

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Water Right)
Application 30298,)
DIANE STULLER,)
Applicant)
HARLAN KANT ET AL.,)
Protestants.)

DECISION 1636
SOURCE: Unnamed stream
tributary to Coleman
Valley Creek
COUNTY: Sonoma

DECISION APPROVING APPLICATION

BY THE BOARD:

1.0 INTRODUCTION

Water Right Application 30298 requests a permit from the State Water Resources Control Board (SWRCB) to appropriate 9 acre-feet of water per year from an unnamed stream tributary to Coleman Valley Creek in Sonoma County. Applicant Diane Stuller proposes to store water in an onstream reservoir for irrigation of a proposed vineyard. Following receipt of protests to the application, SWRCB staff conducted a field investigation and prepared a staff analysis pursuant to Water Code section 1345. The staff analysis recommended approval of the application subject to specified conditions.

By letter dated May 21, 1996, 22 parties objected to the staff analysis and requested a hearing on the application. The SWRCB held a hearing on the application on November 5, 1996, and received evidence from the applicant and from attorney Harlan Kant representing himself and numerous other parties who protested the application.

Based on our review of the evidentiary record, the arguments of the parties and applicable law, the SWRCB concludes that

Application 30298 should be approved subject to the conditions set forth at the end of this decision. Our findings concerning Application 30298 are set forth below.

2.0 BACKGROUND

2.1 Description of Project

Application 30298 was filed on October 29, 1993. The applicant proposes to appropriate 9 acre-feet of water per year to storage behind an earthen dam forming a reservoir with a surface area of approximately one-half acre. The water would be used to irrigate approximately 10 acres of vineyard. The application proposes a season of diversion from October 1 of each year to June 15 of the succeeding year. The project is located approximately two miles northwest of Occidental on an unnamed stream tributary to Coleman Valley Creek. (See Figure 1). The proposed project comes within the definition of a "minor application" as set forth in Water Code section 1348.

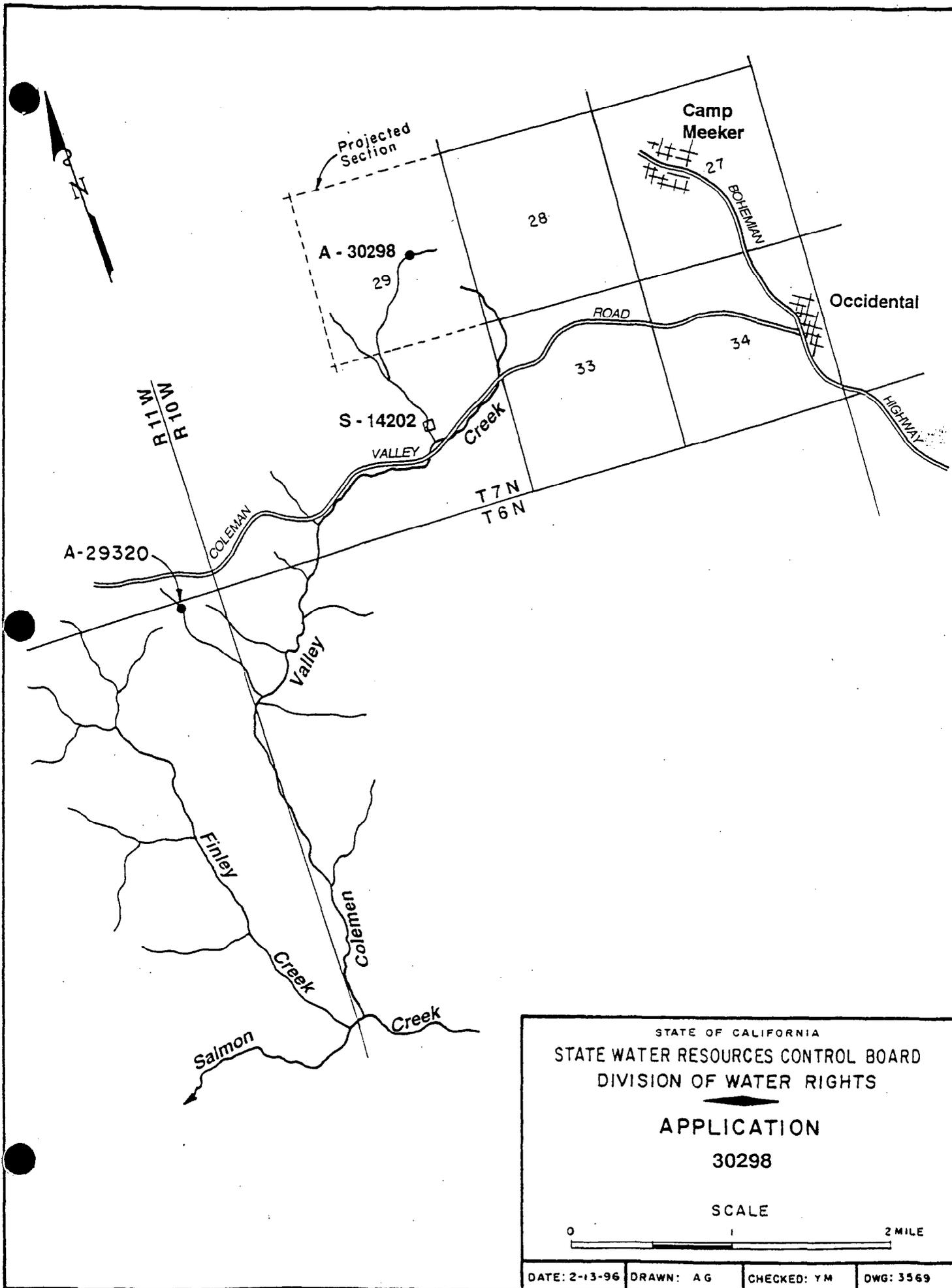
2.2 Protests

The SWRCB received three protests to the application during the 40-day period specified for filing protests. The protests were submitted by: (1) Harlan Kant on behalf of himself and numerous other people, (2) Brooks Austin and Andrea Austin, and (3) Salmon Unlimited.

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

Pursuant to the provisions of Water Code section 1345, staff of the SWRCB Division of Water Rights conducted a field investigation on December 6, 1995. The interested parties who attended and the issues raised at the field investigation are discussed in the "Staff Analysis, Minor Protested Application 30298, Unnamed Stream Tributary to Coleman Valley

FIGURE 1



Creek in Sonoma County," dated April 1996. (Staff 1a.)¹ The staff analysis recommends approval of Application 30298 and issuance of a water right permit subject to several conditions as specified on page 13 of the analysis.

Among the conditions recommended in the staff analysis is a condition restricting the season of diversion for the project to the period of November 1 of each year to April 1 of the succeeding year. The staff analysis also recommends a condition providing for installation of a device which would bypass 25 percent of the stream flow at the applicant's point of diversion as discussed in Section 3.3 below. The applicant did not contest or object to any of the conditions recommended in the staff analysis.

2.4 Hearing

By letter dated May 21, 1996, 22 of the protestants submitted objections to the staff analysis and requested that the SWRCB hold a hearing on Application 30298. By letter dated July 18, 1996, the applicant also requested that the SWRCB proceed to a hearing to resolve any remaining issues. On September 23, 1996, the SWRCB notified interested parties that it would hold a hearing on Application 30298. Water Code 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.

The issues specified in the hearing notice concern: (1) the availability of water for appropriation; (2) potential effects of the geology, soil stability, and seismic considerations at the

¹ Citations to exhibits in the record are indicated by the name of the participant submitting the exhibit, the exhibit number, and the page number or other location within the exhibit. Citations to the transcript are indicated by a "T" followed by the beginning page and line number, followed by the ending page and line number.

project site; (3) compliance of the project with the elements of the Sonoma County General Plan related to land use, noise, traffic and aesthetics; (4) possible effects of pesticide use at the proposed project on neighboring residents or the environment; (5) possible impacts of the project on downstream water quality; and (6) possible effects of the project on riparian vegetation and wildlife.

The hearing before the SWRCB was conducted on November 5, 1996. Applicant Diane Stuller introduced several exhibits and presented testimony from herself, William Robson, and engineer Lee Erickson. Protestant Harlan Kant testified and presented exhibits on behalf of himself, members of his family, and several other persons who object to the proposed project.

3.0 AVAILABILITY OF WATER FOR APPROPRIATION

The quantity of water available for diversion to the proposed reservoir is a function of the size of the watershed, the amount of precipitation, the percentage of runoff that can be expected, and the amount of water bypassed for protection of downstream uses.

3.1 Description of Watershed and Project Site

The watershed above the proposed point of diversion consists of approximately 20 acres of rolling hills. About half of the watershed is mixed evergreen forest and the other half is grassland. The project site is located at about 1,200 feet above mean sea level. The proposed point of diversion is within a swale that contains a small incised channel. (Staff 2.)

Approximately 150 feet downstream of the proposed dam, the unnamed stream channel joins a second stream channel. The channel downstream of the confluence becomes more defined with increased riparian vegetation. (Staff 2.)

3.2 Quantity of Water Available at Proposed Point of Diversion

There are no flow records or gage data for the unnamed stream from which the applicant seeks to appropriate water. Therefore, the amount of water available for appropriation must be calculated as discussed below.

3.2.1 *Watershed Area*

Several different estimates of the area of the watershed upstream of the proposed reservoir site were referred to at the hearing. Applicant's engineer Lee Erickson testified that, using U.S.G.S. quad maps, he estimated the size of the watershed to be approximately 20 acres. (T 52:15-52:18.) Erickson's earlier estimates placed the size of the watershed within the range of 14 to 18 acres. (T 52:19-53:7; T 55:25-56:3; T 54:12-18; T 55:2-55:7.) The approximate area of the watershed above the point of diversion can also be determined by delineation on the U.S.G.S. topographic map, Camp Meeker Quadrangle. (Staff 2.)

Delineation on the U.S.G.S. map of the watershed above the point of diversion shows the area to be approximately 22 acres.²

3.2.2 *Precipitation*

The range of average annual precipitation for the project area presented as evidence at the hearing varied between roughly 50 and 60 inches. (Stuller E-5; Kant 1; Kant 2.) The closest measurement station to the project area is the Occidental station operated by the National Oceanic and Atmospheric Administration. Protestants submitted precipitation data for years 1962-1995 for the Occidental station. (Kant 2.) Data from the Occidental station is also available for the years 1938 through 1961. For the 57-year period of record, the average annual precipitation at

² The area of approximately 22 acres is based on the average of three readings using a planimeter to measure the watershed above the applicant's point of diversion.

the Occidental station is approximately 54 inches or 4.5 feet.³ The precipitation is in the form of rainfall, primarily during the months of October through April. Approximately 83 percent of average annual precipitation occurs during the revised diversion season of November through March.

3.2.3 Runoff Coefficient

The amount of runoff resulting from precipitation is dependent on many factors, including soil type, slope, vegetative cover, and surface depression storage. Surface soils are described in the Erosion Control Mitigation Plan which was prepared for the project as including "brown clay loam topsoil of 1'-3' depth, transitioning to orange-yellow clay, overlaying geologically-stable decomposed shale or serpentine bedrock. Bedrock formations occur at variable depth, from surface expression in some vineyard locations to between six and ten feet below grade in some on-site soils test pits." (Stuller E-7, p. 2.)

The elevation of the watershed varies approximately 153 feet from a low of 1,167 feet at the point of diversion to a high of 1,320 feet at the top of the watershed. As measured from the U.S.G.S. Topographic Map (7½-minute scale) for the Camp Meeker Quadrangle, the overland distance between the high and low elevations is about 1,150 feet resulting in a slope of 13 percent. (Staff 2.)

The vegetative cover in the watershed consists of evergreen forest and grassland. Photographs contained in the files for the proposed project show no evidence of significant surface depression storage. (Staff 1.)

³ The average rainfall data for the 57-year period of record for the Occidental station is reported in the National Oceanic and Atmospheric Administration publication titled "Climatological Data Annual Summary, California, 1995, Volume 99, Number 13." The SWRCB takes official notice of this information pursuant to California Code of Regulations, title 23, section 761, subdivision (e).

Based on the above factors, estimated runoff for this watershed ranges between 20 and 50 percent of precipitation. The protestants accept 17.5 percent as a reasonable estimate of expected runoff. (T 100:14-100:15.) Annual precipitation of 4.5 feet over a watershed area of approximately 20 acres results in a total of approximately 90 acre-feet of water. Multiplying 90 acre-feet by a runoff coefficient of 0.5 (i.e., 50 percent) yields 45 acre-feet of water at the proposed point of diversion. Multiplying 90 acre-feet by a runoff coefficient of 0.2 (20 percent) yields 18 acre-feet of water at the proposed point of diversion. A runoff coefficient of 0.175 (17.5 percent) would yield 15.75 acre-feet.

3.3 Availability of Water for Downstream Uses

Brooks and Andrea Austin divert water under claim of riparian right from the unnamed stream just upstream of its confluence with Coleman Valley Creek. (Statement of Water Diversion and Use S14202.) The Austins use water for irrigation and domestic use from April through August. (Staff 1a, p. 5.) Of the approximately 500 acre watershed above the Austins' point of diversion, less than 5 percent lies above the small reservoir proposed in Application 30298. (Staff 1a, p. 7.) Although there is no evidence that the applicant's proposed diversion of water to storage would adversely impact the availability of water for direct diversion by the Austins, applicant agreed to reduce her season of diversion to completely exclude the months during which the Austins divert water. (Staff 1a, p. 5.)

In a further effort to resolve concerns raised by protestants, applicant agreed to a permit term proposed by Division staff that would require applicant to install a device to automatically bypass a minimum of 25 percent of reservoir inflow. The applicant's proposed design for a splitter box to bypass 25 percent of inflow at the point of diversion is represented in Stuller Exhibit E-5. Although the specific design shown in

Exhibit E-5 may bypass less than 25 percent of the inflow, testimony from Mr. Erickson establishes that the initial design for the splitter box, as proposed in Exhibit 3-5, can be modified to meet the 25-percent flow bypass requirement. (T 82:3-82:14.) The water available for the downstream riparian corridor would include water bypassed at the applicant's point of diversion, inflow from a second stream which enters about 150 feet below the applicant's point of diversion and other inflow along the course of the stream. There is no evidence in the record that the proposed project would leave insufficient water for maintenance of the downstream riparian corridor.

Although various protestants have expressed concerns about alleged effects of the proposed project on water availability for downstream uses, there is no evidence that downstream uses or users would be injured. In addition, the bypass flow requirements and the reduced season of diversion agreed to by the applicant provide further protection for downstream water uses.

3.4 Conclusion Regarding Availability of Water for Appropriation

Assuming a conservative runoff coefficient of 0.2, the watershed above the proposed point of diversion will yield about 18 acre-feet of runoff in an average year. Based on the historical precipitation patterns discussed in section 3.2.2 above, approximately 15 acre-feet of this runoff would be expected to occur between November 1 and April 1. A 25-percent bypass flow would result in 11.25 acre-feet remaining available to supply the reservoir during the November 1 to April 1 diversion season specified in this decision. Considerably more water ordinarily would be available at the applicant's point of diversion because the actual runoff coefficient during the winter months would be expected to exceed 0.2. Even if the runoff coefficient were only 0.175, as proposed by protestants, there would be 9.8 acre-feet available for diversion in most years after meeting a 25-percent bypass requirement. The SWRCB concludes that, in most years,

sufficient water will be available for appropriation for the project proposed in Application 30298.⁴

4.0 GEOLOGIC CONSIDERATIONS

Protestant Kant objects to construction of the proposed reservoir based on concerns about the slope stability and the fact that the reservoir is located less than 10 miles from the San Andreas fault. (Kant Exh. A, pp. 4 and 5.)

Kant's concern about slope stability appears to be based primarily on a map which indicates the possibility of landslides in the general area where the project is to be built. (Kant 4, attachment.) Kant testified that geologist Eugene Boudreau visited the project site and "stated that the stability of the site should be studied." (Kant Exh. A, p. 4.) Kant testified that a second geologist advised him that "there was no gross physical indication of a landslide" at the project site, but "that one could only determine for sure by doing on-site soil testing." (T 134:9-135:13.) Kant presented no written report or analysis by a geologist or engineer, nor any testimony from a geologist or engineer, regarding the geologic suitability of the site for construction of the 9 acre-foot reservoir proposed in Application 30298.

In response to questions raised about the geologic suitability of the site, applicant retained the services of a geologic consulting firm which prepared a geotechnical evaluation of the proposed project site. In preparing that evaluation, geologist

⁴ The quantity of water physically available at the applicant's point of diversion could be reduced by approximately two acre-feet due to the presence of a small, unauthorized upstream reservoir. As a general matter, the SWRCB does not believe that an unauthorized diversion of water should be used as a basis for finding water to be unavailable for appropriation by an applicant who complies with statutory requirements. In this instance, sufficient water would normally be available for appropriation under Application 30298 even after accounting for diversion of water to the unauthorized upstream reservoir.

Marc Seely considered the location and design maps for the proposed reservoir prepared by Erickson Engineering, geologic maps for the project area published by the California Division of Mines and Geology and the U.S.D.A Soil Conservation Service, and other maps showing the locations and activity of nearby faults. (Stuller E-7, p. 1.) Seely also conducted a site reconnaissance of the Stuller property. (Stuller E-7, pp. 8 and 9.) Based on his review of relevant literature and applicable maps, and his reconnaissance work at the proposed project site, Seely prepared a written report which included the following conclusions:

- (1) "No slope instability features were observed in the area of the proposed dam or upstream along any area of the proposed pond." The only areas of slope instability were located "away from the proposed dam and reservoir."
- (2) "[T]here is no evidence of active faults near or through the subject property Small dams such as the one proposed can usually be built without special geotechnical or seismic design considerations. Based on the site conditions, it appears that a standard design would be appropriate."
- (3) "Based on our literature review, field reconnaissance and our observation of soil and bedrock materials in the area of the proposed dam and pond, and based on the lack of evidence of slope instability features in this area, it appears that the locations selected for the proposed dam and pond are appropriate and geologic conditions should have minimal impacts on the dam and reservoir." (Stuller E-4, p. 10.)

Mr. Erickson, the registered engineer who prepared the design and construction plans for the proposed reservoir, reviewed the geotechnical evaluation and concluded there is no need for

modification of the proposed design of the reservoir. (Stuller Exh. B, p. 3.)

The SWRCB concludes that the steps taken by the applicant have addressed all legitimate concerns about the geologic suitability of the proposed reservoir site and that the record shows the reservoir has been designed in conformance with applicable engineering standards. There is no evidence in the record which would justify denial of Application 30298 based on geologic considerations.

5.0 COMPLIANCE WITH SONOMA COUNTY GENERAL PLAN

Sonoma County's policies for guiding future growth, development, and conservation of resources through the year 2005 are set forth in the Sonoma County General Plan. Protestants have objected to the proposed reservoir and vineyard as being an eyesore which will result in noise and traffic problems. As discussed below, the evidence in the record indicates that the proposed project is consistent with applicable provisions of the general plan. There was no evidence presented which establishes that the project will create significant noise or traffic problems.

5.1 Zoning

Application 30298 states that the proposed project is located on a parcel of land zoned AR B6-10. (Staff 1.) Stuller testified that this land had previously been cleared for agricultural purposes. (T 10:18-10:19.) The project is located on a parcel of land that is zoned agriculture/residential as is authorized in the rural residential land use category of the general plan. (T 13:17-13:21.) The AR zoning authorizes vineyard and accessory uses appurtenant to the permanent use. (T 13:21-13:22; Stuller R-1 and R-2.) Protestant Kant does not dispute the fact that the county zoning allows agricultural uses on applicant's property (T 113:4-113:5; Kant Exh. A), but contends that the applicant's

proposed use of her property is inappropriate for the reasons discussed below.

5.2 Noise

Protestant Kant submitted a copy of a letter from a county planner to SWRCB staff commenting upon the initial study for the project which was conducted pursuant to the California Environmental Quality Act ("CEQA", Public Resources Code section 21000 et seq). The letter questioned whether the project will comply with the performance standards specified in the noise element of the general plan. (Kant 5; Staff 1.) However, the applicant presented testimony that applicable county noise regulations will be followed. (T 14:12-14:13.) Cultivation of vineyards and construction of small on-site reservoirs for irrigation are not unusual activities on agriculturally zoned property. There was no evidence submitted which establishes that the project planned by the applicant will violate the noise restrictions specified in the general plan.

5.3 Traffic

The proposed project will generate additional vehicle trips on Willow Creek Road. Protestant Kant testified that there is already too much traffic on Willow Creek Road. (T 114:16-114:23.) However, the record shows that the traffic impact of this project will be minimal. The project may produce approximately 40 tons of grapes per year, and one truck can carry 24 tons. (T 14:22-14:24; Staff 1.) The general plan indicates that traffic patterns in the Sonoma Coast area are affected primarily by recreational travel, not agricultural activities. (Staff 6.) There was no evidence presented that the project will generate excessive traffic.

5.4 Aesthetics

Protestant Kant objects to the proposed vineyard on the grounds that it "will be an eyesore for most users of Willow Creek Road."

(Kant Exh. A, p. 9.) However, the general plan states that vineyards and other landscapes are of special importance, and preservation of these resources is important to the quality of life for Sonoma County residents, tourism, and the agricultural economy. (Staff 6.) The applicant presented testimony from a design professional who stated that vineyards "can be a thing of great beauty." (T 15:8-15:14.) In view of the inherent subjectivity of opinions on aesthetic matters, and the provisions of the general plan regarding the value of vineyards in Sonoma County, the SWRCB finds the protestant's objections to the appearance of vineyards provide no basis for denying Application 30298.

5.5 Conclusions Regarding Consistency With the General Plan

For the reasons discussed above, the SWRCB concludes that the proposed project is consistent with relevant elements of the County's general plan. The SWRCB further finds that there is no basis for denying Application 30298 based on noise, traffic or aesthetic considerations.

6.0 PESTICIDE USE

Agricultural operations at the proposed vineyard may involve application of pesticides and other chemicals. The primary responsibility for regulating and monitoring the sale and use of pesticides rests with the California Department of Pesticide Regulation and the County Agriculture Commissioner. (Food and Agriculture Code sections 11454 and 11501.5 et seq.) Violations of statutes or regulations governing the use of pesticides in California are subject to criminal penalties, civil liability, and injunctive relief. (Food and Agriculture Code section 12996 et seq.)

Protestant Kant objects to approval of Application 30298 based on his concern about potential health effects on sensitive individuals of pesticides and chemicals used in vineyard

operations. Kant testified about a previous problem with pesticides or chemicals drifting to his property from the applicant's property. Although Kant acknowledges that the Agriculture Commissioner has the responsibility to see that pesticides are applied in a proper manner, Kant did not file a complaint about the incident with the Agriculture Commissioner for Sonoma County. (T 134:4-134:7; T 133:12-133:13.)

Protestant Kant also asserts that the use of pesticides and sulfur at the proposed vineyard may have adverse effects on ground water quality and surface water. No expert testimony or evidence other than protestant's own speculation was presented to establish that the proposed project will adversely affect water quality. If any adverse effect occurs, or threatens to occur, the Regional Water Quality Control Board would have authority to require that the problem be corrected, in addition to the authority of the County Agriculture Commissioner and the Department of Pesticide Regulation.

The applicant proposes to use her property for purposes which are consistent with the general plan and applicable zoning requirements. It is reasonable to require that the applicant's use of pesticides conform with applicable requirements and directions of the County Agriculture Commissioner. Enforcement of those requirements is the responsibility of the County Agriculture Commissioner and the California Department of Pesticide Regulation.

7.0 WATER QUALITY

The potential impacts of construction of the project on water quality are addressed in the "Erosion Control Mitigation Plan" which was prepared for the applicant by an agricultural engineer. (Stuller E-7.) The SWRCB finds that the measures specified in the applicant's erosion control plan will avoid potential water quality impacts from construction. The subject of alleged

impacts on water quality from use of pesticides and chemicals in operation of the proposed vineyard is addressed in Section 6.0 above.

8.0 PLANTS AND WILDLIFE

Protestants allege the project will adversely affect plants and wildlife. As discussed below, however, the evidentiary record does not support those allegations.

8.1 Issues Addressed in Staff Analysis and at Hearing

Protestants' request for hearing alludes to potential adverse effects of the project on wildlife habitat. In processing Application 30298, staff of the Division of Water Rights consulted with the Department of Fish and Game pursuant to sections 2090-2098 of the California Fish and Game Code (DFG). The DFG responded that there is a population of endangered California freshwater shrimp downstream in Salmon Creek of which Coleman Valley Creek is an ephemeral tributary. The DFG concluded that the effect of the proposed project on flows in Salmon Creek would be insignificant and that the project is unlikely to jeopardize the continued existence of the California freshwater shrimp provided that: (1) the construction season is confined to the dry season of between June 1 and October 15, (2) the applicant follows an approved written erosion control plan to control erosion and sedimentation, and (3) the applicant agrees not to plant or allow to be planted any fish other than rainbow trout in her reservoir. (Stuller 8 and 9.)

The requested erosion control plan has been prepared and approved by DFG. This order provides that: (1) the applicant's construction season is limited to the season specified by DFG, (2) the construction of the project must be done in accordance with the approved erosion control plan, and (3) that the applicant must not plant, or allow to be planted, any fish other than rainbow trout.

The protestants have also alleged that various other animals and plants will be adversely affected by the proposed project, but there is insufficient evidence in the record to substantiate those allegations.⁵

8.2 Listing of Coho Salmon Under the Federal Endangered Species Act

Following the close of the hearing and the period for submission of legal briefs or written closing statements, the SWRCB received letters dated March 26, 27, and 29, 1997, from protestants' attorney concerning the recent listing of the coho salmon as a threatened species under the federal Endangered Species Act. Protestants ask that the SWRCB take no action on Application 30298 "until the National Marine Fisheries Service issues final rules and regulations, a Section 7 consultation occurs and an EIR is prepared"⁶

The SWRCB takes official notice of the fact that on October 31, 1996, the National Marine Fisheries Service determined that the coho salmon should be listed as a threatened species under the federal Endangered Species Act. (61 Fed. Reg. 56138.) On November 20, 1996, the U.S. Fish and Wildlife Service added the coho salmon to the list of threatened species under the federal act. (61 Fed. Reg. 59028.) There is no evidence, however that

⁵ Protestant Kant's written testimony alleges, among other things, that the northern spotted owl is "known to frequent the project site." (Kant Exh. A, p. 9.) However, no northern spotted owls were detected by DFG during a field survey of the project location on May 24, 1994, and DFG recommended no mitigation measures for protection of northern spotted owls. (Stuller E-9.) Similarly, DFG advised the SWRCB that the proposed project should not have a significant impact on the California Red Legged Frog. (Staff 1a, p. 11.)

⁶ Protestants' recent letters to the SWRCB also make several factual allegations and repeat arguments which were previously made in petitioners' legal briefs. There is no indication that copies of protestants' letters were served on the applicant. The evidentiary record in this matter closed on November 5, 1996, and the period for submission of final legal briefs ended on December 5, 1996. Although this decision takes official notice of the listing of Coho salmon under the federal Endangered Species Act on November 20, 1996, the decision does not address other arguments and allegations set forth in protestants' letters.

the project proposed by water right Application 30298 will have any adverse impact on coho salmon. The project involves diversion of a small quantity of water from an unnamed ephemeral stream during the wet season at a point of diversion well upstream of any potential anadromous fisheries habitat in the lower reaches of Coleman Valley Creek or in Salmon Creek. The supplementary information provided by National Marine Fisheries Service at the time of listing the coho salmon as a threatened species indicates that the type of water diversion proposed by Application 30298 will not result in a prohibited act under the Endangered Species Act.⁷

In the absence of evidence indicating that the proposed project could adversely affect coho salmon, there is no basis for protestants' request to delay action on Application 30298 pending the National Marine Fisheries Service adoption of regulations for projects or activities which could adversely impact coho salmon. Similarly, petitioners' request to defer action until after a "Section 7 consultation" has occurred is inappropriate since the consultation process established by Section 7 of the Endangered Species Act applies only to activities involving actions by federal agencies. The project proposed by the applicant in this instance does not involve a federal agency or require federal approval. Finally, as discussed in Section 11.0 below, an

⁷ The National Marine Fisheries Service stated that water diversions which utilize a properly designed and functioning fish screen and which do not cause resulting instream flow conditions adverse to coho salmon will not result in a prohibited act under Section 9 of the federal Endangered Species Act. (61 Fed. Reg. 56147.) The reference to a fish screen is inapplicable to the present case since the small ephemeral stream involved is dry much of the year and does not provide habitat for coho salmon. A June 27, 1994, Department of Fish and Game analysis shows that project would have minimal impact on downstream flows. (Stuller E-8, p. 2; Stuller E-3, p. 5 of Initial Study.) Even in the case of a project which could injure a federally listed threatened or endangered species, any potential consultation obligation under Section 10 of the Act would apply to the project developer, not the SWRCB. The order at the end of this decision includes a condition that expressly provides that the permit issued on Application 30298 does not authorize the taking of any species which has been listed as threatened or endangered under the California Endangered Species Act or the federal Endangered Species Act.

environmental impact report is not required for the project presently before the SWRCB. Since no EIR is required, there is no basis for granting protestants' request to delay action pending preparation of an EIR.

9.0 BENEFITS AND DETRIMENTS OF PROJECT

Protestants have requested that the SWRCB evaluate the "benefits and detriments" of the proposed project pursuant to the provisions of Title 23 of the California Code of Regulations, section 756. Section 756 provides that, at the request of any party or on its own motion, the SWRCB shall:

". . . to the extent practicable, identify and evaluate the benefits and detriments, including but not limited to economic and environmental factors, of the present and prospective beneficial uses of the waters involved and alternative means of satisfying and protecting such uses, and make findings with respect thereto"

In this instance, the water diverted by the applicant will be used for agricultural irrigation, in a manner consistent with the Sonoma County General Plan, for a purpose which the general plan expressly seeks to protect. (See section 5.4 above.) The economic success of the project will depend upon numerous factors including weather, future market prices, and the applicant's skill in developing the vineyard. Water Code section 106 recognizes irrigation as a beneficial use of water. In view of the variables involved with a small vineyard, it is not "practicable" for the SWRCB to undertake a detailed economic analysis of the project. The economic risks and the potential benefits of the proposed project will be borne by the applicant as the project developer and owner of the land to be irrigated. As discussed in Section 11.0 below, the environmental document prepared for this project concludes that the proposed project will not have any significant adverse environmental effects.

10.0 CONSISTENCY OF PROPOSED USE WITH DEED RESTRICTIONS ON USE OF APPLICANT'S PROPERTY

Protestant Kant contends that the covenants, conditions, and restrictions (CC&Rs) applicable to the applicant's property prohibit the use of the property for the proposed vineyard. A neighboring landowner, James Noyes, filed a civil action in the Superior Court for Sonoma County alleging that the applicant's proposed vineyard would be in violation of the CC&Rs. At the time of the hearing, the lawsuit was pending before the Superior Court.

Determination of the effect of the disputed CC&Rs is properly within the jurisdiction of the courts rather than the SWRCB. In a case in which a final court judgment establishes that a particular use of property is not allowable, the SWRCB could reasonably conclude that it would not be in the public interest to approve a water right application which would facilitate the prohibited use. In this instance, however, no such judgment has been entered. Therefore, the SWRCB concludes that the dispute over restrictions applicable to the applicant's property under the CC&R's provides no basis for denial of the application.

11.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The SWRCB is the lead agency pursuant to CEQA. Division of Water Rights staff prepared an initial study and draft negative declaration for the project proposed by Application 30298. On October 16, 1995, the SWRCB staff circulated the initial study and proposed negative declaration pursuant to CEQA for public review and comment. Several comments were received regarding the proposed project. However, most comments did not contain factual information related to the proposed project.

CEQA provides that a negative declaration may be adopted when an initial study indicates there are potential significant effects on the environment, but the project plans have been revised to

avoid or mitigate the adverse effects to a less-than-significant level. (Public Resources Code section 21080, subdivision (c)(2).) As discussed in the initial study, in this instance, the applicant revised the project plans in a manner which will avoid or mitigate any potential adverse environmental effects to a less-than-significant level. There is no substantial evidence that the proposed project, constructed pursuant to the conditions set forth in the negative declaration, would have any significant adverse effects on the environment. Therefore, adoption of a negative declaration was appropriate.

12.0 CONCLUSION

Based on the findings above, the SWRCB concludes that there is unappropriated water available for appropriation under Application 30298, the use proposed in the application is beneficial, and that the application should be approved subject to the terms and conditions specified in the order below.

ORDER

IT IS HEREBY ORDERED that Application 30298 is approved and a permit shall be issued subject to prior rights and subject to Standard Permit Terms 6 through 13.⁸ In addition, the permit shall be subject to the following terms and conditions:

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 9 acre-feet per annum to be collected from November 1 of each year to April 1 of the succeeding year.
2. 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.

⁸ The SWRCB maintains a list of Standard Permit Terms which may be obtained upon request.

3. Permittee shall bypass 25 percent of the flow at the permittee's point of diversion. No water shall be diverted under this permit until permittee has installed and constructed a device satisfactory to the Chief of the Division of Water Rights which will automatically bypass 25 percent of the inflow to the reservoir from the unnamed stream. Said bypass device shall be properly maintained.

4. Construction of the dam shall be confined to the period of June 1 through October 15. Construction shall be done in conformance with the "Erosion Control Mitigation Plan" prepared by Erickson Engineering, Inc. dated November 1995.

5. Permittee must not plant, or allow to be planted, any fish other than rainbow trout in the impoundment.

6. All use of pesticides by permittee or permittee's agents must be in compliance with applicable statutes, regulations, and directions of the County Agriculture Commissioner.

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7. This permit does not authorize the taking of any species which has been classified as threatened or endangered under the California Endangered Species Act or the federal Endangered Species Act.

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 April 17, 1997.

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

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board