe Creek Reservoir and Eutenier's permit on Application 29355 should authorize collection to storage of 40 afa in Adobe Creek Reservoir.
14. Adobe Creek Reservoir and Adobe Creek should not be added as points of diversion to License 12125.
15. Within 90 days of the issuance of any permits, Kluge and Eutenier shall install: (1) screens or perforated pipe/plate on all pump intakes, (2) a staff gage in

Adobe Creek Reservoir which is referenced to mean sea level and clearly marked at an elevation of 1434.0 feet above mean sea level, (3) staff gages in Elston and Eutenier Reservoirs which are calibrated to storage in af, and (4) totalizing flow meters on the discharge lines of the diversion facilities on Adobe Creek Reservoir and Adobe Creek.

The staff analysis recommended approval of the applications and petitions for change subject to specified conditions.

2.6 Request for Hearing

After receipt of the staff analysis, both Kluge and Eutenier requested a hearing in accordance with Water Code section 1347. Section 1347 provides that hearings on minor protested applications are restricted to consideration of issues unresolved among the parties following completion of the field investigation and staff analysis.

3.0 KEY ISSUES

The Notice of Hearing was issued on January 22, 1997. The SWRCB held a hearing on March 19, 1997, to receive evidence on the following key issues which were specified in the Notice of Hearing:

- "1. Is 50 acre-feet of water available in Adobe Creek Reservoir between elevations 1434.0 and 1436.5 feet above mean sea level?

- "2. How should the available water stored in Adobe Creek Reservoir be allocated between Kluge and Eutenier?
- a. What factors should provide the basis for the allocation, i.e., actual acreage, acreage irrigated at the time of application filing, number of vines, alternate water source availability, or other factors?
 - b. How many acres were irrigated by each party at the time their respective applications were filed?
 - c. How many vines were planted at the time their respective applications were filed?
- "3. Should each of the applications be given equal priority?
- "4. Should proposed conditions requiring that pump intakes be screened or perforated within 90 days from the date of permit issuance be modified to take into account weather and water level conditions? If so, how?"

The Notice of Hearing also stated that all staff analysis findings which were not objected to by the parties are deemed to stand and would not be considered at the hearing.

4.0 QUANTITY OF WATER AVAILABLE FOR APPROPRIATION IN ADOBE CREEK RESERVOIR

In the staff analysis, staff concluded that Adobe Creek Reservoir has a usable storage capacity of 90 af and that it was necessary to maintain the water level at 1434.0 feet to protect the wetland. Staff also concluded that there are 40 af of water below elevation 1434.0 and 50 af between elevation 1434.0 and 1436.5 (elevation of the drop-inlet spillway crest).

Kluge and Eutenier objected to the conclusion that there are 50 af of storage between elevation 1434.0 and 1436.5. Neither Kluge nor Eutenier offered any evidence 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. (T, 65:21-66:1.)

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, 27:6-27:21, 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 to the contrary, the conclusion in the staff analysis stands. Accordingly, the SWRCB finds that there are 50 af of water available in Adobe Creek Reservoir between elevations 1434.0 and 1436.5 feet above mean sea level.

5.0 ALLOCATION OF AVAILABLE WATER STORED IN ADOBE CREEK RESERVOIR

In the staff analysis, staff recommended that a maximum of 50 af of water be withdrawn from the storage pool of Adobe Creek Reservoir for irrigation. Staff further recommended that Kluge should be allocated 35 af of the 50 af available in Adobe Creek Reservoir and Eutenier should be allocated 15 af of the 50 af.

Kluge's allocation was based on 38.5 irrigated acres that staff found existed at the time he filed his application (21.5 acres of vineyard and 17 acres of walnuts). Eutenier's allocation was based on 34 acres of vineyard that staff found existed at the time he filed his application. No water was allocated for Eutenier's 41 acres of pasture. The water duties applied by staff were 2.3 af per acre for grapes and 2.3 af per acre for walnuts. Staff considered alternate supplies of water, but it is not clear how staff factored the alternate supply into the recommended allocation. Staff found that Kluge had 20 af of storage available in Elston Reservoir and that Eutenier had 33 af of storage available in Eutenier Reservoir.

The SWRCB finds that the general methodology for allocating the available water in Adobe Creek is fair, although the testimony of the parties established different facts than those relied on by the staff in preparing the staff analysis. The SWRCB finds that the allocations to Kluge and Eutenier should be determined as follows:

1. Allocate the water based on the acreage irrigated at the time the applications were filed;

2. Apply a water duty of 2.7 af per acre for walnuts and 2.3 af per acre for grapes;
3. Subtract existing alternate supply available as storage;
4. Allocate the 50 af available in Adobe Creek Reservoir based on the pro-rated share that each has to the total demand.

5.1 Acreage Irrigated at Time of Filing

Based on the testimony of the parties, at the time their respective applications were filed, Kluge had 9 acres of walnuts and 10 acres of grapes and Eutenier had 31 acres of grapes.

(T, 24:13-14, 39:10-40:19, 112:6-10; see Kluge Exhibits 1A, p. 1; 7A, and 7B.)

Kluge suggested using the number of vines each party has as the basis of allocating water from Adobe Creek Reservoir. (T, 25:5-6.) It cannot be determined from the evidence how many vines each party had at the time the applications were filed and both parties have increased the number of vines by "double planting"³ or "interplanting"⁴ since their applications were filed.

(T, 38:18-21; Eutenier Exhibit 1, 5:1-2.) Further, the water duty for each plant has not been determined, especially where double planting has occurred. Therefore, the SWRCB finds that it is inappropriate to use a vine count as the basis for an allocation of water from Adobe Creek Reservoir.

³ Double planting means where there was previously one vine there are now two vines. (T, 38:18-20.)

⁴ Interplanting means planting another vine between two existing vines. (Eutenier Exhibit 1, 5:1-2.)

Kluge suggested using the acreage irrigated at the present time as the basis of allocating water from Adobe Creek Reservoir. Kluge has continued to increase his acreage of grapes since his applications were filed; Eutenier has not.⁵ (T, 24:21-22.) Since both parties knew that their diversions of water were unauthorized at the time they filed their applications, to account for additional acreage planted by Kluge in determining the allocation of water would be rewarding him for violating the law. Therefore, the SWRCB finds that it is appropriate to use the acreage irrigated at the time the applications were filed as the most equitable means of allocating the water from Adobe Creek Reservoir. Accordingly, the SWRCB finds that the allocations should be based on 9 acres of walnuts and 10 acres of grapes for Kluge and 31 acres of grapes for Eutenier.

5.2 Duty of Water

The parties agree that the water duty for grapes is 2.3 af per acre. (T, 55:3-4; Eutenier Exhibit 1, 3:27.) The parties do not agree to the water duty for walnuts.

In the staff analysis, Division staff used duties of 2.3 af per acre for grapes and 2.3 af per acre for walnuts in calculating water duty for the basis of the allocations recommended for Kluge and Eutenier. (Staff Exhibit 1 (staff analysis, p. 27).) The duty of water for grapes is based on Department of Water Resources (DWR) Bulletin 113-4, Table 1: grapes in Lake County. (*Ibid.*) The duty of water for walnuts is based on DWR Bulletin 113-4, Table 1: "other deciduous" in Lake County. (*Ibid.*)

⁵ However, as previously noted, Eutenier has commenced interplanting of vines since he filed his applications. (Eutenier Exhibit 1, 5:1-2.)

Kluge claims that walnuts grown in Lake County require a duty of 3.0 af per acre. (Kluge Exhibit 1, p. 9; T, 26:10-16, 47:21-50:1, 54:14-24.) Kluge testified that his Exhibit 8 states that walnuts require about 4.0 af per acre and he uses this figure to support his claim that walnuts grown in Lake County require 3.0 af per acre. (T, 26:13-16.) Exhibit 8 is an article which appeared in the October 1988 issue of Nut Grower entitled "Watering Walnut Orchards" by Allan Fulton, Soil and Water Farm Advisor for Kings County. Exhibit 8 does not contain any mention of any specific water duty for walnuts in any county. The SWRCB finds no basis for a water duty of 3.0 af per acre for walnuts based on Kluge's Exhibit 8.

Eutenier claims that walnuts grown in Lake County require a duty of 1.8 af per acre. (Eutenier Exhibit 1; Eutenier Exhibit 12; Eutenier Exhibit 5, 3:19-21.) The duty of water for walnuts of 1.8 af per acre is based on extrapolation of data from DWR Bulletin 113-4, Table 1, as calculated by Division staff. (Eutenier Exhibit 12; T, 97:4-22.)

Division staff calculated the water duty for walnuts by calculating the average water duty for almonds and pistachios shown in Bulletin 113-4, Table 1 and dividing it by an average duty for grapes shown in Table 1 and multiplying that figure by 2.3 af per acre water duty of grapes in Lake County. (Eutenier Exhibit 12.) While there is logic in using a ration to translate from statewide average to demand in Lake County, evidence is not available to show that the information on grapes and nut trees is sufficiently similar to rely on this method. Thus, the SWRCB finds there is no basis: (a) for estimating the water duty of

walnuts in Lake County using the ration of water duty for grapes in Lake County to the average water duty for grapes statewide, and (b) for a water duty of 1.8 af per acre for walnuts in Lake County.

As noted above, in the staff analysis Division staff used the water duty for "other deciduous" in Lake County (2.3 af per acre) as the water duty for walnuts in Lake County. The SWRCB finds there is no basis for using the water duty for "other deciduous" (2.3 af per acre) for walnuts. "Other deciduous" is not defined and it cannot be determined whether walnuts are appropriately classified as "other deciduous." Therefore, it is not appropriate to use 2.3 af per acre as the water duty for walnuts in Lake County.

The most similar crops to walnuts in the DWR Table are almonds and pistachios. Thus, the SWRCB finds that it is reasonable to use the water duty for almonds and pistachios as the basis for the water duty for walnuts. Using the data in DWR Bulletin 113-4, Table 1, an average duty of water for almonds and pistachios is 2.7 af per acre.

Accordingly, the SWRCB finds that the duties of water to be used in calculating the allocations of water for Kluge and Eutenier are 2.3 af per acre for grapes and 2.7 af per acre for walnuts.

5.3 Existing Alternate Supplies Available as Storage

Kluge does not have any alternate supply available as storage. His access to Elston Reservoir has been revoked. (Kluge Exhibit 6; T, 12:12-14, 22:6-23.) Eutenier has Eutenier

Reservoir available as an alternate supply which has a capacity of 33 af. In accordance with Section 5.0 above, the SWRCB finds that Eutenier's allocation should be reduced by the alternate supply available as storage and measured by the capacity of Eutenier Reservoir.

At the hearing, Eutenier asked the SWRCB to consider using the amount of water that is actually available in storage in Eutenier Reservoir on June 1 of each year rather than using the capacity of the reservoir as the amount to deduct from his demand in calculating his allocation from Adobe Creek Reservoir.

(T, 94:18-23.) Eutenier controls the amount of water diverted to storage in Eutenier Reservoir and he testified that he waits to see if Eutenier Reservoir will fill from runoff before he pumps water from Adobe Creek into it. (T, 122:13-123:1.) Eutenier testified that the reasons he waits to see if the reservoir will fill from runoff rather than pumping when water is available from Adobe Creek are:

1. He does not want to pay the costs associated with pumping water from Adobe Creek to Eutenier Reservoir, and
2. He does not want Eutenier Reservoir to spill.

(T, 122:15-123:1.)

The SWRCB finds that using the capacity of Eutenier Reservoir as the amount of water to deduct from his demand in determining his allocation from Adobe Creek Reservoir is reasonable. Eutenier

has the ability to fill Eutenier Reservoir early although he does not want to pay the costs associated with pumping the water from Adobe Creek to the reservoir while Kluge has no other source of water available to him. Accordingly, the SWRCB finds that Eutenier's total demand of 71.3 af should be reduced by 33 af (capacity of Eutenier Reservoir) for a total of 38.3 af.⁶

5.4 Allocation of 50 af

Demand for both parties is calculated by multiplying acreage by water duty. Demand for Kluge is 47.3 af⁷ and demand for Eutenier is 71.3 af.⁸ Eutenier's demand is reduced to 38.3 af because his alternate supply available as storage (33 af) should be subtracted in accordance with the findings in Sections 5.0 and 5.3. Thus, total demand for both parties is 85.6 af. Kluge and Eutenier are allocated water based on their pro-rated share of the total demand, 27.6 af⁹ and 22.4 af,¹⁰ respectively.¹¹

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⁶ (31 acres of grapes x 2.3 af per acre) - 33.0 af = 38.3 af.

⁷ (9 acres of walnuts x 2.7 af per acre) + (10 acres of grapes x 2.3 af per acre) = 47.3 af.

⁸ 31 acres of grapes x 2.3 af per acre = 71.3 af.

⁹ (47.3 ÷ 85.6) x 50 = 27.6.

¹⁰ (38.3 ÷ 85.6) x 50 = 22.4.

¹¹ The SWRCB notes that the allocations are close to the estimated actual use of water from Adobe Creek Reservoir as testified to by the parties. Kluge testified that he estimates that he actually used approximately 30 afa. (T, 62:7-10.) Eutenier testified that he estimates that he actually used approximately 28 afa. (T, 119:5-12.) However, neither Kluge nor Eutenier had any way to actually measure their respective water use from the reservoir. (T, 70:16-23, 119:8-12.)

6.0 PRIORITY OF APPLICATIONS

In the staff analysis, staff recommended that the applications of Kluge and Eutenier be given equal priority. Staff found that it was in the public interest to assign equal priority to the competing applications because both Kluge and Eutenier rely on water from the reservoir for existing crops. Prior to filing applications, Kluge and Eutenier were the subject of a complaint investigation regarding their unauthorized diversion of water from Adobe Creek Reservoir. In the report of the complaint investigation, Division staff recommended that any applications filed by Kluge and Eutenier should be considered as having equal priority. (Eutenier Exhibit 6, p. 4.)

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.)

In this case, both applicants have been diverting and using the water from Adobe Creek Reservoir and Adobe Creek for decades. At

one time, both were partners in the joint development of the vineyards. 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. (T, 146:20-23.)

Eutenier filed his application after Kluge based on the assumption that the date of application did not matter because he alleges that during the complaint investigation Division staff told him that both he and Kluge would be given equal priority for their applications. (T, 82:11-83:13; 105:17-107:8; Eutenier Exhibit 1, 4:8-24.) It cannot be determined from the record whether Eutenier's detrimental reliance on alleged oral statements regarding equal priority made by Division staff during the complaint investigation is justified. The Report of Complaint Investigation does not contain any written promises of equal priority; it does contain a staff recommendation that any applications filed by Kluge and Eutenier "should be considered as having equal priority." (Eutenier Exhibit 6, page 4.)

The SWRCB finds that it is in the public interest to adjust the priorities of water rights and give equal priority to Applications 29323, 29324, 29355, and 29356 because the applicants have been diverting water for existing uses for decades and were once partners in the joint development of the vineyards.

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7.0 MODIFICATION OF PROPOSED CONDITION REQUIRING SCREENING OR PERFORATION OF PUMP INTAKES WITHIN 90 DAYS OF PERMIT ISSUANCE

The staff analysis includes proposed permit terms that would require the parties to screen or perforate pump intakes within 90 days from the date of permit issuance. Eutenier objected to the proposed conditions because weather and water level conditions may make it impossible to comply with these terms. He requested that November 1 of the year permits are issued be used as the completion date, assuming the permits are issued before August 1, because the work can be performed most economically and effectively in the fall when water levels are low. (Eutenier Exhibit 10, 2:23-3:10.)

There was no testimony or evidence introduced at the hearing on this subject. Given the expected date of adoption of this decision, the November 1 completion date is close to the 90 days recommended in the staff analysis. The 90-day completion requirement may give more flexibility to the parties depending upon when the Division actually issues the permits. Therefore, the SWRCB finds that the 90-day completion date should be affirmed. However, if weather and water level conditions prevent the parties from complying with the screening requirement, the Chief of the Division of Water Rights should be authorized to approve a petition for extension of time if due diligence in complying with the term has been shown.

8.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The SWRCB is the lead agency pursuant to CEQA. Division staff prepared and circulated a proposed mitigated negative declaration for public review and comment (SCH No. 96072086). The public

review period ended on August 30, 1996. No comments were received.

The mitigation measures contained in the negative declaration are incorporated in the order set forth below.

The SWRCB has considered the negative declaration and finds that these terms mitigate the adverse impacts which would otherwise be caused by the proposed projects. These terms will be included in any permits issued for Applications 29323, 29324, 29355, and 29356; and in any changes made in accordance with the petitions to change Permit 16684 (Application 24336) and License 12125 (Application 26123). Therefore, the negative declaration should be adopted.

9.0 CONCLUSION

Based on the findings above, the SWRCB concludes that:

1. There are 50 af of water available in Adobe Creek Reservoir between elevations 1434.0 and 1436.5;
2. 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;
3. The applications should be given equal priority;

4. The proposed conditions requiring that pump intakes be screened or perforated within 90 days from the date of permit issuance are affirmed.
5. Applications 29323, 29324, 29355, and 29356; and petitions to change Permit 16684 (Application 24336) and License 12125 (Application 26123) should be approved subject to the terms and conditions specified in the order which follows.

ORDER

IT IS HEREBY ORDERED that Applications 29323, 29324, 29355, and 29356 are approved and permits shall be issued subject to prior rights and subject to Standard Permit Terms 1 through 4, 6, 8 through 13,¹² in addition to the terms and conditions set forth below. It is further ordered that Permit 16684 and License 12125 be amended as set forth below.

Application 29323 of Kluge

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed a total of 50 acre-feet per annum (afa) to be collected from November 1 of each year through April 14 of the succeeding year.
2. The maximum withdrawal from the storage pool of Adobe Creek Reservoir in any one year shall not exceed 27.6 af.

¹² The SWRCB maintains a list of Standard Permit Terms which may be obtained upon request.

3. This permit does not authorize collection of water to storage outside of the specified season to offset evaporation and seepage losses or for any other purpose.
4. The State Water Resources Control Board (Board) reserves jurisdiction over this permit to impose conditions to conform this permit to Board policy on use of water for frost protection. Action by the Board will be taken only after notice to interested parties and opportunity for hearing.
5. This permit shall not be construed as conferring upon permittee right of access to the points of diversion on Adobe Creek Reservoir.
6. Permittee shall, within 90 days from the date of this permit, or such time as approved by the Chief of the Division of Water Rights upon receipt of a petition for extension of time showing due diligence in attempting to comply with the 90-day limit, screen all pump intakes with 5/32-inch mesh. In lieu of screening, perforated pipe or plate, with holes 5/32-inch or less in diameter may be used. Screens and/or perforations shall be regularly cleaned by permittee or otherwise designed so that approach velocities at the intake do not exceed 0.33 feet per second.
7. Diversion of water under this permit from Adobe Creek Reservoir is only authorized when the level of Adobe Creek Reservoir is above elevation 1434.0 feet.

8. Permittee, in cooperation with Donald R. Eutenier and successors in interest, shall install and maintain in Adobe Creek Reservoir a staff gage, satisfactory to the Chief, Division of Water Rights, for purposes of determining water levels in the reservoir.

The staff gage shall be installed within 90 days from the date of this permit at a location and in a manner acceptable to the Chief, Division of Water Rights, and the Lake County Flood Control and Water Conservation District.

The staff gage shall be referenced to mean sea level and shall be clearly marked at an elevation 1434.0 feet above mean sea level.

9. This permit is subject to the prior rights of Yolo County Flood Control and Water Conservation District to store water in Clear Lake as set forth in the Gopcevic Decree. During years in which the elevation of Clear Lake does not reach 7.56 feet as measured on the Rumsey Gage and water has not been discharged from Clear Lake to hold the water level down in compliance with the Gopcevic Decree, diversion under this permit is not authorized unless permittee has entered into a contract with the Yolo County Flood Control and Water Conservation District for the purchase of water collected to storage in Adobe Creek Reservoir. Permittee shall comply with the provisions of the contract insofar as the provisions are not inconsistent with the terms of this permit.

10. Permittee shall install and maintain a totalizing flow meter(s) on the discharge line of the diversion facilities on Adobe Creek Reservoir satisfactory to the Chief, Division of Water Rights, to measure the cumulative quantity of water diverted from storage. The flow meter(s) shall be installed within 90 days from the date of this permit.
11. Permittee shall record and supply the staff gage and flow meter readings to the Yolo County Flood Control and Water Conservation District at the times specified in the contract with the District, to the California Department of Fish and Game, and to the State Water Resources Control Board with permittee's report of annual water use.
12. The rights acquired under this permit shall be of equal priority with the rights acquired under the permits issued pursuant to Applications 29324, 29355, and 29356.

Application 29324 of Kluge

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 3.0 cubic feet per second to be diverted from March 15 through April 14 of each year. The maximum amount diverted under this permit shall not exceed 36.1 acre-feet per year.
2. Same as Condition 4, Application 29323.
3. Same as Condition 5, Application 29323.

4. Same as Condition 6, Application 29323.
5. Same as Condition 7, Application 29323.
6. Same as Condition 8, Application 29323.
7. This permit is subject to the prior rights of Yolo County Flood Control and Water Conservation District to store water in Clear Lake as set forth in the Gopcevic Decree. During years in which the elevation of Clear Lake does not reach 7.56 feet as measured on the Rumsëy Gage and water has not been discharged from Clear Lake to hold the water level down in compliance with the Gopcevic Decree, diversion under this permit is not authorized unless permittee has entered into a contract with the Yolo County Flood Control and Water Conservation District for the purchase of water directly diverted for frost protection. Permittee shall comply with the provisions of the contract insofar as the provisions are not inconsistent with the terms of this permit.
8. Permittee shall install and maintain a totalizing flow meter(s) on the discharge line of the diversion facilities on Adobe Creek Reservoir satisfactory to the Chief, Division of Water Rights, to measure the cumulative quantity of water directly diverted from the inflow to the reservoir. The flow meter(s) shall be installed within 90 days from the date of this permit.
9. Permittee shall record the total amount of water diverted each year for frost protection purposes under this permit

and shall supply such records to the Yolo County Flood Control and Water Conservation District at the time specified in the contract with the District and to the State Water Resources Control Board with permittee's report of annual water use.

10. The rights acquired under this permit shall be of equal priority with the rights acquired under the permits issued pursuant to Applications 29323, 29355, and 29356.

Application 29355 of Eutenier

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 1.0 cubic foot per second by direct diversion to be diverted from April 1 through April 14 and November 1 to November 30 of each year and 73 acre-feet per annum by storage to be collected from November 1 of each year through April 14 of the succeeding year as follows:

Forty acre-feet in Adobe Creek Reservoir and 33 acre-feet in Eutenier Reservoir. The maximum rate of diversion to offstream storage in Eutenier Reservoir shall not exceed 5.77 cubic feet per second.

The total amount of water to be directly diverted shall not exceed 73 acre-feet per annum and the total amount collected to storage shall not exceed 73 acre-feet per annum.

2. The maximum withdrawal from the storage pool of Adobe Creek Reservoir in any one year shall not exceed 22.4 af.
3. This permit does not authorize collection of water to storage outside of the specified season to offset evaporation and seepage losses or for any other purpose.
4. The State Water Resources Control Board (Board) reserves jurisdiction over this permit to impose conditions to conform this permit to Board policy on use of water for frost protection. Action by the Board will be taken only after notice to interested parties and opportunity for hearing.
5. This permit shall not be construed as conferring upon permittee right of access to the point of diversion on Adobe Creek Reservoir.
6. Permittee shall, within 90 days from the date of this permit, or such time as approved by the Chief of the Division of Water Rights upon receipt of a petition for extension of time showing due diligence in attempting to comply with the 90-day limit, screen all pump intakes with 5/32-inch mesh. In lieu of screening, perforated pipe or plate, with holes 5/32-inch or less in diameter may be used. Screens and/or perforations shall be regularly cleaned by permittee or otherwise designed so that approach velocities at the intake do not exceed 0.33 feet per second.

7. Diversion of water under this permit from Adobe Creek Reservoir is only authorized when the level of Adobe Creek Reservoir is above elevation 1434.0 feet.
8. Permittee, in cooperation with Charles Kluge and successors in interest, shall install and maintain in Adobe Creek Reservoir a staff gage satisfactory to the Chief, Division of Water Rights, for the purpose of determining water levels in the reservoir.

The staff gage shall be installed within 90 days from the date of this permit at a location and in a manner acceptable to the Chief, Division of Water Rights, and the Lake County Flood Control and Water Conservation District.

The staff gage shall be referenced to mean sea level and shall be clearly marked at an elevation 1434.0 feet above mean sea level.

9. This permit is subject to the prior rights of Yolo County Flood Control and Water Conservation District to store water in Clear Lake as set forth in the Gopcevic Decree. During years in which the elevation of Clear Lake does not reach 7.56 feet as measured on the Rumsey Gage and water has not been discharged from Clear Lake to hold the water level down in compliance with the Gopcevic Decree, diversion under this permit is not authorized unless permittee has entered into a contract with the Yolo County Flood Control and Water Conservation District for the purchase of water directly diverted for irrigation, collected to storage in Eutenier

Reservoir, and pumped from Adobe Creek Reservoir. Permittee shall comply with the provisions of the contract insofar as the provisions are not inconsistent with the terms of this permit.

10. Permittee shall install and maintain in Eutenier Reservoir an accurate direct reading staff gage, calibrated to storage in acre-feet, which is referenced to a permanent bench mark. The staff gage shall be installed within 90 days from the date of this permit.
11. Permittee shall install and maintain a totalizing flow meter(s) on the discharge line of the diversion facilities on Adobe Creek Reservoir satisfactory to the Chief, Division of Water Rights, to measure the cumulative quantity of water directly diverted from the inflow to the reservoir and the quantity of water diverted from storage. The flow meter(s) shall be installed within 90 days from the date of this permit.
12. Permittee shall record and supply the staff gage and meter readings to the Yolo County Flood Control and Water Conservation District at the times specified in the contract with the District, to the Department of Fish and Game, and to the State Water Resources Control Board with permittee's report of annual water use.
13. Permittee shall allow a designated representative of the Yolo County Flood Control and Water Conservation District reasonable access to Eutenier Reservoir and to the flow

meter for the purpose of determining water levels and meter readings.

14. The rights acquired under this permit shall be of equal priority with the rights acquired under the permits issued pursuant to Applications 29323, 29324, and 29356.

Application 29356 of Eutenier

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 2 cubic feet per second to be diverted from March 15 through April 14 of each year. The maximum amount diverted under this permit shall not exceed 29 acre-feet per year.
2. Same as Condition 4, Application 29355.
3. This permit shall not be construed as conferring upon permittee right of access to the points of diversion on Adobe Creek Reservoir and Adobe Creek.
4. Same as Condition 6, Application 29355.
5. Same as Condition 7, Application 29355.
6. Same as Condition 8, Application 29355.
7. This permit is subject to the prior rights of Yolo County Flood Control and Water Conservation District to store water in Clear Lake as set forth in the Gopcevic Decree. During years in which the elevation of Clear Lake does not reach

- 7.56 feet as measured on the Rumsey Gage and water has not been discharged from Clear Lake to hold the water level down in compliance with the Gopcevic Decree, diversion under this permit is not authorized unless permittee has entered into a contract with the Yolo County Flood Control and Water Conservation District for the purchase of water directly diverted for frost protection. Permittee shall comply with the provisions of the contract insofar as the provisions are not inconsistent with the terms of this permit.
8. Permittee shall install and maintain totalizing flow meters on the discharge lines of the diversion facilities on Adobe Creek and Adobe Creek Reservoir satisfactory to the Chief, Division of Water Rights, to measure the cumulative quantity of water directly diverted from Adobe Creek and from the inflow to the reservoir. The flow meters shall be installed within 90 days from the date of this permit.
 9. Permittee shall record the total amount of water diverted each year for frost protection purposes under this permit and shall supply such records to the Yolo County Flood Control and Water Conservation District at the time specified in the contract with the District, to the Department of Fish and Game, and to the State Water Resources Control Board with permittee's report of annual water use.
 10. For the protection of fish and wildlife, permittee shall during the period:

From March 15 through March 31 bypass a minimum of 5 cubic feet per second and from April 1 through April 14 bypass a minimum of 3 cubic feet per second at the point of diversion on Adobe Creek. The total streamflow shall be bypassed whenever it is less than the designated amount for that period.

11. No water shall be diverted under this permit until permittee has installed a device, satisfactory to the Chief, Division of Water Rights, which is capable of measuring the bypass flows required by the conditions of this permit. The measuring device shall be properly maintained.
12. The rights acquired under this permit shall be of equal priority with the rights acquired under the permits issued pursuant to Applications 29323, 29324, and 29355.

Petition to Change Permit 16684 of Eutenier

1. Condition 4 of this permit regarding the description of the place of use shall read as follows:

15 acres within the NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 32; and
19 acres within the NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 32, all
within T13N, R9W, MDB&M as shown on map on file
with the State Water Resources Control Board.

2. Condition 19 is added to this permit as follows:

This permit is subject to the prior rights of Yolo County Flood Control and Water Conservation District to store water in Clear Lake as set forth in the Gopcevic Decree. During years in which the elevation of Clear Lake does not reach 7.56 feet as measured on the Rumsey Gage and water has not been discharged from Clear Lake to hold the water level down in compliance with the Gopcevic Decree, diversion under this permit is not authorized unless permittee has entered into a contract with the Yolo County Flood Control and Water Conservation District for the purchase of water directly diverted for frost protection. Permittee shall comply with the provisions of the contract insofar as the provisions are not inconsistent with the terms of this permit.

3. Condition 20 is added to this permit as follows:

Permittee shall install and maintain a totalizing flow meter on the discharge line of the diversion facilities on Adobe Creek satisfactory to the Chief, Division of Water Rights, to measure the cumulative quantity of water directly diverted from the creek. The flow meter shall be installed within 90 days from the date of this permit.

4. Condition 21 is added to this permit as follows:

Permittee shall record the total amount of water diverted each year for frost protection purposes under this permit and shall supply such records to the Yolo County Flood Control and Water Conservation District at the time specified in the contract with the District and to the State Water Resources Control Board with permittee's report of annual water use.

5. Condition 22 is added to this permit as follows:

Permittee shall, within 90 days from the date of this permit, or such time as approved by the Chief of the Division of Water Rights upon receipt of a petition for extension of time showing due diligence in attempting to comply with the 90-day limit, screen all pump intakes with 5/32-inch mesh. In lieu of screening, perforated pipe or plate, with holes 5/32-inch or less in diameter may be used. Screens and/or perforations shall be regularly cleaned by permittee or otherwise designed so that approach velocities at the intake do not exceed 0.33 feet per second.

Petition to Change License 12125 of Eutenier

1. The place of use under this license shall read as follows:

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15 acres within the NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 32; and
19 acres within the NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 32, all
within T13N, R9W, MDB&M as shown on map on file
with the State Water Resources Control Board.

CERTIFICATION

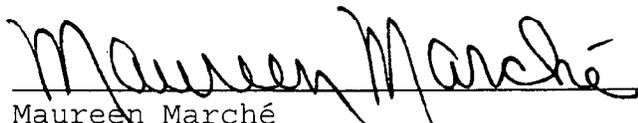
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full and correct copy of a decision duly and regularly adopted at a meeting of the State Water Resources Control Board held on August 21, 1997.

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

NO: None

ABSENT: None

ABSTAIN: None



Maureen Marché
Administrative Assistant to the Board