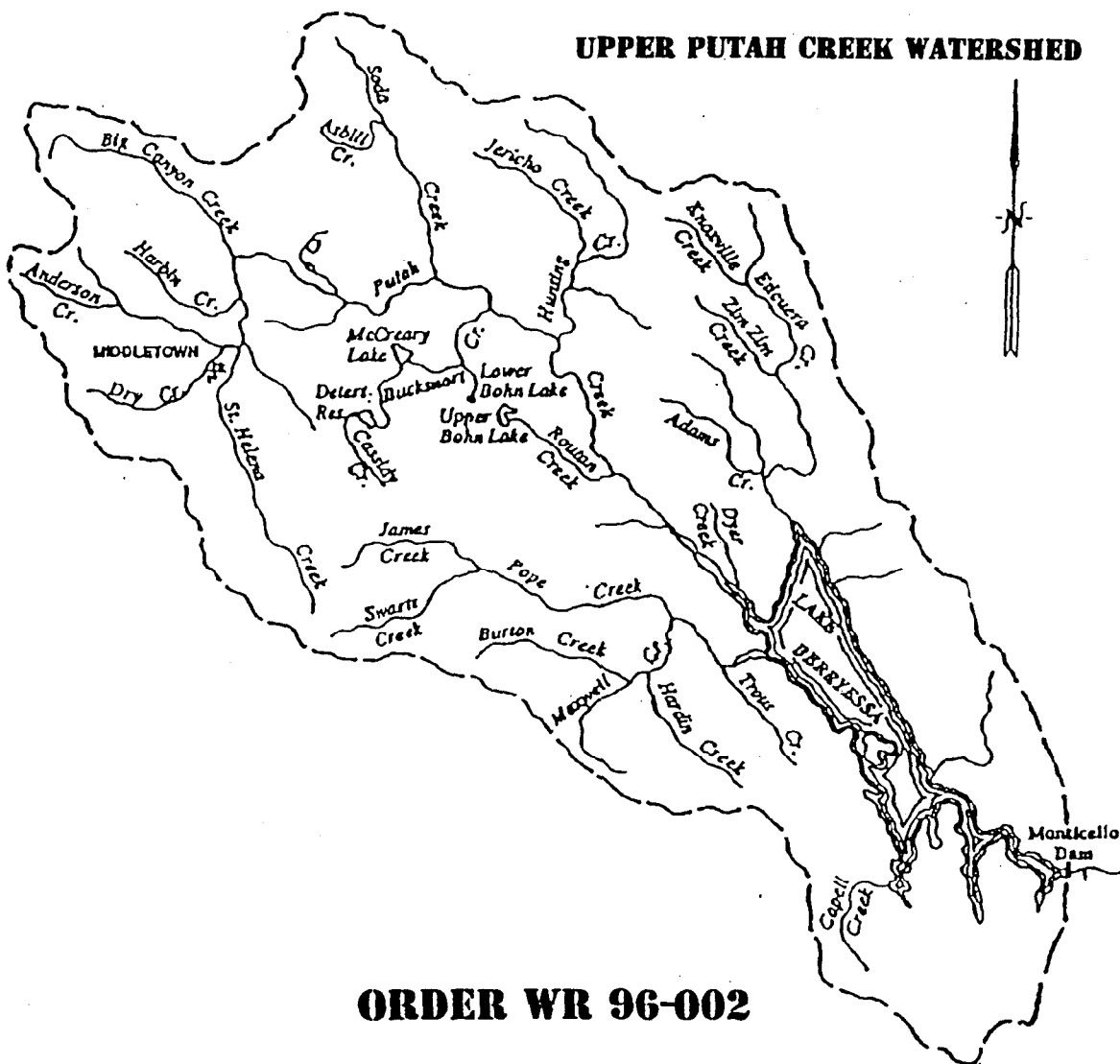


**UPPER PUTAH CREEK WATERSHED**



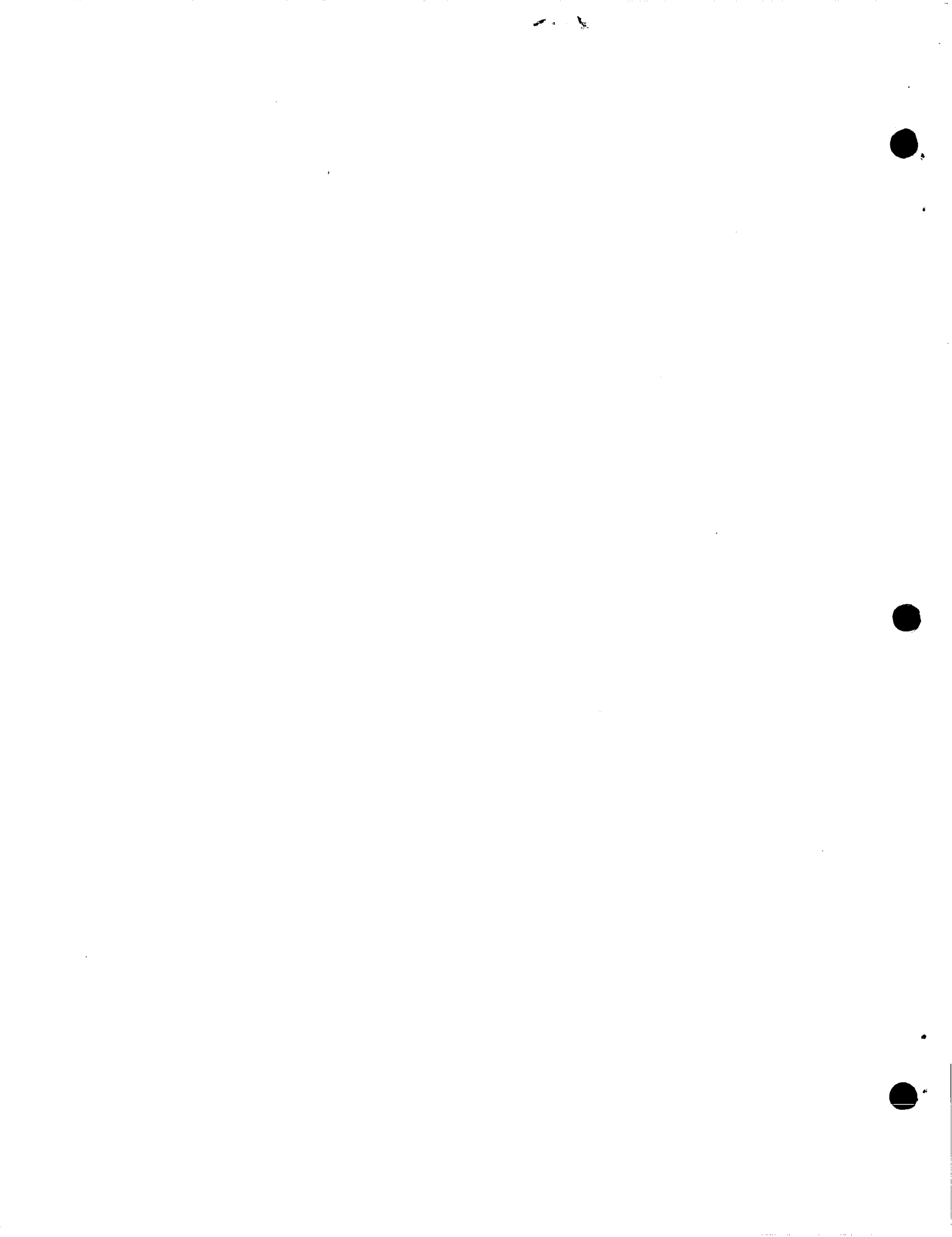
**ORDER WR 96-002**

**ORDER AMENDING APPROPRIATIVE WATER RIGHTS IN THE  
UPPER PUTAH CREEK WATERSHED FILED SUBSEQUENT TO OCTOBER 29, 1945  
AND SUBJECT TO CONDITION 12 OF THE U.S. BUREAU OF RECLAMATION'S  
PERMITTED APPLICATIONS 11199, 12578, AND 12716**



**FEBRUARY 27, 1996**

**STATE WATER RESOURCES CONTROL BOARD**





(afa), by depletion, for development of water in the Putah Creek watershed above Monticello Dam on Putah Creek.<sup>3</sup>

This order modifies Condition 12 of Permitted Applications 11199, 12578, and 12716 pursuant to the Condition 12 Settlement Agreement (Agreement) dated March 10, 1995, among the Solano Irrigation District and Solano County Water Agency (Solano Agencies), Reclamation, and numerous holders of post-October 29, 1945, appropriative rights affected by the operation of Condition 12 who have signed the Agreement. This order also adopts conditions for nonsigning holders of State Water Resources Control Board (SWRCB) licenses and permits affected by the operation of Condition 12. Finally, this order provides that certain conditions shall be included in all future permits issued for applications in the upper Putah Creek after the effective date of this order.

## 2.0 BACKGROUND

During early 1990 the Solano Agencies commenced an action in superior court to determine all rights to the use of water from Putah Creek and its tributaries.<sup>4</sup> Over 2,000 persons were served in upper Putah Creek. Among other issues, the action requires a determination of how rights subject to Condition 12 can be exercised between Reclamation and hundreds of persons affected by Condition 12. On December 10, 1993, an order was entered referring the interpretation of Condition 12 to the SWRCB and on June 2, 1994, the SWRCB adopted its Report of Referee. Several parties, including Solano Agencies, Reclamation, and many upper Putah Creek appropriators, filed exceptions to the SWRCB's

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<sup>3</sup> The amount of water actually developed under this condition can be less than 33,000 afa if Reclamation obtains licenses for the Solano Project before the 33,000 afa is developed and put to use by upstream licensees and permittees.

<sup>4</sup> Solano Irrigation District, et al. v. Upstream Water Right Holders in Upper Putah Creek, Solano County Superior Court No. 108552; Sacramento County Superior Court, Judicial Council Coordination Proceeding No. 2565 (the adjudication).

report. Thereafter, nine months of negotiations among representatives of Solano Agencies, Reclamation, and upper Putah Creek water users resulted in the Agreement to settle all issues as to how persons can exercise rights subject to Condition 12.<sup>5</sup>

On January 6, 1996, the Upstream Settlement Committee<sup>6</sup> requested the SWRCB to adopt an order modifying the water rights for the Solano Project and all upper Putah Creek appropriators, having a priority subsequent to October 29, 1945, consistent with the Agreement. The Agreement provides for the exercise of such rights in a manner that differs from how the SWRCB currently implements the condition. Furthermore, the Agreement provides that: "In the absence of a final judgement against the United States, this Agreement is not binding on the United States until the SWRCB adopts this Agreement through amendment of the Solano Project Rights." Agreement p. 21.

As of February 1, 1996, 308 defendants, including all major diverters of water in upper Putah Creek, have signed the Agreement. The signatories to the Agreement hold licensed or permitted rights to 99 percent of the water subject to Condition 12.<sup>7</sup> The holder of only one permit affected by this order has not signed the Agreement.<sup>8</sup> In addition, the holders of

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<sup>5</sup> The Agreement provides markedly different operative effects for Condition 12 from that set forth in the SWRCB, Report of Referee, dated June 2, 1994.

<sup>6</sup> The Upstream Settlement Committee was formed by the court for Solano Irrigation District et al. v. Upstream Water Right Holders in Upper Putah Creek.

<sup>7</sup> Permitted Applications 11199, 12578, and 12716 of Reclamation are not included in this calculation, nor upstream applications having a priority date before October 29, 1945, the date that Reclamation filed its earliest application for the Solano Project.

<sup>8</sup> Solano Agencies have filed a request for a default judgement against the permittee for failing to appear in response to the complaint initiating the adjudication.

three unpermitted applications and about 21 licenses<sup>9</sup> have not signed the Agreement. Finally, representatives of the Solano Agencies and Reclamation have signed the Agreement.

### 3.0 CONDITION 12 AND ITS IMPLEMENTATION

#### 3.1 Condition 12 provides:

"12. This permit and all rights acquired or to be acquired thereunder are and shall remain subject to depletion of stream flow above Monticello Reservoir, not to exceed 33,000 acre-feet of water annually, by future appropriations of water for beneficial use within the watershed of Putah Creek above said reservoir; provided such future appropriations shall be initiated and consummated pursuant to law prior to full beneficial use of water within the project service area under this permit."

#### 3.2 SWRCB Implementation of Condition 12

A number of licensees, permittees, and applicants have not signed the Agreement and existing Condition 12 will remain in effect for such persons.<sup>10</sup> This section briefly explains how the SWRCB will implement Condition 12 for licensees and permittees who have not signed the Agreement. This section will also provide background necessary for understanding how the Agreement modifies the implementation of Condition 12.

Existing Condition 12 creates a race to the pump house between Reclamation and upstream users. Under the 33,000 afa depletion allowance, upstream development could continue until either: (1) it is exhausted by upstream development or (2) the full beneficial use of the water under Reclamation permits is achieved

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<sup>9</sup> Solano Agencies have requested entry of a default judgement against six defendants holding four licenses for failing to appear in response to the complaint initiating the adjudication.

<sup>10</sup> Solano Agencies state that: (a) default judgements will be sought for nonsigning holders of permits and licenses who have failed to file an answer to their complaint and (b) the court will be requested to bind all remaining nonsigners to the terms of the settlement agreement. Thus, nonsigners may be precluded from exercising permitted and licensed rights except in compliance with the provisions of the Agreement.

as evidenced by Reclamation's acceptance of water right licenses for Solano Project permits.<sup>11</sup> On September 30, 1992, Reclamation requested the SWRCB to commence the licensing process for Solano Project permits. Depending upon when additional information and decisions are provided to the SWRCB, proposed licenses could be offered to Reclamation during the spring or summer of 1996.<sup>12</sup> The reservation is terminated when Reclamation accepts licenses for the Solano Project permits. Condition 12, Report of Referee, p. 33.

When Reclamation accepts licenses, no new permits can be issued on pending or new applications to appropriate water in Lake or Napa Counties in the upper Putah Creek watershed.<sup>13</sup> In other words, all future development in Lake and Napa Counties within the watershed will have to depend solely on existing rights to the use of water from surface and ground water sources or on water imported from outside the watershed. The total quantity of water available to satisfy the cumulative demands of upstream post-October 29, 1945, appropriative rights and to supply the

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<sup>11</sup> Among other matters, the Report of Referee found that the reservation would be cut off when Reclamation accepts proposed licenses from the SWRCB. Solano Agencies filed an exception to this finding with the court. Due to settlement negotiations, no court hearing has been set to consider objections to the findings in the Report of Referee.

<sup>12</sup> Substantial work has been completed toward the issuance of licenses for Reclamation's permits; however, additional information is needed concerning the collection and use of water during the 1994-95 water year. In addition, Reclamation may advise the SWRCB that it wishes to petition for changes in its place of use, purposes of use, and for extensions of time. Upstream signatories have agreed not to protest petitions for changes to the place of use or purpose of use. The no protest proviso does not extend to petitions for time extension, however. Agreement p. 19.

<sup>13</sup> There may be minor exceptions to this statement. For example, it may be possible to issue permits for the appropriation of water in years during which Lake Berryessa fills and spills, or when an application seeks water from a stream during those times when the flow in the stream would not be capable of reaching Lake Berryessa. In addition, the SWRCB is required, by law, to issue small domestic registrations until such time as upper Putah Creek has been declared fully appropriated in accordance with Water Code Sections 1228 et seq. and 1205 et seq. Finally, agreements between Solano Agencies and Lake and Napa Counties could allow limited additional development above Monticello Dam even after acceptance of licenses by the Bureau.

needs of the residents of Lake and Napa Counties within the watershed could be substantially less than 33,000 afa.<sup>14</sup>

If Condition 12 did not exist, permittees would normally be provided time to fully develop and put to beneficial use all of the water which is authorized by permit.<sup>15</sup> Under Condition 12, however, permittees may receive a license for only that amount of water which is developed and put to beneficial use prior to the date that Reclamation accepts licenses.<sup>16</sup> Condition 12, Report of Referee, pp. 21-25, 33-38.

Persons on upper Putah Creek and its tributaries who have already received licenses will not be affected by Reclamation's acceptance of licenses for the Solano Project because such rights will be perfected prior to full beneficial use under Solano Project permits.

#### 4.0 SETTLEMENT AGREEMENT'S MODIFICATION OF IMPLEMENTATION OF CONDITION 12

The Agreement changes the exercise of appropriative rights subject to Condition 12. This section briefly describes how the more significant changes affect appropriative rights subject to

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<sup>14</sup> During the 1970s the SWRCB commenced adding conditions to permits which stated, in part:

*"Permittee is hereby put on notice that there may be years when diversion of water under this permit will not be within the reservation of water established for the watershed upstream from Monticello Reservoir in Decision 869."*

Condition 12 has been in effect for 39 years. Upstream permittees have had a reasonable time in which to develop and put water to reasonable beneficial use. Provided that certain conditions are met, the parties to the Agreement have agreed that as much as 13,668 afa can be developed after December 31, 1995. Agreement p. 12.

<sup>15</sup> This assumes the permittee is proceeding with due diligence to construct works and put water to use and in conformity with permit conditions; Article X, Section 2 of California's Constitution; the public trust doctrine; applicable law; and regulations.

<sup>16</sup> This applies to only those permittees who opted not to sign the Agreement. Different provisions will apply to permittees who sign the Agreement.



Condition 12. These changes will also affect all new permits for upper Putah Creek issued after the effective date of this order.<sup>17</sup>

The signatories have agreed that the right to develop water under existing Condition 12 terminated on December 31, 1995;<sup>18</sup> however, Reclamation has agreed to subordinate its prior rights under Solano Project permits for up to 12,668 afa of additional depletion in upper Putah Creek after December 31, 1995. Solano Agencies have also agreed to the subordination of Reclamation rights. Agreement pp. 11, 12. In recognition of memoranda negotiated between Solano Agencies with Lake and Napa Counties during 1990 and 1991, the subordination will allocate, by depletion, 6,000 afa to Lake County users and 6,668 afa to Napa County users. Agreement pp. 2, 12. An additional, 1,000 afa is specifically allocated for development by Reclamation for fish, wildlife, and riparian habitat enhancement in and around Lake Berryessa under permitted Application 19934; however, this amount is not to be counted when determining upstream depletion. Agreement pp. 12-13. Two thirds of the Lake County allocation is initially dedicated for municipal use.<sup>19</sup> In addition, the Agreement provides that the amounts of water allocated to Lake and Napa Counties can be reapportioned by agreement between themselves.<sup>20</sup> Agreement p. 13.

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<sup>17</sup> The changes may also be imposed on permits issued between the effective date of the Agreement and the date of this order.

<sup>18</sup> This date was negotiated during early 1995. At that time, the best estimate for the date that licenses would be offered Reclamation was around the end of 1995. The Agreement provides that the signatories will not object to the SWRCB determining that upper Putah Creek is fully appropriated under Water Code Section 1205 et seq., provided that the determination provides for continued issuance of permits under the Remaining Reservation identified in the Agreement. Agreement p. 19.

<sup>19</sup> This amount can be changed at Lake County's option.

<sup>20</sup> Water can be allocated in this manner because future water development in upper Putah Creek is a function and condition of Reclamation and Solano's waiver of priority dates of the Solano Project permits.

Signatories who now hold permits may be licensed for the amount of water developed and put to reasonable beneficial use as of December 31, 1995.<sup>21</sup> In addition, signatories can elect to continue developing water under a continuation<sup>22</sup> permit as a post-reservation water right, assuming that not all the remaining depletion water is licensed.<sup>23</sup> Agreement p. 13. Continuation permits<sup>24</sup> are not necessary for existing licensees because they have already perfected rights to the use of water in relation to Reclamation's permits for the Solano Project.

Applicants, permittees, and licensees may benefit from provisions respecting the measurement of depletion and payback of any excess depletion. Pay-back provisions address the contingency that holders of post-October 29, 1945, appropriative rights may cumulatively exceed the 27,668 afa limit on the amount of water that can be depleted from upper Putah Creek watershed during a series of years. Significantly, the depletion allowed in any year is dependent upon the amount in storage in Lake Berryessa on May 1 and can be (a) 33,202 af, provided the five year running average of annual depletion does not exceed 27,668 af or (b) 30,435 af, provided the three year running average does not exceed 27,668 af. In years when the lake spills, there is no limit on depletion. Agreement pp. 2-3. Furthermore, if the limit on allowable depletion is exceeded, the Agreement provides a pay-back period of one or three years depending on the amount

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<sup>21</sup> No license will be issued if no water has been developed under a permit.

<sup>22</sup> Continuation permits are permits or portions thereof that are not perfected by December 31, 1995. The amount of water determined by the SWRCB to have been put to beneficial use (perfected) under permits held prior to December 31, 1995, may be licensed.

<sup>23</sup> The election to continue developing water under a permit that is partially licensed is subject to SWRCB approval.

<sup>24</sup> The Agreement provides that "Continuation Permit" means that portion of a permit issued by the SWRCB with a priority date after October 29, 1945, and prior to the Reservation Cut-off date, under which a water right may be consummated after the Reservation Cut-off Date as provided in Section 4.1. hereof. "Reservation Cut-off Date" means the date on which the Reservation under Condition 12 is terminated, that is, December 31, 1995.

of water stored in Lake Berryessa on May 1. Agreement pp. 9-11. Finally, if Lake Berryessa spills prior to full payback of any excess depletion, pay-back obligations are excused. Agreement p. 11.

Other provisions provide for the installation of monitoring devices and the measurement and reporting of water use. Separate measurement provisions are required for specifically identified large facilities.<sup>25</sup> Agreement pp. 5-6. All facilities not specifically identified as large are small facilities.<sup>26</sup> Licensees and permittees owning small facilities may continue using existing methods of measurement or any other standard means of measurement acceptable to the SWRCB. Agreement p. 7. A watermaster will be appointed, serving as an officer of the court, to oversee implementation of the Agreement. The watermaster will provide information to the SWRCB as to the quantity of water available for development under continuation permits and for new applications to appropriate water.<sup>27</sup> Agreement pp. 15-17. Finally, licensees and permittees are required to file annual reports of the quantity of water diverted with the watermaster. Agreement p. 7.

The signatories to the Agreement also agree that no water is available for appropriation under existing Condition 12 after December 31, 1995, and they will not object to the SWRCB finding that upper Putah Creek is fully appropriated pursuant to Water Code Section 1205, et seq., provided the SWRCB continues to

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<sup>25</sup> "Large Licensees" are the twelve (12) holders of licenses and permits who have the largest total face value of Reservation Water Rights licenses and permits, deemed to be those holders of licenses and permits identified in "Exhibit B". Agreement p. 4.

<sup>26</sup> "Small Licensees" are holders of Reservation Water Rights who are not Large Licensees. Agreement p. 5.

<sup>27</sup> "The watermaster will provide such testimony, records and evidence to the SWRCB as may be necessary to carry out the provision of this Agreement." Agreement p. 17.

accept new applications and to issue permits in the upper Putah Creek watershed on terms consistent with the Agreement.<sup>28</sup>  
Agreement pp. 12, 19.

**5.0 MODIFICATION TO CONDITION 12 IN RECLAMATION'S PERMITTED APPLICATIONS FOR THE SOLANO PROJECT**

Reclamation has agreed that permitted Applications 11199, 12578, and 12716 shall be subject to post-October 29, 1945, appropriative water rights in Putah Creek watershed above Monticello Dam, provided the holders of such rights have subscribed or subscribe to the Agreement. Thus, we find that Condition 12 of Reclamation's permits should be modified to reflect the Agreement and that the following condition should be added to Reclamation's permits:

12. (a) Notwithstanding the foregoing, this permit is subject to post-October 29, 1945, appropriative water rights in upper Putah Creek watershed above Monticello Dam which (1) are licensed for the use of water perfected as of December 31, 1995, pursuant to the March 10, 1995, Condition 12 Settlement Agreement or (2) are perfected after December 31, 1995, provided the holders of such rights have subscribed, subscribe or are otherwise subject to the provisions of the March 10, 1995, Condition 12 Settlement Agreement.

**6.0 AMONG THE SIGNATORIES RECLAMATION IS DEEMED TO HAVE PUT WATER TO FULL BENEFICIAL USE ON DECEMBER 31, 1995**

As previously noted, existing Condition 12 creates a race to the pump house between Reclamation and post-October 29, 1945, upstream appropriators. The right to develop water under the reservation terminates either when Reclamation accepts licenses for Solano Project permits or when 33,000 afa is depleted by upstream appropriators. The depletion under Condition 12 reservation as of December 31, 1995 is 15,000 af. Thus, since the signatories agree that the reservation has terminated on December 31, 1995, we conclude that the Agreement provides that Reclamation shall be deemed to have put water to full beneficial

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<sup>28</sup> This Board will probably consider an order revising the Declaration of Fully Appropriated Streams during the summer of 1996.

use on December 31, 1995. The Agreement provides procedures whereby persons upstream of Monticello Dam can continue to develop water after December 31, 1995. Therefore, as among the signatories to the Agreement only, the SWRCB will deem Reclamation to have put water to full beneficial use within the project service area on December 31, 1995.

Reclamation has requested the SWRCB to commence the licensing process for Solano Project permits. Until such time as licenses are accepted by Reclamation, the SWRCB does not deem Reclamation to have put water to full beneficial use under Condition 12. As a result, Reclamation is not deemed to have put water to full beneficial use within the project service area under the permit for persons who had the opportunity but chose not to sign the Agreement. This is important because existing permittees who have not and do not sign the Agreement will not be foreclosed from perfecting the right to develop and put water to use up to the time Reclamation accepts licenses for Solano Project permits.<sup>29</sup>

**7.0 CONDITIONS SHOULD BE INCLUDED IN CONTINUATION PERMITS AND FOR PERMITS ISSUED FOR PENDING APPLICATIONS.**

**7.1 Signatories Request Conditions Be Imposed Upon All Post-Reservation Water Rights**

The signatories agree that the following terms and conditions should be included in all post-reservation water rights<sup>30</sup> (new permits) issued by the SWRCB, including continuation permits:

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<sup>29</sup> Solano Agencies state that the court will be requested to bind all nonsigning permittees to the terms of the settlement agreement. Thus, nonsigning permittees may be precluded by the court from exercising permitted rights except in compliance with the provisions of the Agreement.

<sup>30</sup> The Agreement provides that "'Post-Reservation Water Rights' are appropriative rights to the Remaining Reservation, as conditioned by this Agreement, consummated after December 31, 1995". "'Remaining Reservation' means the Annual Depletion to which Solano and Reclamation agree to subordinate the Solano Project water rights and make available for Post-Reservation Rights in the Putah Creek watershed above Monticello Dam pursuant to this Agreement. The Remaining Reservation is deemed to be 12,668 Acre-feet of Annual Depletion plus an additional 1,000 acre-feet to be used by Reclamation as provided in Section 4.E hereof."

1. A watermaster has been appointed by the Sacramento County Superior Court, Judicial Council Coordination Proceeding No. 2565, to implement the provisions of the Agreement. The Permittee shall be responsible for partial payment of the watermaster costs in accordance with the terms of the Agreement.

2. Water diverted to storage shall be measured during the Accumulation Season<sup>31</sup> in the following manner:

Onstream Storage Reservoirs: Within one year following construction of the reservoir, Permittee shall have the capacity of such reservoir surveyed by a registered civil engineer or licensed surveyor.<sup>32</sup> A copy of such survey and area-capacity curves shall be provided to the watermaster and the SWRCB. Permittee shall install and properly maintain a staff gauge in the reservoir for the purpose of determining water levels. Permittee shall record the water levels at the beginning and the end of the Accumulation Season.

Offstream Storage Reservoirs: Permittee shall measure the diversions to storage in one or both of the following manners:

- a. In-line flow metering device.
- b. Power records accompanied by a pump test which was performed during the past five (5) years.

3. Direct diversions shall be measured by one or both of the following methods:

- a. In-line flow metering device.
- b. Power records accompanied by a pump test which was performed during the past five (5) years.

4. The Permittee shall report all diversions annually to the watermaster by September 1 of each year on forms approved by the watermaster.

5. Permittee is hereby put on notice that there may be years when diversion of water under this permit will

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<sup>31</sup> "'Accumulation Season' means from October 1 through the following April 30 for reservoir storage, or such other period comprising the runoff season as may be determined by the watermaster from time to time with written notice to all reservoir owners. The Accumulation Season shall be used for the sole purpose of calculating Annual Depletion."

<sup>32</sup> In the event the reservoir was constructed before the date of this order, permittee shall have one year from the date of this order to comply with the requirements of this condition.

not be within the reservation of water established for the watershed upstream of Monticello Dam as set forth in the Agreement, and that in those years no water may be available under this permit, and releases may be required of stored water.

6. Permittee is hereby put on notice that the waiver of priority granted by Reclamation and Solano County Water Agency provide that in the event Allowable Depletion<sup>33</sup> is exceeded in any year, water diverted to storage that year shall be released to the extent necessary to bring the Allowable Depletion into compliance, in the following order:

a. All amounts diverted by holders of Post-Reservation Water Rights to storage in excess of 120 percent of that water right holder's previous five-year average, in reverse order of water right priority;

b. All amounts diverted to storage by holders of Post-Reservation Water Rights above the previous five-year average diversion, in reverse order of priority;

c. All remaining water diverted that year by holders of Post-Reservation Water Rights in reverse order of priority.

Permittee's direct diversion rights under this permit, if any, are included in the above categories as appropriate for their respective priorities, and to the extent Permittee does not make storage releases for Permittee's share of the exceedence payback, Permittee shall be required to contribute to pay back by curtailment of direct diversion

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<sup>33</sup> "Allowable Depletion" is the amount of Annual Depletion permitted in any year. The amount of Allowable Depletion shall be as follows:

1. In any year in which storage in Lake Berryessa is at or above 740,000 acre-feet by May 1, the Allowable Depletion shall be deemed to be 33,202 acre-feet per year, provided however, that the five (5) year running average of Annual Depletion may not exceed 27,668 acre-feet per year;

2. In any year in which storage in Lake Berryessa has not attained 740,000 acre-feet by May 1, the Allowable Depletion for that year shall be 30,435 acre-feet, provided that the three (3) year running average of Annual Depletion may not exceed 27,668 acre-feet per year.

3. In any year in which Lake Berryessa spills, there shall be no limit to the "Allowable Depletion". Agreement pp. 2, 3.

during the ensuing season(s) until the amount of the exceedence is paid back.

7. In any year in which the Annual Depletion<sup>34</sup> exceeds the Allowable Depletion, if Lake Berryessa: (1) does not drop below 640,000 acre-feet in storage as of May 1, Permittee shall have three years, starting in the next Accumulation Season, to make up or repay Permittee's excess diversion and (2) does not reach 640,000 acre-feet of storage as of May 1, Permittee shall have one year, starting in the next Accumulation Season, to make up or repay Permittee's excess diversions. If Lake Berryessa spills at any time prior to full payback of excess depletion, Permittee shall be excused from any further obligation for repayment of the overage.

8. Permittee is hereby put on notice that the watermaster shall have the right to enter property to inspect measuring equipment and to observe compliance with these permit terms and conditions, upon 48 hours prior notice and upon such reasonable conditions as Permittee may prescribe.

9. Permittee is hereby put on notice of Permittee's right, upon reasonable prior notice, to inspect and to copy, at Permittee's own expense, all records and reports of the watermaster.

10. Permittee is hereby put on notice of Permittee's obligation to notify the watermaster of any change in ownership of land, changes in the water right, or changes in address related to the Permit.

11. Permittee is hereby put on notice that the Sacramento County Superior Court, Judicial Council

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<sup>34</sup> "Annual Depletion" means the total amount of water diverted either to storage or by direct diversion under appropriative rights with priority dates after October 29, 1945, minus:

1. The evapotranspiration of preproject native vegetation as adjusted by winter evaporation of reservoir surface area on inundated reservoir areas;
2. The amount of diversions during periods of surface water hydraulic noncontinuity with Lake Berryessa;
3. The amount of return flow which returns to the stream system from Post-1945 Rights diversions; and
4. The amount of water used by Reclamation for fish, wildlife, and riparian vegetation enhancement in and around Lake Berryessa, all as measured, estimated, and adjusted in accordance with Section 3.A.7 of the Agreement. Agreement p. 3.



Coordination Proceeding No. 2565, has retained jurisdiction over the parties, and upon application by the watermaster, has the right to temporarily enjoin water diversions pursuant to this permit for noncompliance with the terms of the Agreement.

12. Solely for purposes of administering Post-Reservation Depletion<sup>35</sup>, the average annual depletion assigned to this project is XXX acre-feet per annum as calculated by the watermaster using information described in Exhibit C of the Condition 12 Settlement Agreement. Permittee shall notify the watermaster of any change in crop type, acreage irrigated, and irrigation method. Any change in water usage which results in an increase in average annual depletion of more than 10 percent for nonweather related reasons, as determined by the watermaster, will require filing a new water right application. Agreement pp. 13-15, Exhibit E.

#### **7.2 Conditions Should be Imposed on Continuation Permits Issued Pursuant to the Agreement**

"Continuation Permit" means that portion of an existing permit with a priority date after October 29, 1945, which may be consummated after December 31, 1995,<sup>36</sup> as provided in Section 4.1. hereof. Agreement p. 3. The holders of Post-Reservation Water Rights have agreed that continuation permits should be subject to the same conditions as new permits. Agreement p. 14. Thus, we find that continuation permits issued by the SWRCB should include the conditions set forth in subsection 7.1 above.

#### **7.3 Conditions Should be Imposed on Permits Issued for Applications Permitted After the Date of This Order**

Signatories also request that the foregoing conditions be imposed upon applicants who have never received permits. No applicant

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<sup>35</sup> "Post-Reservation Depletion" means the estimated Annual Depletion from Post-Reservation Water Rights calculated by the watermaster using information described in Exhibit C to the Agreement.

<sup>36</sup> "Reservation Cut-Off Date" means the date on which the Reservation under Condition 12 is terminated; that is, December 31, 1995. "Reservation" means the 33,000 acre-feet per year of depletion reserved for the benefit of the Upper Putah Creek Watershed as specified in Term 14 of SWRCB Decision 869 (Condition 12 of the Solano Project Water Right Permits issued under Applications 11199, 12578, 12716), quoted above in the Recital C of this Agreement. Agreement p. 5.

will be injured by the addition of the foregoing conditions to new permits. Existing applicants possess a mere legal expectancy that a permit will be issued which may entitle them to some quantity of water. Such an expectancy is not a sufficient legal interest to set aside the inclusion of the conditions in new permits. As previously stated, once Reclamation accepts licenses for the Solano Project, the reservation which makes water available for upstream applicants is terminated. Thus, but for the Agreement (or other potential future agreements with Reclamation and Solano Agencies), no water would be available for existing or new applicants.

It is possible that applicants who may have constructed works for the diversion and use of water without complying with the requirements of the Water Code for obtaining a permit for the use of water could be disadvantaged, because they could immediately seek a license for water being illegally diverted upon receipt of a permit. Water Code Section 1052(a) provides that "[t]he diversion and use of water subject to this division other than as authorized in this division is a trespass." Given the language of Section 1052, an applicant who is also an illegal diverter would have untenable grounds for attempting to set aside the requested conditions.

Numerous, but not all, unpermitted applicants have signed the Agreement. The Agreement is a physical solution or management solution which provides a means whereby Putah Creek applicants in Lake and Napa Counties can continue to develop water that would not otherwise be available once Reclamation accepts licenses for the Solano Project. In addition, the Agreement sets forth numerous provisions providing more certainty in the exercise of appropriative rights subject to Condition 12. Thus, the SWRCB finds that these measures are in furtherance of Article X, Section 2 of the California Constitution, mandating that the waters of the State be developed to the fullest extent of which they are capable, and that it is in the public interest for the

SWRCB to impose the measures set forth in Section 7.1 on new applicants.

#### **8.0 MODIFICATIONS REQUIRED TO CONFORM EXISTING LICENSES AND PERMITS TO THE AGREEMENT**

Modifications are required to conform existing licenses and permits of persons who are: (a) signatories to the Agreement and (b) persons who are not signatories to the Agreement.

#### **8.1 Modifications Required to Conform the Licenses and Permits of Signatories to the Agreement**

The following terms and conditions are applicable to signatories holding existing licenses (which are to be conformed) and permits (which are to be licensed) pursuant to the Agreement:

1. A watermaster has been appointed by the Sacramento County Superior Court, Judicial Council Coordination Proceeding No. 2565, to implement the provisions of the Agreement. The Permittee/Licensee shall be responsible for partial payment of the watermaster costs in accordance with the terms of the Agreement.

2. Permittee/Licensee may employ existing methods or means of measurement (or alternatively any other standard means of measurement normally acceptable or satisfactory to the SWRCB in its administration of appropriative rights) for determining the amount of water diverted directly for use or to storage, unless otherwise specified by the Agreement.<sup>37</sup>

Permittee/Licensee shall install at his or her own cost such additional or other measurement devices as are necessary to measure actual depletions, if the watermaster determines that additional measures are necessary, consistent with paragraph 3.3 (Measuring Devices) of the Agreement.

3. Permittee/Licensee shall report to the watermaster annually, on or about September 1, the amounts of their diversions to storage at the beginning and end of the Accumulation Season as required by the watermaster and their direct diversions under post-1945 appropriative rights. Such reports shall be made in writing on forms approved by the watermaster.

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<sup>37</sup> The Agreement provides other measures for Large Licensees. Agreement pp. 5, 6.

4. Permittee/Licensee is hereby put on notice that there may be years when diversion of water under this permit/license will not be within the reservation of water established for the watershed upstream of Monticello Dam as set forth in the Agreement, and that in those years no water may be available under this permit/license.

5. In the event Allowable Depletion is exceeded in any year, Permittee/Licensee shall release water diverted to storage to the extent necessary to bring the Allowable Depletion into compliance. Permittee's/Licensee's obligation to release water from storage shall be governed by the repayment provisions of the Agreement. Agreement pp. 9, 10, and 12.

6. In the event Allowable Depletion is exceeded in any year, Permittee/Licensee shall curtail direct diversions of water during ensuing seasons until the amount of the exceedence is paid back consistent with the repayment provisions of the Agreement. Agreement pp. 9, 10, and 12.

7. In any year in which Annual Depletion exceeds Allowable Depletion, if Lake Berryessa: (1) does not drop below 640,000 acre-feet in storage as of May 1, Permittee/Licensee shall have three years, starting in the next Accumulation Season, to make up or repay Permittee/Licensee's excess diversion; (2) does not reach 640,000 acre-feet of storage as of May 1, Permittee/Licensee shall have one year, starting in the next Accumulation Season, to make up or repay Permittee/Licensee's excess diversions. If Lake Berryessa spills at any time prior to full payback of excess depletion, Permittee/Licensee shall be excused from any further obligation for repayment of the overage.

8. Permittee/Licensee shall provide watermaster prior notice of any repayment. Repayment may be made either by releases from storage, curtailment of direct diversion, or by the provision of water from other sources.

9. The watermaster shall have the right to enter property to inspect measuring equipment and to observe compliance with this permit terms and conditions, upon 48 hours prior notice and upon such reasonable conditions as Permittee may prescribe.

10. Permittee/Licensee is hereby put on notice of Permittee/Licensee's right, upon reasonable prior notice, to inspect and to copy, at Permittee/Licensee's own expense, all records and reports of the watermaster.

11. Permittee/Licensee shall notify the watermaster of any change in ownership of land, changes in the water right, or changes in address related to the permit/license.

12. Permittee/Licensee is hereby put on notice that the Sacramento County Superior Court, Judicial Council Coordination Proceeding No. 2565, has retained jurisdiction over the parties and, upon application by the watermaster, has the right to temporarily enjoin water diversions pursuant to this permit/license for noncompliance with the terms of the Agreement.

Inasmuch as the foregoing provisions are agreed to, the SWRCB should add these terms and conditions to the signatories' permits and licenses to implement the Agreement.<sup>38</sup>

#### **8.2 Additional Modifications Required to Conform the Appropriative Rights of Large Licensees to the Agreement**

In addition to the foregoing terms and conditions, the holders of expressly identified permits and licenses have agreed to be subject to the following special conditions for measuring annual depletion:

1. Reservoir storage other than under stockpond certificates and small domestic registrations by the Large Licensees under Post-1945 Rights shall be measured at the beginning and end of the Accumulation Season. Contribution to Annual Depletion for Post-1945 Rights shall be determined to be the change in storage during the Accumulation Season. The Large Licensee shall pay for the costs of installing and maintaining any water level measuring device required by the SWRCB.

The following reservoirs shall have a water level measuring device that documents continuous reservoir levels during the Accumulation Season, purchased (and replaced if necessary) by the watermaster as a watermaster cost pursuant to Section 5.F. of the Agreement, and installed and maintained at the expense of the Large Licensee:

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<sup>38</sup> These conditions are not applicable to Applications 11199, 12578, and 12716 held by Reclamation. Permitted Application 19934 is subject to conditions as provided by the Agreement.

<u>Reservoir Name</u>	<u>Reservoir Owner</u>	<u>Stream</u>
Guenoc Lake <sup>19</sup> (Detert Reservoir)	Magoon Estate, Ltd.	Bucksnort Creek
McCreary Reservoir <sup>40</sup>	Magoon Estate, Ltd.	Bucksnort Creek

If reasonably determined to be necessary by the watermaster to determine Annual Depletion, the following reservoirs shall also have a water level measuring device that documents continuous reservoir levels during the Accumulation Season, purchased (and replaced if necessary) by the watermaster as a watermaster cost pursuant to Section 5.F. of the Agreement, and installed and maintained at the expense of the Large Licensee:

<u>Reservoir Name</u>	<u>Reservoir Owner</u>	<u>Stream</u>
Big Lake (Dick Week) <sup>41</sup>	Juliana Vineyards	Unnamed stream tributary to Pope Creek
State Dam <sup>42</sup>	St. Supery Vineyards	Unnamed stream tributary to Maxwell Creek

2. Nonriparian direct diversions of the Large Licensees under post-October 29, 1945 rights shall be measured at the cost of the Large Licensee or determined to the satisfaction

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<sup>19</sup> The Guenoc Lake applications subject to the Large Licensee provisions are Applications 15706, 19890, 20877, and 24297. Having been filed prior to October 29, 1945, Applications 3069 and 4889 are not subject to the Large Licensee provisions.

<sup>40</sup> The McCreary Reservoir applications subject to the Large Licensee provisions are Applications 15706, 19890, 20877, and 24297. Having been filed prior to October 29, 1945, Applications 3069 and 4889 are not subject to the Large Licensee provisions.

<sup>41</sup> The Big Lake applications subject to the Large Licensee provisions are Applications 11236, 14024, 15164, 16267, 20060, 20061, 24045, 25432, 26299, and 27029.

<sup>42</sup> The State Dam applications subject to the Large Licensee provisions are Applications 23247, 23248, 23249, 23672, 23834, and 27852.

of the watermaster. Measuring requirements shall be no more stringent than for comparable diversions of Small Licensees.

Inasmuch as Large Licensees have agreed to the foregoing provisions, the SWRCB should add terms and conditions to the permits and licenses of Large Licensees identified in Exhibit B of the Agreement to implement the foregoing provisions.

### **8.3 Modifications to Licenses and Permits of Persons Who Did Not Sign the Agreement**

The Upstream Settlement Committee requests the SWRCB to impose the provisions of the Agreement on Permittees and Licensees who have not signed the Agreement to the extent the SWRCB believes it has legal authority. As previously stated, a number of licensees and permittees have not signed the Agreement. California water law, Condition 12, and conditions in existing permits and licenses impose certain conditions on nonsigners irrespective of whether the Agreement is signed. Such conditions include the obligation to report on the amount of water diverted and put to use. In addition, each permit and license has a priority, based on the date of its application, which determines its relative claim on the available supply of water in relation to all other legal claimants against the supply. Water Code Sections 1450, 1455. Implicit to the priority system is the requirement not to divert water when sufficient water is not available to supply rights having a superior right or an earlier priority in time.

The Agreement includes a physical or managed solution providing a means whereby Putah Creek applicants in Lake and Napa Counties can continue to develop water that otherwise would not be available once Reclamation accepts licenses for the Solano Project. In addition, the Agreement sets forth numerous provisions providing more certainty in the exercise of appropriative rights subject to Condition 12. The SWRCB finds that these measures are in furtherance of Article X, Section 2 of the California Constitution, mandating that the waters of the

State be developed to the fullest extent of which they are capable, and that it is in the public interest for the following terms and conditions to be included in the permits and licenses of persons who have not signed the Agreement:

1. A watermaster has been appointed by the Sacramento County Superior Court, Judicial Council Coordination Proceeding No. 2565, to implement the provisions of the March 10, 1995, Condition 12 Settlement Agreement.

2. Permittee/Licensee may employ existing methods or means of measurement (or alternatively any other standard means of measurement normally acceptable or satisfactory to the SWRCB in its administration of appropriative rights) for determining the amount of water diverted directly for use or to storage. Permittee/Licensee shall install at his or her own cost such additional or other measurement devices as are necessary to measure actual diversions, if the SWRCB at the request of the watermaster, determines that additional measures are necessary to effectively administer the diversion and use of water in upper Putah Creek under Condition 14 of Decision 869 and Order WR 96-2.<sup>43</sup>

3. Permittee/Licensee shall report to the watermaster annually, on or about September 1, the amounts of their diversions to storage and/or their direct diversions under this permit/license. Such reports shall be made in writing on forms approved by the watermaster.<sup>44</sup>

4. Permittee/Licensee is hereby put on notice that there may be years when diversion of water under this permit/license will not be within the reservation of water established for the watershed upstream of Monticello Dam as provided in Condition 14 of Decision 869 and Order WR 96-2, and that in such years no water may be available under this permit/license.<sup>45</sup>

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<sup>43</sup> Condition 14 of Decision 869 is synonymous with Condition 12 in Reclamation's Solano Project permits.

<sup>44</sup> SWRCB regulations require: (1) permittees to file annual progress reports with the SWRCB and (2) licensees to file report upon request. Both reports require reporting of the amount of water used. SWRCB practice is to request licensees to report once every three years for the diversion and use covering the entire period. 23 CCR § 847.

<sup>45</sup> Standard Permit Terms 86 and 87 currently provide such notice to upstream permittees and licensees in upper Putah Creek.



5. In the event Allowable Depletion as determined under the Condition 12 Settlement Agreement is exceeded in any year, Permittee/Licensee shall bypass/release water diverted to the extent necessary to bring Allowable Depletion into compliance as determined by the watermaster. Permittee/Licensee's obligation to bypass/release water shall be governed by the following repayment provisions:

a. Permittee/Licensee is required to curtail direct diversions of water during years when water is not available under the reservation.<sup>46</sup> Permittee/Licensee's obligation to repay shall be in reverse order of the priority of the permit/license in relation to all other permits and licenses affected by Condition 12.

b. Permittee/Licensee is required to curtail diversions of water to storage during years when water is not within the reservation. During such years, unless replacement water is provided on an exchange basis, Permittee/Licensee shall release water collected to storage under this permit, during the preceding collection season at the maximum practical rate to flow into Lake Berryessa.<sup>47</sup> Permittee/Licensee's obligation to repay shall be in reverse order of the priority of the permit/license in relation of all other permittees and licensees affected by Condition 14 of Decision 869.

c. If Lake Berryessa spills at any time prior to full payback of excess depletion, Permittee/Licensee shall be excused from any further obligation for repayment.

6. Permittee/Licensee shall provide watermaster prior notice of any repayment. Repayment may be made either by releases from storage, curtailment of diversion, or by the provision of water from other sources.

7. The watermaster shall have the right to enter property to inspect measuring equipment and to observe compliance with this permit's terms and conditions,

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<sup>46</sup> Standard Permit Term 86 currently provides that upstream direct diverters must forego diversion when water is not available within the reservation.

<sup>47</sup> Standard Permit Term 87 currently requires these measures of existing permittees and licensees diverting water to storage in the upper Putah Creek Watershed.

upon 48 hours prior notice and upon such reasonable conditions as the permit/license may prescribe.<sup>48</sup>

8. Permittee/Licensee is hereby put on notice of Permittee/Licensee's right, upon reasonable prior notice, to inspect and to copy, at Permittee/Licensee's own expense, all records and reports of the watermaster.

9. Permittee/Licensee shall notify the watermaster of any change in ownership of land, changes in the water right, or changes in address related to the permit/license.<sup>49</sup>

10. Permittee/Licensee is hereby put on notice that the Sacramento County Superior Court, Judicial Council Coordination Proceeding No. 2565, has retained jurisdiction over the parties, and upon application by the watermaster, has the right to temporarily enjoin water diversions pursuant to this permit/license for noncompliance with the terms of this permit/license and any order of the court.<sup>50</sup>

These conditions do not require the permittees and licensees to pay any portion of the cost for services of the watermaster. Conversely, these conditions do not provide nonsigning permittees and licensees the benefits of up to three-year payback of depletion exceedences, depending upon the amount of water stored in Lake Berryessa, which Reclamation and Solano Agencies have agreed to accord the signatories to the Agreement. Finally, these conditions do not preclude a permittee from obtaining a right to develop and put water to beneficial use prior to the

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<sup>48</sup> Standard Permit Term 11 provides:

*"Permittee shall allow representatives of the State Water Resources Control Board and other parties, as may be authorized from time to time by said Board, reasonable access to project works to determine compliance with the terms of this permit."*

<sup>49</sup> Permittees and licensees are required to inform the SWRCB of changes of address and ownership. 23 CCR §§ 830, 831. Permittees and licensees are required to petition the SWRCB for changes in the point of diversion, place of use, and purpose of use. Water Code § 1700 et seq.

<sup>50</sup> Standard Permit Term 23 provides:

*"Rights under this permit are, and shall be, specifically subject to existing rights determined by the \_\_\_\_\_ Adjudication, Superior Court, \_\_\_\_\_ County, No. \_\_\_\_\_ insofar as said adjudicated rights are maintained."*

time when Reclamation actually accepts licenses for the Solano Project permits.<sup>51</sup>

#### **8.4 Licensees and Permittees Who Did Not Sign the Agreement Will Not Be Adversely Affected by the Terms and Conditions**

The terms and conditions required of licensees and permittees who have not signed the Agreement impose no requirements over and above those already in existence. Nonsigners are currently required to: (1) report to the SWRCB the amount of water used; (2) allow inspection by SWRCB representatives; (3) advise the SWRCB of changes of address and/or ownership; (4) petition the SWRCB for changes in the point of diversion, place of use, and/or purpose of use; and (5) release water diverted in excess of the reservation. The new conditions do: (1) require that measurements of water diverted for use be reported to the watermaster; (2) expressly state the priority for how water taken in excess of the allowed depletion is to be released; and (3) provide that the watermaster, an officer of the court, may conduct inspections following reasonable notice. These changes, however, are not a material change from the requirements which must currently be observed and the changes will not adversely affect rights to the use of water by nonsigning Permittees and Licensees. Importantly, the changes will facilitate a more comprehensive oversight and management of the exercise of all rights subject to Condition 12 by the watermaster, the SWRCB, and the court.

#### **8.5 Licenses and Permits of Persons Who Did Not Sign the Agreement Should be Modified**

In light of the discussion in Sections 8.3 and 8.4, we find that the SWRCB should add terms and conditions to the permits and licenses of nonsigning permittees and licensees to implement the provisions set forth in Section 8.3 above.

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<sup>51</sup> Solano Agencies state that the court will be requested to bind all nonsigners to the terms of the settlement agreement. Thus, nonsigners may be precluded from exercising permitted and licensed rights except in compliance with the provisions of the Agreement.

**9.0 STOCKPOND CERTIFICATES AND SMALL DOMESTIC REGISTRATIONS ARE EXEMPTED FROM ANY REQUIREMENTS SET FORTH IN THIS ORDER**

The Agreement does not require any active measures of the signatories owning stockpond certificates or small domestic registrations. In addition, by letter dated December 28, 1995, a representative of the Upstream Settlement Committee stated that there is no need to impose the provisions of the Agreement upon holders of stockpond certificates or small domestic registrations. Thus, this order does not impose any conditions upon stockpond certificates or small domestic registrations issued pursuant to Water Code Sections 1226 et seq. and 1228 et seq., respectively.

**10.0 MEASUREMENT OF DEPLETION.**

Condition 12 provides, in part:

"This permit and all rights acquired or to be acquired thereunder are and shall remain subject to depletion of stream flow above Monticello Reservoir, not to exceed 33,000 acre-feet of water annually, by future appropriations of water for beneficial use within the watershed of Putah Creek above said reservoir."  
(Emphasis added.)

In the Report of Referee, we found that depletion should be measured by the quantity of water actually diverted from the source minus return flow. Report of Referee pp. 8, 9.

The signatories have entered into a detailed agreement as to how depletion should be measured for the purpose of determining compliance with Condition 12 of Reclamation permits. These measures are set forth in the Agreement under: (1) definitions for "Allowable Depletion", "Annual Depletion" and (2) 3. Depletion, A. Determination of Annual Depletion, 1. Large Licensees, 2. Small Licensees, and 7. Adjustments to Annual Depletion; B. Repayment of Diversions Greater Than Allowable Depletion, and 3. Accounting for Depletion Overages; and II. Effective Date of this Agreement, C.

Inasmuch as signatories owning 99 percent of the post-October 29, 1945 appropriative rights to the use of water in upper Putah Creek watershed have a comprehensive agreement for determining depletion pursuant to Condition 12, the SWRCB finds that it is in the public interest that it also should determine depletion consistent with the terms of the Agreement.

**11.0 APPROVAL OF AGREEMENT BY THE COURT AND APPOINTMENT OF A WATERMASTER**

In the coordinated actions in the Sacramento County Superior Court, both the SWRCB and the court have concurrent jurisdiction over the post-1914 appropriative water rights issued by the SWRCB. The SWRCB is requested to amend the terms and conditions in appropriative rights to give effect to the terms of the Agreement. The Agreement will also be presented for the court's review and approval and there is always a possibility that a reviewing court will have one or more reservations about the appropriateness of the provisions in a settlement agreement. Under circumstances such as these, it is possible that the court could enter an order that is not consistent with the Agreement and/or this order. In order to avoid the possibility that post-1914 appropriative rights could be subjected to inconsistent mandates from the SWRCB and the court, the SWRCB should review any and all orders of the court implementing the provisions of the Agreement. If it appears that the order of the court and the SWRCB impose inconsistent mandates on appropriative water rights, the SWRCB should consider amending the requirements set forth by this order.

In addition, this order approves numerous conditions predicated upon the appointment of a watermaster by the court. To date, a watermaster has not been appointed; however, on March 1, 1996, Solano Agencies will move the court to appoint a watermaster. Holders of post-1914 appropriative rights should not be held accountable for complying with terms that are impossible to satisfy in the absence of a watermaster. Accordingly, all terms

and conditions in this order requiring the presence of a watermaster shall be unenforceable until such time as the Chief, Division of Water Rights, and the parties holding post-October 29, 1945, appropriative rights are notified in writing by Solano Agencies that a watermaster has been appointed by the court.

#### 12.0 CONTINUING AUTHORITY

The Agreement is a physical solution providing means whereby the holders of post-October 29, 1945, appropriative rights in upper Putah Creek can continue to develop water that otherwise would not be available once Reclamation accepts licenses for the Solano Project. In addition, the Agreement sets forth numerous provisions providing more certainty in the exercise of appropriative rights subject to Condition 12. The SWRCB finds that these measures are in furtherance of Article X, Section 2 of the California Constitution, mandating that the waters of the state be developed to the fullest extent of which they are capable, and that it is in the public interest for the SWRCB to retain continuing authority to delete, revise, amend, or adopt new terms or conditions to: (1) implement the Agreement and any amendments to the Agreement and (2) make the terms or conditions consistent with any order of the superior court. Accordingly, the following condition should be added to all permits subject to Condition 12:

The SWRCB shall have continuing authority under Article X, Section 2 of the California Constitution; Water Code Sections 100 and 275, and common law the public trust doctrine over this permit/license to delete, revise, amend, or adopt new terms or conditions to: (1) implement the Agreement and any amendments to the Agreement and (2) make the terms or conditions consistent with any order of the superior court. No action shall be taken pursuant to this paragraph unless the SWRCB provides notice to affected parties and provides an opportunity for a hearing.

### 13.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

This order adopts conditions affecting how the holders of existing water right licenses and permits subject to Condition 12 must exercise such rights in relation to each other. This order also approves conditions to be included in new permits, if and when such permits are issued. These conditions will not result in existing projects being operated in a manner that: (1) will have a direct physical effect on the environment or (2) will result in a reasonably foreseeable indirect physical change in the environment. In addition, this order does not approve: (1) the issuance of any new right to divert and use water; (2) petitions for changes in the point of diversion, place of use, or purpose of use of existing rights for the diversion and use of water; or (3) petitions for additional time to develop water under existing permits. Thus, this order does not approve a project within the meaning of the California Environmental Quality Act (CEQA). Public Resources Code § 21,065, 14 CCR § 15378.

### 14.0 CONCLUSIONS

The Upstream Settlement Committee has requested the SWRCB to modify the terms and conditions of permits and licenses subject to Condition 12 to implement the provisions of the Agreement. This order finds that the Chief, Division of Water Rights, should be directed to modify the terms and conditions for: (1) new permits issued after the date of this order, (2) continuation permits issued pursuant to the Agreement, (3) existing permits and licenses for signatories to the Agreement, and (4) the permits and licenses of persons who have not or do not sign the Agreement. In addition, this order also makes it clear that Reclamation's permits are subject to the Agreement and that water can be developed above Monticello Dam consistent with the provisions of the Agreement. The rights to divert and use water under stockpond certificates and small domestic registrations are expressly exempted from the terms and conditions required by this order. All terms and conditions in this order requiring the

presence of a watermaster should be unenforceable until such time as the Chief, Division of Water Rights, and post-October 29, 1945, holders of appropriative water rights are notified in writing by Solano Agencies that a watermaster has been appointed by the court. It is in the public interest for the SWRCB to retain continuing authority to delete, revise, amend, or adopt new terms or conditions to: (1) implement the Agreement and any amendments to the Agreement and (2) make the terms or conditions consistent with any order of the superior court. Finally, this order does not approve a project within the meaning of CEQA.

#### ORDER

**NOW THEREFORE IT IS ORDERED THAT** the following terms and conditions be added to the permits and licenses subject to Condition 12, including Reclamation's permitted applications for the Solano Project.

1. The following condition shall be added to Reclamation's permits:
  12. (a) Notwithstanding the foregoing, this permit is subject to post-October 29, 1945, appropriative water rights in the Putah Creek watershed above Monticello Dam which (1) are licensed for the use of water perfected as of December 31, 1995, pursuant to the March 10, 1995, Condition 12 Settlement Agreement, or (2) are perfected after December 31, 1995, provided the holders of such rights have subscribed, subscribe, or are otherwise subject to the provisions of the March 10, 1995, Condition 12 Settlement Agreement.
2. The Chief, Division of Water Rights, is directed to include terms and conditions implementing the provisions set forth:
  - a. In Section 7.1 for continuation permits issued by the SWRCB;



- b. In Section 7.1 for new permits issued by the SWRCB after the date of this order;
  - c. In Section 8.1 and 8.2 for the permittees and licensees who sign or have signed the Agreement; and
  - d. In Section 8.3 for the permittees and licensees who have not signed the Agreement.
3. The Chief, Division of Water Rights, is directed to review any and all orders of the court concerning the effect to be given the Agreement. If it appears that the orders of the court and the SWRCB impose inconsistent mandates on appropriative water rights, the Chief is directed to bring such mandates to the attention of the SWRCB with a recommendation as to how the SWRCB should respond to such conflicting mandates.
  4. The Chief, Division of Water Rights, is directed to include the following condition in all permits and licenses which are or may become subject to Condition 12, including Reclamation's permitted applications for the Solano Project and Reclamation's permitted Application 19934:

The SWRCB shall have continuing authority under Article X, Section 2 of the California Constitution, Water Code Sections 100 and 275, and the common law public trust doctrine over this permit/license to delete, revise, amend, or adopt new terms or conditions to: (1) implement the March 10, 1995, Condition 12 Settlement Agreement and any amendments to the agreement and (2) make the terms or conditions consistent with any order of the superior court. No action shall be taken pursuant to this paragraph

unless the SWRCB provides notice to affected parties and provides an opportunity for a hearing.

**CERTIFICATION**

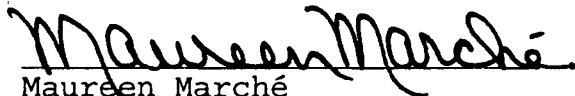
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on February 27, 1996.

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

NO:             None

ABSENT:        Mary Jane Forster

ABSTAIN:       None



Maureen Marché  
Administrative Assistant to the Board