

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 98 - 08

In the Matter of the Declaration of Fully Appropriated Stream Systems in California

SOURCES: Various Stream Systems, Statewide

COUNTY: All Counties Except Imperial and San Francisco

**ORDER REVISING DECLARATION OF FULLY APPROPRIATED STREAM SYSTEMS**

BY THE BOARD:

1.0 BACKGROUND

Water Code sections 1205 through 1207 establish a procedure for the State Water Resources Control Board (SWRCB) to adopt a declaration designating stream systems which are determined to be fully appropriated either year-round or during specified months. The SWRCB may act on its own motion or on petition of any interested person. On November 16, 1989, the SWRCB adopted the "Order Adopting Declaration of Fully Appropriated Stream Systems and Specifying Conditions for Acceptance of Applications and Registrations." (Order WR 89-25. [Footnote1](#)) The SWRCB adopted an updated and revised order by the same name on August 22, 1991. (Order WR 91-07.) Orders WR 89-25 and WR 91-07 were based upon previous water right decisions or orders which determined that no water remains available for appropriation from the specified sources during particular months. The Declaration of Fully Appropriated Streams (Declaration) adopted by this order includes additions and revisions to the provisions of the Declarations previously adopted in Order WR 89-25 and Order WR 91-07.

1.1 Current Proceeding

On January 22, 1997, the SWRCB held a hearing to consider revisions to the Declaration established in Order WR 91-07. The proposed revisions to the earlier Declaration were identified in Exhibit A, dated September 25, 1996, which was attached to a Notice of Public Hearing dated October 16, 1996 (hereafter the "Hearing Notice Attachment"). [Footnote2](#) The notice and Hearing Notice Attachment identified, for each specified stream system, the season of unavailability of water for appropriation, the previous decision which determined that no water remains available for appropriation, and the critical reach or segment of the stream reach that is fully appropriated. Pursuant to Water Code section 1206(b), the January 22 hearing addressed the revisions proposed in the Hearing Notice Attachment and the conditions under which applications to appropriate water could be accepted for critical reaches of streams which were previously determined to be fully appropriated.

1.2 Effects of Declaration

The statutory consequences of placing a stream on the Declaration of Fully Appropriated Streams are as follows:

- (1) The SWRCB is precluded from accepting any application to appropriate water from a specified stream system, except where the proposed appropriation is consistent with conditions contained in the Declaration.
- (2) Initiation of a water right pursuant to the Water Rights Permitting Reform Act of 1988 (Water Code § 1228 et seq.) governing registration of small use domestic appropriations is precluded, except where the proposed appropriation is consistent with conditions contained in the Declaration.

(3) Pursuant to Water Code section 1206(a), the SWRCB is authorized, but not required, to cancel pending applications where inconsistent with conditions contained in the Declaration. Orders WR 91-07 and WR 89-25 establish a procedure for disposition of those applications pending on the effective date of the declaration. Title 23, California Code of Regulations, section 873, specifies procedures for review of pending applications by the Chief of the Division of Water Rights. Section 873(e) identifies several classes of pending applications which shall not be reviewed for consistency with the Declaration and shall be processed normally.

## 2.0 SUMMARY OF FINDINGS REGARDING REVISIONS TO DECLARATION OF FULLY APPROPRIATED STREAMS AND PROVISIONS OF PRIOR ORDERS

Based on consideration of previous water right decisions and the record in this proceeding, the SWRCB's findings regarding revisions to the Declaration are summarized in Sections 2.1 through 2.4 below. More detailed findings regarding the specific stream systems addressed in this order are provided in Sections 3.0 through 3.7 below. General conditions applicable to appropriation or diversion of water from fully appropriated streams are set forth in Sections 4.0 through 4.14.

### 2.1 Summary of Stream Systems Identified as Fully Appropriated Streams

The SWRCB finds that the Declaration should be revised to include the streams, designated stream reaches, and seasons identified in the Hearing Notice Attachment, with the following modifications:

(1) For the reasons discussed in Section 3.1 below, the Salinas River System in Monterey County and San Luis Obispo County should not be added to the Declaration as was proposed in the Hearing Notice Attachment.

(2) The description of the unnamed stream tributary to the Salinas River System that was identified as being fully appropriated should be revised as discussed in Section 3.1.

(3) As discussed in Section 3.3 below, the Carmel River System should be added to the Declaration as proposed in the Hearing Notice Attachment and the November 14, 1996, letter from the Chief of the Division of Water Rights.

The modifications and revisions identified above are included in the revised Exhibit A which is attached to and incorporated into this order as though fully set forth herein.

### 2.2 General Conditions Applicable to Fully Appropriated Streams Established in Prior SWRCB Orders

There are a several conditions applicable to new water right applications and proposed diversions from fully appropriated streams which were established in Orders WR 89-25, WR 90-2, and WR 91-07. The general conditions established in those orders are consolidated and summarized in Sections 4.0 through 4.14 below.

### 2.3 Finding with Regard to Previous Orders

Except as specifically revoked or revised by this Order, the provisions of Orders WR 89-25, WR 90-2, and WR 91-07 are confirmed.

### 2.4 Compilation and Maintenance of the Declaration

The Chief of the Division of Water Rights should revise and maintain the SWRCB's Declaration of Fully Appropriated Stream Systems, in accordance with the findings and provisions of this Order. The revised Declaration will consist of Exhibit A together with the Conditions for Acceptance of Water Right Applications and Small Domestic Use Registrations and other appropriate conditions as specified in this Order.

## 3.0 FINDINGS RELATED TO UNAVAILABILITY OF WATER ON SPECIFIC STREAM SYSTEMS

The SWRCB makes the following findings with respect to the unavailability of water on the stream systems specified in Sections 3.1 through 3.7 below:

### 3.1 Salinas River System (Monterey and San Luis Obispo Counties)

The proposed revisions in the Declaration set forth in the Hearing Notice Attachment would designate a large portion of the Salinas River System as fully appropriated subject to specified conditions. Prior to the hearing, exhibits and testimony were received from several parties stating that the Salinas River System should not be included in the Declaration based on the limited information contained in SWRCB Decision 1614 and in the Staff Analysis of Record for Application 28199.

Following review of those documents by SWRCB staff, the Chief of the Division of Water Rights advised interested parties by letter dated January 16, 1997, that staff would recommend that no changes should be made at the present time with respect to the status of the Salinas River. (SWRCB Exh. 4.) Several parties at the hearing presented statements in support of the revised staff recommendation not to add the Salinas River System in Monterey County and San Luis Obispo County to the Declaration. The SWRCB finds the Salinas River System in Monterey County and San Luis Obispo County should not be added to the Declaration.

The revised Exhibit A adopted by Order WR 91-07 on August 22, 1991, lists an unnamed stream in Monterey County which is located within the NE-1/4 of the SW-1/4 of Section 4, T17S, R4E, MDB&M, and tributary to the Salinas River System. (Revisions to Exhibit A, p. 32.) The critical reach is identified as: "from the Salinas Valley groundwater basin upstream including all streams where hydraulic continuity exists and where the Salinas Valley groundwater basin could be affected by an appropriation."

Based on review of Decision 1614 and the related staff analysis, the SWRCB finds that the specified watercourse should have been identified as, and limited to, the unnamed stream considered in Decision 1614 and its tributaries. The Declaration should be revised to define the critical reach of that stream as follows: "from the confluence of the Unnamed Stream and the Salinas River upstream including all tributaries where hydraulic continuity exists." The season of unavailability of water for appropriation is the entire year.

### 3.2 Mokelumne River (Alpine, Amador, Calaveras and San Joaquin Counties)

The season of unavailability of water for appropriation on the Mokelumne River currently includes the months of July through November. The proposed change to the Declaration, as set forth in the Hearing Notice Attachment and based on Decision 1527, would add the months of March through June to the season of unavailability for the Mokelumne River.

The Mokelumne River Water and Power Authority (MRWPA) and San Joaquin County requested a continuance of the proceeding with respect to the Mokelumne River based on the fact that the subject of minimum fishery flows in the Mokelumne River was pending before the Federal Energy Regulatory Commission (FERC) in its review of East Bay Municipal Utility District's (EBMUD) federal power license. MRWPA and San Joaquin County anticipated it would be a year or more before a fishery agreement is final and FERC was not expected to act prior to that time. MRWPA and San Joaquin County ask the SWRCB to defer action on the status of the Mokelumne River pending final action by FERC. However, the proposal to add the months of March through November to the season of nonavailability as set forth in the Hearing Notice Attachment was based on the findings in Decision 1527, and not on any past or anticipated future action of FERC. The SWRCB concludes that it is appropriate to revise the Declaration to be consistent with the findings of Decision 1527. If future proceedings establish that more water should be left in the Mokelumne River for instream flow needs, then the Declaration can be further amended following that determination.

MRWPA and San Joaquin County also presented testimony from James Hanson, a consulting engineer familiar with the project addressed in Decision 1527. Mr. Hanson testified that, in addition to diversion of water to storage, the project addressed in Decision 1527 proposed to appropriate water by direct diversion for frost

protection and heat control for a vineyard from March through June. Mr. Hanson testified that he agreed with the conclusion in Decision 1527 to deny direct diversion rights for the particular project under consideration in that instance because water probably would have been available for direct diversion by the applicant less than 50 percent of the time. Mr. Hanson stated, however, that he does not believe Decision 1527 supports including the months of March through June in the fully appropriated period since water would be available during that period in many years for diversion and use in a conjunctive use program which is not dependent upon water being available every year. (T 17:8-20:13.) MRWPA has Water Right Applications 29835 and 29855 pending on the Mokelumne River. The surface water proposed to be appropriated under those applications could be diverted when available and used conjunctively with groundwater.

At the start of the hearing, SWRCB staff explained that one alternative would be to update the Declaration as proposed in the Hearing Notice Attachment, but also include a condition to allowing for acceptance of applications for projects on the Mokelumne River that would only need water on an infrequent basis. Counsel for MRWPA and San Joaquin County stated his clients do not believe that Decision 1527 establishes the Mokelumne River is fully appropriated. However, the alternative identified by staff would be acceptable to his clients. (T 16:14-17:1.)

North San Joaquin Water Conservation District (NSJWCD) agrees with the position of the MRWPA. (T 20:15-20:22.) The NSJWCD also submitted a technical report addressing the groundwater overdraft problem in San Joaquin County and difficulties the district has encountered in obtaining adequate water supplies. [Footnote3](#)

Counsel for Amador Water Agency (AWA) agreed with Mr. Hanson's analysis of Decision 1527 and the evidence on which that decision was based. AWA does not support placing the Mokelumne River on the Declaration for the months of March through June, even if a provision were included to allow for acceptance of applications for projects which could utilize water available on an infrequent basis. AWA argues that the term "infrequent" is too vague and inaccurate, and that questions regarding the availability of water for appropriation from the Mokelumne River can best be addressed in proceedings on the individual applications rather than in the fully appropriated streams proceeding. (T 21:13-24:15.)

Alpine County agreed with the suggestion of other parties that consideration of the fully appropriated stream status of the Mokelumne River should await the outcome of ongoing FERC proceedings. Alpine County also requested that the SWRCB recognize Alpine County's priority as a county-of-origin for future water needs within the county that could be met from the Mokelumne River. (T 27:23-30:2.) The subject of acceptance of applications seeking the benefit of area-of-origin protection principles is addressed in Section 4.6 below.

Counsel for Calaveras County Water District (Calaveras) agreed with Mr. Hanson's testimony regarding water availability on the Mokelumne River. Calaveras opposed the option of declaring the Mokelumne River to be fully appropriated during March through June with a provision for acceptance of applications for projects which would utilize water on an infrequent basis. Calaveras also stressed the desirability of adopting an order which consolidates and clarifies relevant provisions from the SWRCB's previous fully appropriated streams orders. (T 30:10-34:13.)

The Department of Fish and Game (DFG) supports the proposed change regarding the Mokelumne River as set forth in the Hearing Notice Attachment, but does not support staff's suggested condition to allow for acceptance of applications for projects that need water on an infrequent basis. DFG believes that Decisions 858, 1109, and 1527 provide an adequate basis for expanding the season of unavailability to include the entire period of March 1 to November 30. DFG contends that if sufficient water is provided to maintain fish in good condition that there would be no water available for appropriation from the Mokelumne River from March 1 through November 30. (T 24:22-27:2.)

EBMUD agrees with the proposed change to the Declaration as set forth in the Hearing Notice Attachment, but would not support acceptance of applications for projects that need water on an infrequent basis. EBMUD would not object to deferring action to update the Declaration with respect to the Mokelumne River. (T 34:18-

35:22.)

With regard to the issue of water availability on the Mokelumne River, Decision 1527 concluded:

"Analysis of the record on past flow data for Mokelumne River indicates that water is not available for appropriation during March, April, May, and June often enough to warrant approval of Application 24386 for that time period." (Decision 1527, page 4.)

The findings of Decision 1527 regarding water availability were supported by evidence in the record before the SWRCB at the time the decision was adopted. [Footnote4](#) Those findings provide a sufficient basis for adding the months of March through June to the period of unavailability of water for appropriation from the Mokelumne River as set forth in the Hearing Notice Attachment. The SWRCB also concludes that to allow for acceptance of future applications for projects that require water on an "infrequent basis," would be vague and should not be included in the Declaration. Any future water right applications that may be filed to appropriate water from the specified reach of the Mokelumne River are subject to the requirements established in Water Code section 1205 et seq. and Title 23, California Code of Regulations, section 871 et seq.

As discussed above, MRWPA has two pending applications (Applications 29835 and 29855) for a project that would require water on an infrequent basis. Those applications have been noticed to the public and protests have been accepted. The disposition of pending applications on a stream covered by the Declaration is addressed in Title 23, California Code of Regulations, section 873. In this instance, the pending applications will need water on an infrequent basis and information in the record upon which Decision 1527 is based shows unappropriated water is available during 28 percent of the years in March, 17 percent of the years in April, 37 percent of the years in May, and 42 percent of the years in June. Therefore, the SWRCB finds that "circumstances exist which justify the continued processing" of Applications 29835 and 29855 and concludes that, pursuant to Title 23, California Code of Regulations, section 873(b)(5), the applications should be maintained and processed in the normal manner. [Footnote5](#)

### 3.3 Carmel River System (Monterey County)

The availability of water for appropriation in the Carmel River System was addressed in Decision 1632 as follows:

"No additional water is available for appropriation from the Carmel River between May 1 to December 31 of each year. The staff of the SWRCB is directed to include the Carmel River among those streams determined to be fully appropriated during all or part of each year in accordance with Water Code Section 1205." [Footnote6](#)

In accordance with the direction of Decision 1632, the Hearing Notice Attachment and subsequent November 14, 1996, letter from the Chief of the Division of Water Rights proposed to declare the Carmel River to be fully appropriated from May 1 to December 31. Order WR 95-10 found that the aquifer underlying and closely paralleling the surface watercourse portion of the Carmel River is water flowing in a subterranean stream subject to the permitting authority of the SWRCB. (Order WR 95-10, pages 38 and 39.) The November 16, 1996, letter from the Chief of the Division of Water Rights advised interested parties that SWRCB staff proposed to refer to Order WR 95-10 as a basis for including the Carmel River aquifer in the Declaration. The letter also advised interested parties of the specific portion of the aquifer which would be affected.

Senior Staff Counsel Nancee Murray appeared on behalf of DFG in support of the recommendation to add the Carmel River to the Declaration in accordance with the findings of Decision 1632 and the provisions of the Hearing Notice Attachment. (T 37:3-40:7.) Similarly, Attorney Jan Goldsmith appeared, on behalf of several parties listed in Table 13 of Decision 1632, to express support for adding the Carmel River to the Declaration and processing applications from the parties listed in Table 13 of Decision 1632 in accordance with the provisions of that decision. (T 37:17-37:21.) Attorney Anthony Lombardo appeared on behalf of nine parties listed in Table 13 of Decision 1632 and two parties who have asked to be added to Table 13. Mr. Lombardo

supports adding the Carmel River to the Declaration as proposed, but requested that the SWRCB clarify that any water rights which are obtained, or applications which are filed, in accordance with the provisions of Condition 10 of Decision 1632 are not subject to cancellation as a result of adding the Carmel River to the declaration. (T 46:7-48:18.)

Attorney Alan Lilly appeared on behalf of the "Carmel Valley Water Users," who are several of the small water users in the Carmel Valley listed in Table 13 of Decision 1632 and who oppose the recommendation to add the Carmel River to the Declaration as proposed in the Hearing Notice Attachment. (T 41:3-42:1.) Mr. Lilly contends that the Carmel River aquifer contains a significant amount of water which has not been lawfully appropriated by Cal-Am Water Company and which is not subject to use under any other water right.

Decision 1632 addressed the subject of water remaining available for appropriation and the relative priority of competing applications which were already filed or which might be filed in accordance with Condition 10 on page 97 of the decision. Condition 10 of Decision 1632 established the procedure by which parties listed in Table 13 could acquire an appropriative water right permit with a senior priority to the permit issued for the New Los Padres Project. However, the parties listed in Table 13 were accorded senior priority vis-à-vis the New Los Padres Project only to the extent specified in Decision 1632 and subject to the requirements of that decision.

In the absence of the provisions of Decision 1632, no water would be available for appropriation from May 1 to December 31 of each year under new or pending applications by any of the parties covered by Condition 10 of Decision 1632. Therefore, the subject of the relative priority of Mr. Lilly's clients with respect to Cal-Am Water Company is not relevant to the question whether additional water would remain available for appropriation from the Carmel River after satisfying the rights established in accordance with Condition 10 of Decision 1632 and the rights granted to the Monterey Peninsula Water Management District (MPWMD). If any party intended to contest the provisions of Decision 1632 allowing for obtaining an appropriative water right with a senior priority to the rights for the New Los Padres Project, they should have challenged Decision 1632 when it was issued. Having not done so, parties seeking the benefit of the seniority provisions under Condition 10 of Decision 1632 are subject to the limitations established in that decision.

Mr. Lilly also argues that it is premature to conclude that the Carmel River is fully appropriated for the months specified when it is not yet certain whether the New Los Padres Project of the MPWMD will be built. Permit 20808 allows until December 31, 2005, to complete construction of the authorized project. (Order WR 98-04.) The time for construction can be extended pursuant to the process specified in Title 23, California Code of Regulations, section 840 et seq. The Water Code provides for revocation of water right permits when projects are not pursued with due diligence. (Water Code § 1410.) Water Code section 1205 provides for revision of the Declaration under appropriate conditions. In the event that water becomes available for appropriation due to the revocation of a previously issued permit or license, the Declaration could be revised accordingly. At present, however, the record shows that, after accounting for water needed for the projects specified in Decision 1632, the Carmel River is fully appropriated from May 1 through December 31 of each year.

Based on Decision 1632, Order WR 95-10, and the findings above, the SWRCB concludes that the Carmel River system should be added to the Declaration for the period of May 1 to December 31, as proposed in the Hearing Notice Attachment and the November 14, 1996, letter from the Chief of the Division of Water Rights. (SWRCB 3.)

### 3.4 Putah Creek (Lake and Napa Counties)

The Hearing Notice Attachment proposed to add Putah Creek to the Declaration for the period of January 1 through December 31 based on the findings in Decision 869 and Order WR 96-002. The critical reach is identified as from Monticello Dam upstream including all tributaries where hydraulic continuity exists. Solano County Water Agency submitted written testimony in support of adding Putah Creek to the Declaration. Based on the findings in Decision 869 and Order WR 96-002, the SWRCB concludes that Putah Creek should be

added to the Declaration as proposed in the Hearing Notice Attachment.

### 3.5 Chorro Creek (San Luis Obispo County)

Based on the findings of Decision 1633, the Hearing Notice Attachment proposed to add Chorro Creek to the Declaration for the period of June 15 through November 30. The critical reach is identified as from the California Men's Colony Wastewater Treatment Plant outfall (immediately upstream of the confluence of Chorro Creek and Pennington Creek) downstream to the Pacific Ocean. By letter dated January 21, 1997, the City of Morro Bay withdrew an earlier objection and stated that it supports including Chorro Creek in the Declaration. In addition, counsel for DFG appeared in support of adding Chorro Creek to the Declaration. (T 40:8-40:14.) The SWRCB finds that, in accordance with the findings of Decision 1633, Chorro Creek should be added to the Declaration as proposed in the Hearing Notice Attachment.

### 3.6 Rock Creek (Butte County)

Based on Order WR 96-04, the Hearing Notice Attachment proposed adding Rock Creek to the Declaration for the period of June 1 through September 30. The critical reach was identified as from the Keefer Ditch (located within the SE-1/4 of the NE-1/4 of Section 14, T23N, R1E, MDB&M) upstream. DFG supports the recommendation to include Rock Creek in the Declaration as proposed. (T 40:8-40:14.) The SWRCB finds that, in accordance with the findings of Order WR 96-04, Rock Creek should be added to the Declaration as specified in the Hearing Notice Attachment.

### 3.7 Kellogg Creek (Alameda and Contra Costa Counties)

Based on the findings of Decision 1629, the Hearing Notice Attachment proposed to add Kellogg Creek to the Declaration for January 1 through December 31. The critical reach was identified as upstream from Los Vaqueros Dam on Kellogg Creek (located within the NW-1/4 of NW-1/4, Projected Section 23, T1S, R2E, MDB&M). In accordance with the provisions of Decision 1629, the Hearing Notice Attachment proposed that the unapproved portions of Application 25516 remain on file for appropriations from Marsh Creek and West Canal up to 61,300 acre-feet annually. (Decision 1629, pp. 33 and 34.)

Byron Bethany Irrigation District (BBID) submitted written comments requesting that the Declaration include an acknowledgment that future applications would not affect the existing rights of BBID. Decision 1629 declared Kellogg Creek fully appropriated from January 1 through December 31 from Los Vaqueros Dam on Kellogg Creek upstream. With the exception of the provision for further appropriations under Application 25516, there were no provisions in Decision 1629 to acknowledge future applications or other special circumstances. Any other person who applies for a water right permit on Kellogg Creek after this order is adopted by the SWRCB, must either: (1) petition the SWRCB pursuant to Title 23, California Code of Regulations, section 871, and make a showing as to why water is now available for appropriation; or (2) submit information to the SWRCB showing that an exemption from the Declaration is appropriate under one of the conditions specified in this order. Any future applications will not affect the validity of existing water rights. The SWRCB finds, in accordance with the findings of Decision 1629, that Kellogg Creek in Alameda County and Contra Costa County should be added to the Declaration as proposed in the Hearing Notice Attachment.

## 4.0 GENERAL CONDITIONS APPLICABLE TO APPROPRIATION OR DIVERSION OF WATER FROM FULLY APPROPRIATED STREAMS

Counsel for Calaveras County Water District requested that this order include all the applicable conditions from previous SWRCB orders on fully appropriated streams (i.e. Orders WR 89-25, WR 90-2 and WR 91-07). (T 31:11-33:11.) This request is consistent with the purpose of this proceeding as set forth in the hearing notice, and it is also consistent with the public interest in having a comprehensive order include generally applicable conditions governing fully appropriated streams. The applicable conditions are discussed below. [Footnote7](#)

#### 4.1 Acceptance of Applications for Nonconsumptive Use

Under certain circumstances, water may be appropriated for nonconsumptive use without substantially affecting the supply available to satisfy existing uses. Accordingly, applications which propose only nonconsumptive use of water from the sources identified in the Declaration should be accepted, even where such applications propose diversion during a season of unavailability of water for consumptive use. Acceptance of those applications will allow the SWRCB to carry out the Constitutional mandate that the water resources of the state be put to the fullest possible beneficial use. (California Constitution, art. X, § 2.) For the purpose of this condition, nonconsumptive use means a use of water which does not substantially diminish the quantity or quality of water in the source and does not regulate the flow in the source in such manner as to impair any other existing reasonable and beneficial use, including instream use. Nonconsumptive use includes, but is not limited to, power use. (See Cal. Code Regs., tit. 23, § 662; SWRCB Order WR 89-25, section 4.0.)

Rights acquired by registration of small project domestic uses pursuant to the Permitting Reform Act are limited to domestic use as that use is defined by SWRCB rule, plus incidental aesthetic, recreation, or fish and wildlife purposes. (Water Code § 1228.1, subd. (b).) Domestic use as defined in the applicable regulation is consumptive use. (Cal. Code Regs., tit. 23, § 660.) Therefore, registration of small projects cannot propose solely nonconsumptive uses. Accordingly, no exception for nonconsumptive use should be made for registrations of small domestic uses under the Permitting Reform Act. (See SWRCB Order WR 89-25, section 4.1.)

#### 4.2 Acceptance of Applications Proposing to Develop or Salvage Water

The principle is well-established that the water supply in a source may be augmented by artificial means, thereby making such water available for beneficial use by the developer. (See *Pomona Land & Water Co. v. San Antonio Water Co.* (1908) 152 Cal. 618 [93 P. 881].) If the environmental impacts of a proposal to augment a water supply are satisfactorily addressed, the developed or salvaged water principle should be preserved. The SWRCB's action on applications to appropriate unappropriated water is subject to the requirements of the California Environmental Quality Act (Public Resources Code §§ 21000 et seq.) which provide for addressing potential environmental impacts of proposed projects, including projects involving an application to appropriate water made available through actions to develop or salvage water. Accordingly, applications which propose to augment the water supply in an otherwise fully appropriated source should be accepted and considered and not be barred pursuant to Water Code section 1206(a). Approval of any application to appropriate water which is made available through the actions of the applicant will require a showing that the proposed actions will make water available for appropriation without infringing on prior water rights. This provision is consistent with the constitutional mandate to maximize beneficial use of the water resources of the state. (See SWRCB Order WR 89-25, section 5.0.)

Because the SWRCB's function in the procedure authorizing registration of small domestic use appropriations pursuant to the Permitting Reform Act is ministerial, the SWRCB has no opportunity to consider the environmental consequences of a registration of a small domestic use appropriation which proposes to augment the water supply in a fully appropriated source by developing or salvaging water. Accordingly, any such registration should not be exempted from the filing prohibition contained in Water Code section 1206(a). Pursuant to subdivision (b) of Water Code section 1228.2, the SWRCB should not accept such registrations. The registration procedure being thus unavailable to such a project, the proponent should file an application to appropriate unappropriated water, pursuant to the exception for developed or salvaged water. (See SWRCB Order 89-25, section 5.1.)

#### 4.3 Applications and Registrations for Appropriation of Water in Adjudicated Areas

Water Code section 2500 et seq. establish a procedure for adjudicating all of the water rights within a specified stream system. The process, known as a "statutory adjudication," results in an SWRCB Order of Determination, and ultimately a Superior Court decree, determining the rights of all water users in the stream system, in terms

of amount, priority, season of use, purpose of use, point of diversion, and place of use of water. (Water Code § 2769.) Statutory adjudication proceedings ordinarily do not involve a determination whether unappropriated water is available to supply an applicant for a water right permit. (See Water Code § 1375(d).) Therefore, special analysis is required to determine the status of availability of water for appropriation in stream systems which have been subject to a statutory adjudication.

Examination of the records of statutory adjudication proceedings, including especially the reports of investigation conducted pursuant to Water Code section 2525, shows that there is insufficient water available during the dry seasons of most years to satisfy all direct diversion rights of existing water right holders. These reports of investigation form the basis for the SWRCB's findings and orders, pursuant to Water Code section 2525, that the public interest and necessity will be served by conducting the adjudication. Inadequacy of water to serve all direct diversion rights is typically the reason that a petition for a statutory adjudication is filed. The SWRCB's Order of Determination and the resulting superior court decree create priority classes in which the various water rights in the adjudicated area are classified. Existing domestic use rights generally receive a senior priority and other uses, including irrigation, are assigned more junior priority. Subsequent rights, whether initiated by conventional application or by small domestic use registration, are relegated to a junior priority to all classes of existing rights.

It would be contrary to the public interest to attempt to meet domestic water use needs through acquisition of a new appropriative direct diversion right having an inferior priority and uncertain reliability. One of the primary objectives of the statutory adjudication procedure is avoidance of water right conflicts. Acquisition of paper domestic rights for which little water is usually available would inevitably promote conflict among the holders of domestic rights with a junior priority and the holders of other rights having a senior priority under the decree. Accordingly, the SWRCB reaffirms our finding in Order WR 89-25 that all stream systems wherein rights have been determined pursuant to a statutory adjudication are fully appropriated as to direct diversion for domestic use. (Order WR 89-25, p. 44.) The SWRCB further finds that the Declaration should contain conditions in accordance with the following findings. [Footnote8](#)

(1) Registrations of small domestic use appropriations, made pursuant to the Permitting Reform Act, which propose in whole or in part appropriation other than by collection to storage during the wet season [Footnote9](#) from sources within statutorily adjudicated stream systems should not be accepted. Since the registration procedure is unavailable to that type of project, the project proponent should be authorized to file a conventional application to appropriate unappropriated water, pursuant to the requirements of paragraph (2) below.

(2) Applications to appropriate water for domestic use which propose any appropriation by direct diversion or appropriation by storage outside the wet season, from sources within statutorily adjudicated stream systems, should be accepted for filing only if accompanied by written information that shows a reliable alternative source of water is available. The statement should comply with the formal requirements for information presented in an application to appropriate unappropriated water.

(3) Applications to appropriate unappropriated water for nondomestic use which propose any appropriation by direct diversion or appropriation by storage outside the wet season, from sources within statutorily adjudicated stream systems, should be accepted for filing only if accompanied by written information that shows a reliable alternative source is either available or unnecessary. The statement should comply with the formal requirements for information presented in an application to appropriate unappropriated water.

#### 4.4 Acceptance of Petitions for Assignment of State Filings and Filing of Proposed Completed Applications, and of Petitions for Release of Priority of State Filings in Favor of Conventional Applications

Water Code section 10500 et seq. address the procedure under which the Department of Water Resources and its predecessor agencies have been authorized to file applications to appropriate water that may be needed in the development and completion of a "general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the state." A primary purpose of the state filing system is to reserve a

priority of right, as of the filing date of the application, for projects that may be needed in the future as part of the coordinated development of the state's water resources. As discussed in Order WR 89-25, the legislative objective of the state filing process would be undermined if placement of a stream on the Declaration resulted in canceling any pending state filings on the affected stream. Therefore, petitions for assignment of existing state filings and petitions for release of priority of state filings, together with accompanying applications, which implement Water Code section 10500 et seq., and which propose appropriation of water from stream systems identified in the Declaration as fully appropriated, should be accepted for filing. Such filings should be processed in the manner provided by law. (See SWRCB Order WR 89-25, section 8.0, pp. 50 and 51.)

#### 4.5 Acceptance of New State Filings

Order WR 89-25 provided for continued acceptance of petitions for assignment of state filings and petitions for release of priority of state filings in favor of conventional applications. That order also directed that pending state filings not be considered for cancellation. To do otherwise would frustrate the legislative objective underlying the state filing system. However, the legislative objective to reserve water, in advance, that may be needed as part of the coordinated plan for the development of the state's water resources does not exist in the context of a new water right application to appropriate water from stream systems already declared to be fully appropriated. Therefore, new state filings should not be accepted on stream systems where they are inconsistent with conditions contained in the Declaration. (See SWRCB Order WR 91-07, section 5.3.)

#### 4.6 Acceptance of Applications Seeking the Benefit of Area-Of-Origin Protection Principles

Order WR 89-25 provides for acceptance of new applications which propose appropriations entitled to the benefit of area-of-origin principles. (See Order WR 89-25.) [Footnote10](#) Accordingly, such applications should be accepted but should be required to be accompanied by a statement showing that the appropriation proposed by the application is entitled to the benefit of area-of-origin principles. The statement should comply with the formal requirements for information presented in an application to appropriate unappropriated water.

#### 4.7 Finding Disclaiming Any Impact of Declaration on Existing Rights

The legal effect of this Declaration is limited to that set forth in Water Code section 1206. The SWRCB may not accept new applications to appropriate unappropriated water where the source is declared to be fully appropriated, except where the application is consistent with conditions specified in the Declaration. The disposition of any applications pending on the date of enactment or amendment of the Declaration is governed by the provisions of Title 23, California Code of Regulations, section 873. No provision of law provides that the Declaration is to affect existing water rights, regardless of their basis in legal doctrine. This would include rights in the process of being perfected, i.e., rights initiated under permits to appropriate unappropriated water. Accordingly, nothing in the Declaration should be interpreted as affecting, or intending to affect, such existing rights. [Footnote11](#)

#### 4.8 Critical Reach

In previous proceedings concerning fully appropriated streams, [Footnote12](#) the SWRCB defined the scope of the term "stream system," as meaning a stream named in the Declaration but limited to its reach within an identified county or counties. (See Order WR 90-2, Order Paragraph 3.) Recognizing that county boundaries are often without hydrologic significance, Order WR 91-07 concluded that, for purposes of determining fully appropriated streams, stream systems identified in the Declaration should be identified by "critical reach" without regard to county boundaries. This approach more accurately reflects hydrologic conditions and should continue to be utilized in compiling and maintaining the Declaration. However, for ease of reference, the Declaration should also continue to be organized by counties. Whenever a critical reach of a stream system lies within more than one county, it should be identified within each county in which it is located. (See SWRCB Order WR 91-07, section 2.1.)

#### 4.9 Hydraulic Continuity

Order WR 89-25 found that a declaration that specifically identified that a stream system is fully appropriated should encompass all upstream sources which contribute to the identified stream if, and to the extent that, such sources are hydraulically continuous to the identified stream system. Order WR 89-25 also found that, whenever a tributary stream system and a downstream system to which the tributary contributes are both specifically declared to be fully appropriated, the declaration containing the more restrictive conditions should govern the tributary stream system if, and to the extent that, the tributary is hydraulically continuous to the downstream system. (Order WR 89-25, pp. 38 and 39.) As stated in Order WR 91-07, the converse is also true. Where, and to the extent that, a tributary is not hydraulically continuous to the downstream system, the tributary should not be governed by the limitations on the downstream system. (See Order WR 91-07, section 5.2.) The SWRCB concludes that the above findings regarding hydraulic continuity between a tributary and a downstream watercourse should continue to apply in matters involving streams identified in the Declaration.

#### 4.10 Water Service Contracts, Water Transfers, and Water Exchanges

As noted in section 3.17 of Order WR 91-07, transactions may occur which, in effect, make water available for diversion and use by specific persons from stream systems where water would not otherwise be available for appropriation. These transactions include water service contracts and water transfers, where a natural stream channel is used for delivery, and water exchanges. [Footnote 13](#) Under certain circumstances the SWRCB requires that an application be filed and a permit issued prior to diversion of water. [Footnote 14](#) In those cases, the Declaration should not preclude acceptance of the application nor should any such pending applications be canceled. Compliance with the statutory process governing applications to appropriate water will help assure protection of other lawful users of water and instream uses. (See SWRCB Order WR 91-07, section 5.1.)

#### 4.11 No Presumption of Availability of Water for Appropriation from Nonlisted Stream Systems

The absence of a fully appropriated declaration as to a particular stream system does not raise a presumption that water is available for appropriation from that source. Nor does a presumption arise that water is available for appropriation from a listed source, pursuant to any application accepted for filing because it meets the conditions contained in the declaration for that source. As a prerequisite to obtaining a permit in either case, the applicant will continue to be responsible for showing that unappropriated water is available to supply the applicant. (Water Code § 1375, subd. (d).)

#### 4.12 Acceptance of Applications for Temporary Permits and Petitions for Change of Point of Diversion, Place of Use, or Purpose of Use

In accordance with subdivision (c) of Water Code section 1206, the prohibition of accepting applications for the appropriation of water from streams listed on the Declaration does not apply to applications for temporary permits made pursuant to Water Code section 1425 et seq., nor does it apply to petitions to change the point of diversion, place of use, or purpose of use.

#### 4.13 Findings Concerning Applications for Appropriation from State and Federal Wild and Scenic Rivers

Order WR 91-07 explained that the purpose in adding the state and federal Wild and Scenic River stream systems to the Declaration was to recognize the restrictions on appropriation of water contained in the respective state and federal acts. These restrictions will continue to be implemented by the SWRCB as they have in the past. (See Order WR 91-07, Sec. 4.2.)

### ORDER

IT IS HEREBY ORDERED, based upon the foregoing findings, that:

1. The State Water Resources Control Board (SWRCB) adopts the attached Exhibit A as revised, together with the conditions stated in this order, as its Declaration of Fully Appropriated Stream Systems.
2. The Chief of the Division of Water Rights shall compile and maintain the Declaration of Fully Appropriated Stream Systems in accordance with the findings of this Order.
3. Except as specifically revoked or revised by this Order, the findings and orders contained in Orders WR 89-25, WR 90-2 and WR 91-07 are confirmed
4. Water Right Applications 29835 and 29855 shall continue to be processed in accordance with applicable statutory and administrative requirements.
5. Applications to appropriate water, and other projects for which a water right is needed, which propose diversion and use of water from any of the stream systems specified in Exhibit A to this order are subject to the following conditions:
  - a. Nonconsumptive Use: Applications for nonconsumptive use may be accepted if the use of water does not substantially diminish the quantity or quality of water in the source and does not regulate the flow in the source in such manner as to impair any other existing reasonable and beneficial use, including instream use.
  - b. Applications Proposing to Develop or Salvage Water: Applications which propose to augment the water supply in an otherwise fully appropriated source may be accepted. Approval of any applications to appropriate water which is made available through the actions of the applicant will require a showing that the proposed actions will make water available for appropriation without infringing on prior water right holders.
  - c. Applications and Small Domestic Use Registrations for Appropriations in Adjudicated Areas: On stream systems which have been subject to a statutory adjudication of water rights, the following requirements shall apply to all applications to appropriate water and to projects which would otherwise meet the requirements for small domestic use registrations:
    - (1) Registrations of small domestic use appropriations, made pursuant to the Permitting Reform Act, which propose in whole or in part appropriation other than by collection to storage during the wet season [Footnote 15](#) from sources within statutorily adjudicated stream systems shall not be accepted. Because the registration procedure is unavailable for that type of project, the project proponent is authorized to file a conventional application to appropriate unappropriated water, pursuant to the requirements of paragraph (2) below.
    - (2) Applications to appropriate water for domestic use which propose any appropriation by direct diversion or appropriation by storage outside the wet season, from sources within statutorily adjudicated stream systems, shall be accepted for filing only if accompanied by written information that shows a reliable alternative source of water is available. The statement shall comply with the formal requirements for information presented in an application to appropriate unappropriated water.
    - (3) Applications to appropriate unappropriated water for nondomestic use which propose any appropriation by direct diversion or appropriation by storage outside the wet season, from sources within statutorily adjudicated stream systems, shall be accepted for filing only if accompanied by written information that shows a reliable alternative source is either available or unnecessary. The statement shall comply with the formal requirements for information presented in an application to appropriate unappropriated water.
  - d. Petitions for Assignment of State Filings and Filing of Proposed Completed Applications, and Petitions for Release of Priority of State Filings in Favor of Conventional Applications: Petitions for assignment and release of priority, together with accompanying applications, which implement Water Code section 10500 et seq., and which propose as sources for appropriation of water stream systems identified in Exhibit A as fully appropriated, shall be accepted for filing. Such filings shall be processed in the manner provided by law.

e. State Filings: New state filings shall not be accepted on stream systems identified in Exhibit A where inconsistent with conditions contained in this order.

f. Applications Seeking Area-of-Origin Protections: Applications which propose appropriations to benefit an area of origin shall be accepted but must be accompanied by a statement showing that the appropriation proposed by the application is entitled to the benefit of area-of-origin principles. The statement shall comply with the formal requirements for information presented in an application to appropriate unappropriated water.

g. Critical Reach: The "critical reach" of stream systems specified in Exhibit A and any future revisions of Exhibit A shall reflect the hydrologic conditions without regard to county boundaries. However, for ease of reference, Exhibit A and any future revisions of Exhibit A shall be organized by counties and, whenever a critical reach of a stream system lies within more than one county, it shall be identified within each county in which it lies.

h. Hydraulic Continuity: Availability of unappropriated water in a particular stream shall generally apply to tributary streams if, and to the extent that, such tributary is hydraulically continuous to the downstream system. The converse is also true. Where, and to the extent that, a tributary is not hydraulically continuous to the downstream system, the tributary shall not be governed by the limitations of the Declaration on the downstream system.

i. Water Service Contracts, Water Transfers, and Water Exchanges: Water transactions such as water service contracts, water transfers and water exchanges where a natural stream channel is used for delivery, in effect, make water available for diversion and use by specific persons from stream systems wherein water is not otherwise available for appropriation. Under certain circumstances the SWRCB requires that an application be filed and permit issued prior to diversion of water. In such cases, the Declaration shall not preclude acceptance of the application nor shall any such pending applications be canceled.

j. State and Federal Wild and Scenic Rivers: State and federal Wild and Scenic River stream systems shall be included in the Declaration of Fully Appropriated Stream Systems in recognition of the restrictions on appropriation of water under applicable provisions of state and federal law. These restrictions shall be implemented by the SWRCB as they have in the past.

6. This order shall not be construed as creating a presumption that water is available for appropriation from stream systems not specified in Exhibit A. Applicants seeking to appropriate water from stream systems not specified in Exhibit A shall continue to be responsible for showing that unappropriated water is for appropriation to supply the applicant.

7. Nothing in this order shall be interpreted as affecting, or intending to affect, existing water rights, regardless of their basis in legal doctrine.

#### CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 19, 1998.

AYE: John Caffrey

James M. Stubchaer

Marc Del Piero

Mary Jane Forster

John W. Brown

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché

Administrative Assistant to the Board

[\[Click here to view Attachment A\]](#)

#### Footnote1

In response to a petition to reconsider Order WR 89-25, the SWRCB adopted Order WR 90-2 on February 15, 1990. Order WR 90-2 modified and affirmed Order WR 89-25 as modified.

#### Footnote2

The SWRCB provided notice by publication and by mail pursuant to Water Code section 1207. Following the hearing, however, the SWRCB was informed that five papers had not published notice of the hearing as requested. Therefore, the notice was published in those papers with instructions on how interested parties could contact the SWRCB to request augmentation of the record. Six parties contacted the SWRCB in response to that notice. None of the parties who inquired about the proceeding following the hearing presented information requiring augmentation of the hearing record.

#### Footnote3

Although the SWRCB acknowledges NSJWCD's ongoing water supply concerns, we are not able to address those problems in the context of the current proceeding regarding revisions to the Declaration of Fully Appropriated Streams.

#### Footnote4

The Engineering Staff Analysis of Record, dated April 1, 1977, which supports Decision 1527, states in part:

". . . Woodbridge presented evidence based on East Bay's Exhibit #3 which shows that when the Woodbridge diversions are taken into consideration, water is available during the 65 year study as follows: in March 18 times, in April 11 times, in May 24 times, and in June 27 times (RT 73, 74, 75, 76, 77; Woodbridge 7, 8)."

Therefore, water would be available in March, 28 percent of the years; in April, 17 percent of the years; in May, 37 percent of the years; and in June, 42 percent of the years.

#### Footnote5

Due to the occasional availability of unappropriated water in the Mokelumne River during the months of March through June, the SWRCB also finds that the Declaration should not apply to proposed conjunctive use projects which are not dependent upon unappropriated water being available in most years but which could utilize unappropriated water in years when it is available. Applications for that type of project, if any, may be accepted for processing and evidence of water availability will be evaluated by the SWRCB in the course of processing

the applications.

#### Footnote6

SWRCB Order WR 98-04 amended specified provisions of Decision 1632, but it did not revise the general finding of Decision 1632 regarding availability of water for appropriation.

#### Footnote7

The findings set forth in Sections 4.1 through 4.13 of this order are largely repeated from previous orders dealing with fully appropriated streams. For purposes of clarity, the language of the findings set forth in this order may be modified slightly from the language of previous orders.

#### Footnote8

The findings are based on Sections 6.0 through 6.2 of Order WR 89-25.

#### Footnote9

For the purpose of these conditions, the wet season means that period from December 1 of each year through March 31 of the succeeding year. Order WR 91-07 went on to state that since Order WR 89-25 defines the wet season, then the dry season regarding unavailability of water for appropriation is the period of April 1 through November 30 of each year.

#### Footnote10

The general objective common to all of California's area-of-origin principles is to secure a water supply for development of the area in which water originates, as against users of such water outside the originating area, that is "exporters". Obviously, however, these principles cannot guarantee that sufficient water will originate in the protected areas to meet the needs of all levels of development.

#### Footnote11

See SWRCB Order WR 89-25, section 11.0.

#### Footnote12

As noted, previous proceedings in this matter produced Order WR 89-25 and, on reconsideration, Order WR 90-2.

#### Footnote13

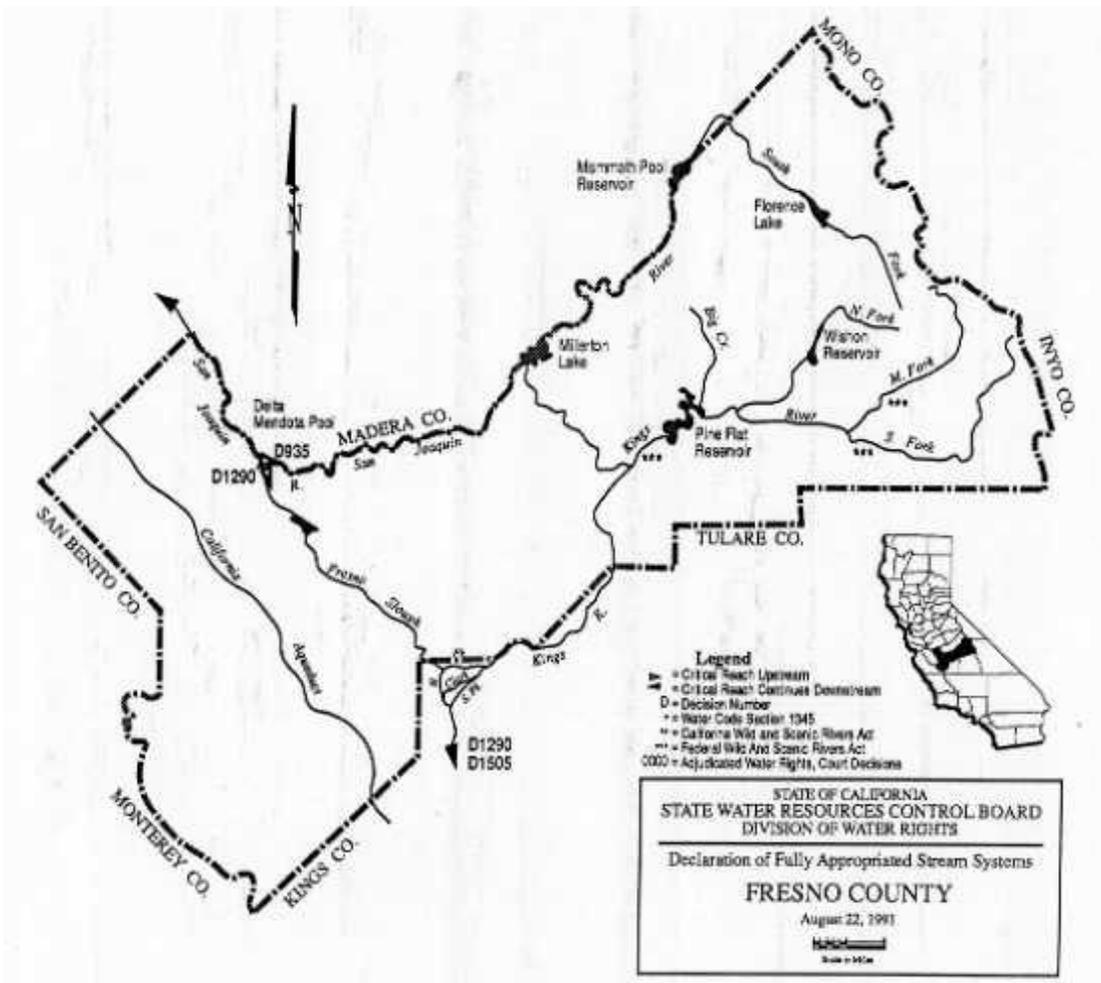
Water Code section 7075 authorizes water which has been appropriated from one stream to be conveyed through the channel of another stream and reclaimed provided that so doing does not diminish water which has already appropriated from the second stream.

#### Footnote14

In most cases, the water right impact of these transaction may be dealt with through the various change procedures set forth in the Water Code. (See, e.g., Water Code section 1700 et seq.) Proposed changes in point of diversion, place of use, and purpose of use are specifically exempt from the legal consequences of a declaration that a stream system is fully appropriated. (See Water Code section 1206, subd. (c).)

Footnote15

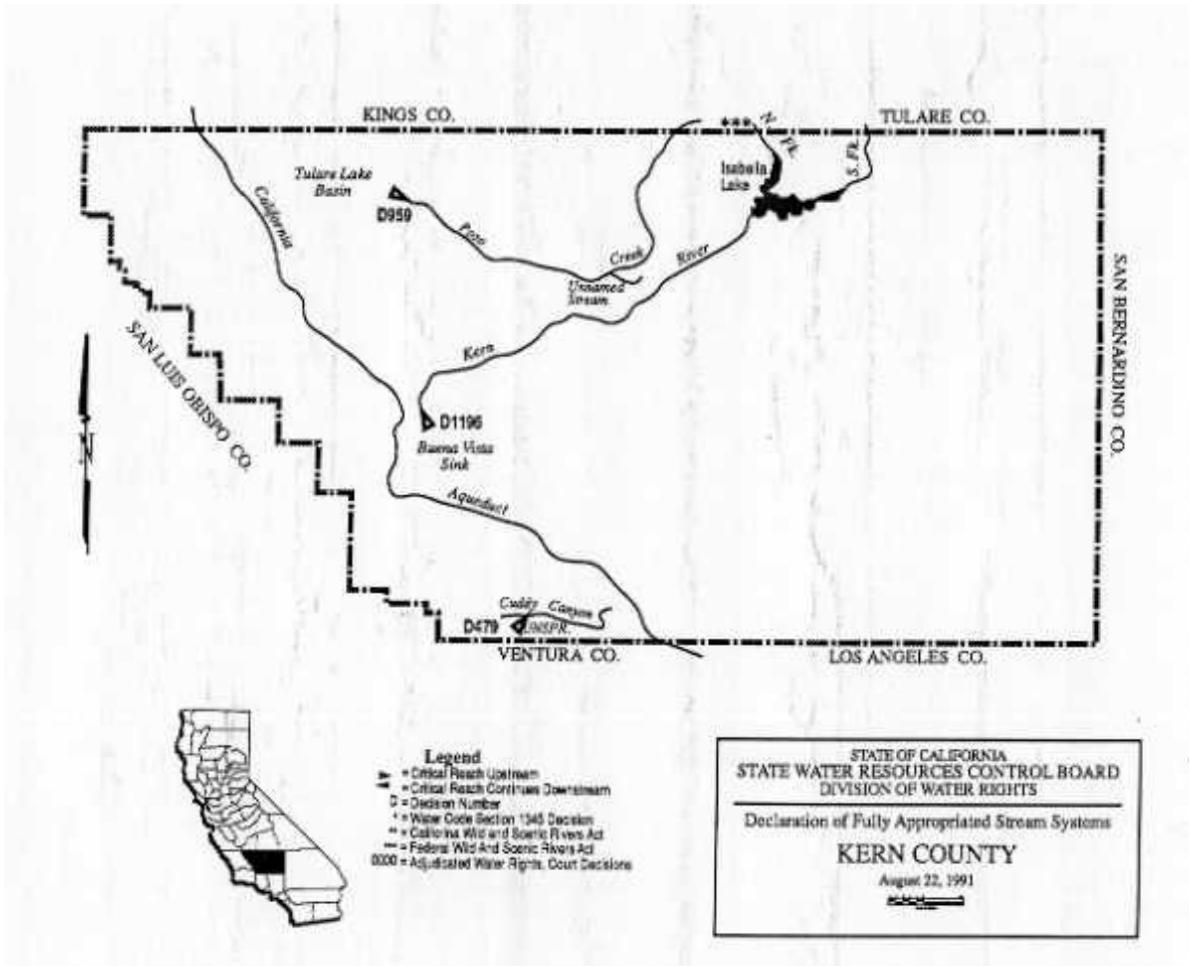
For purposes of this condition, the wet season is defined as the period from December 1 of each year through March 31 of the succeeding year.



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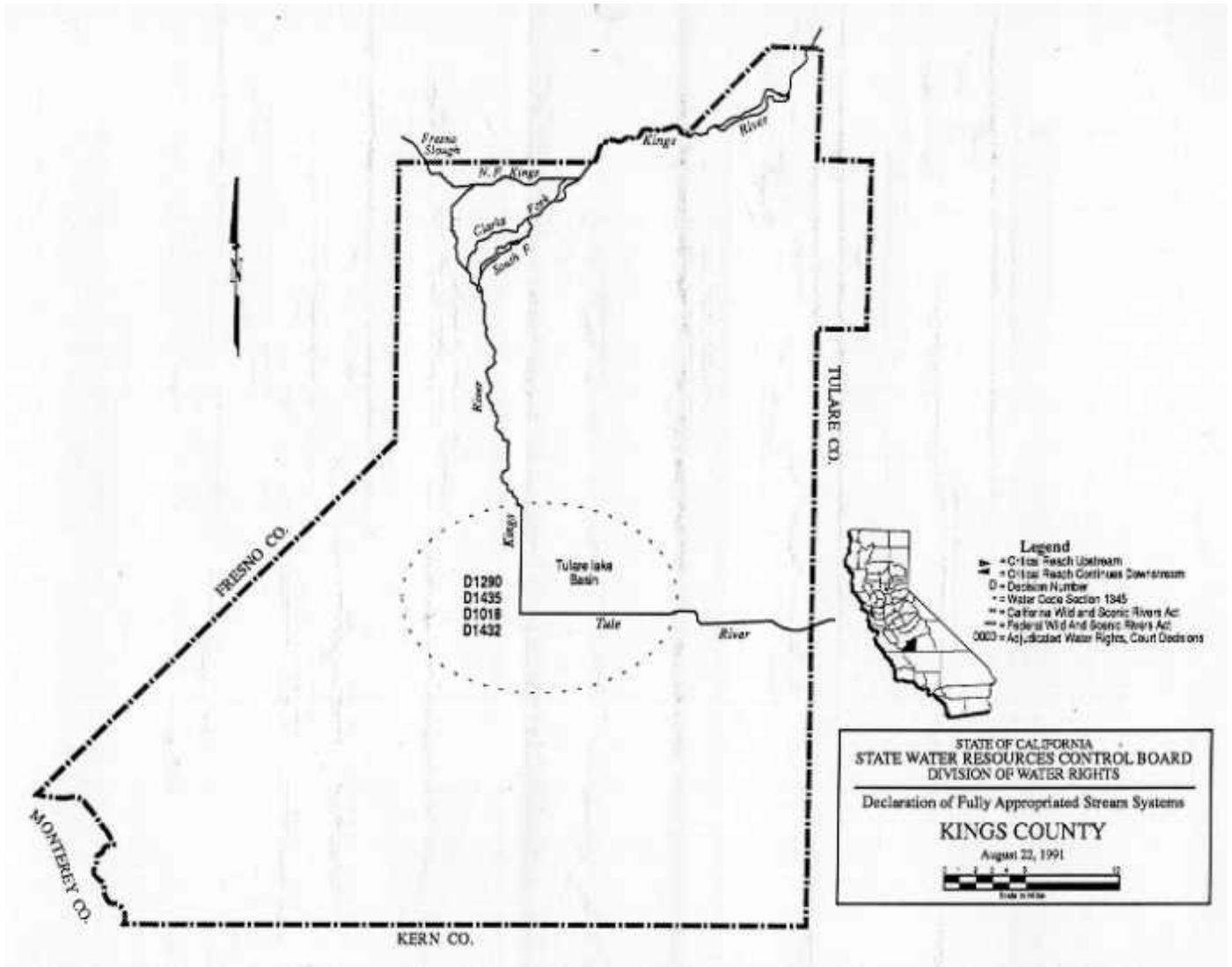
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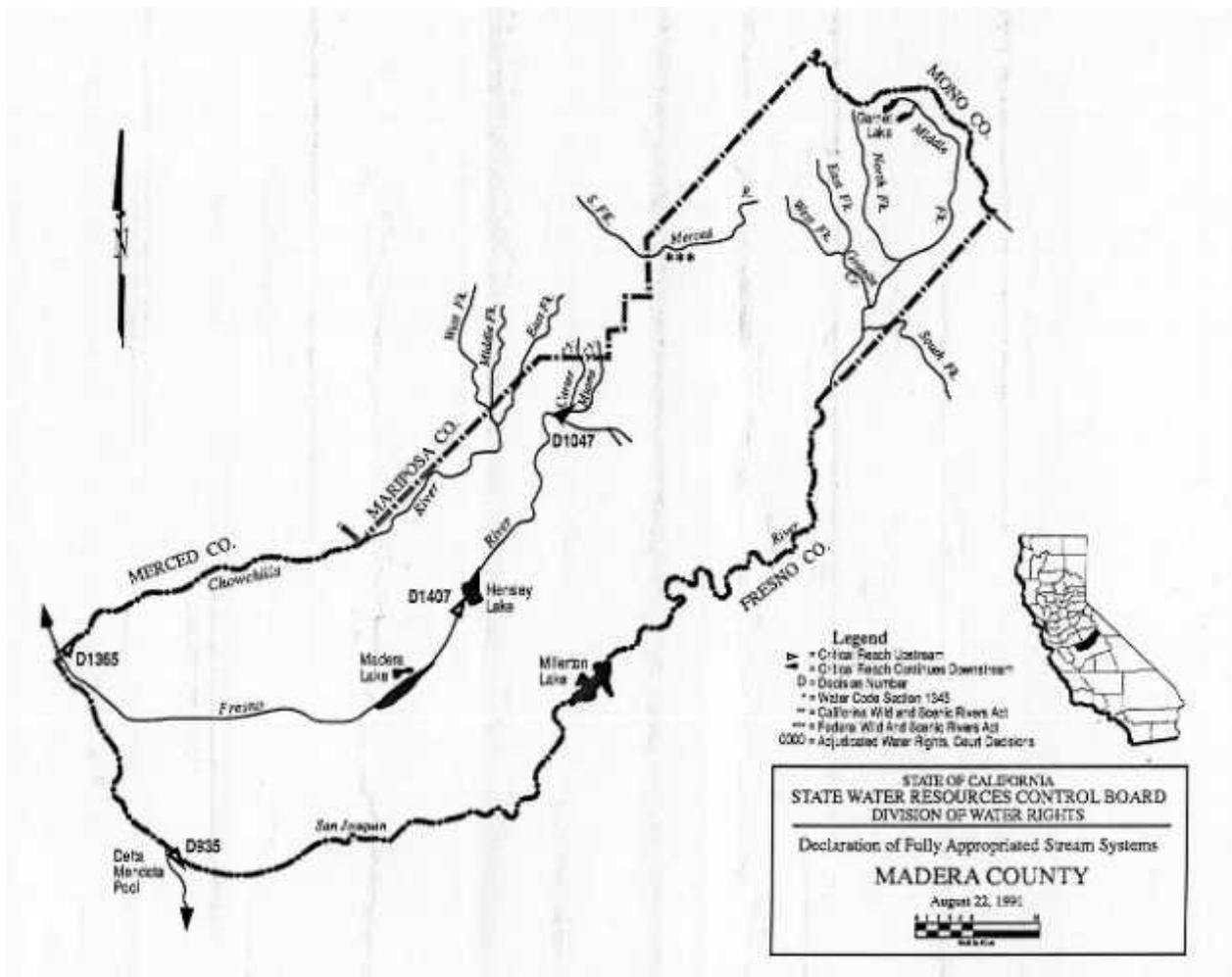
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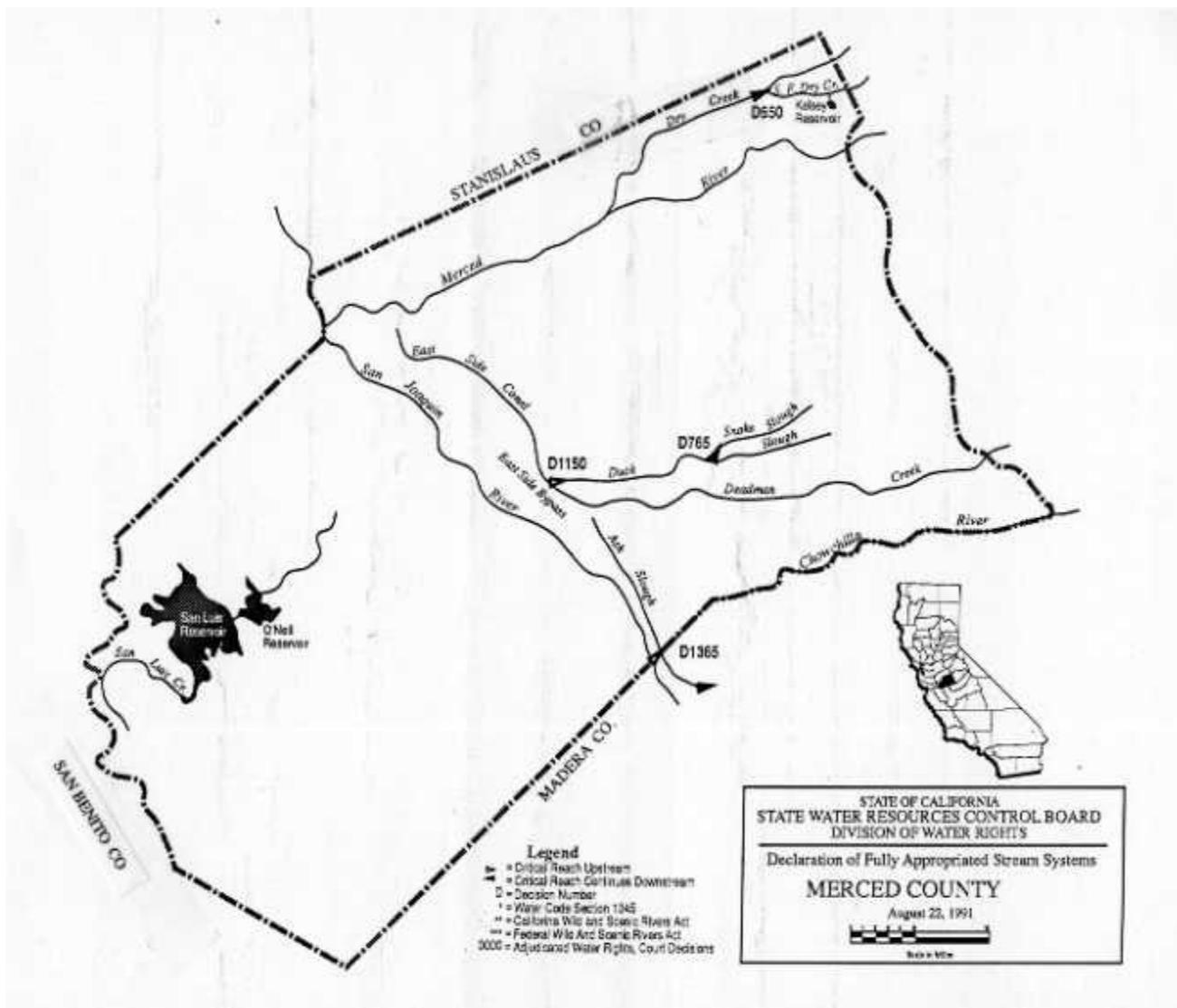
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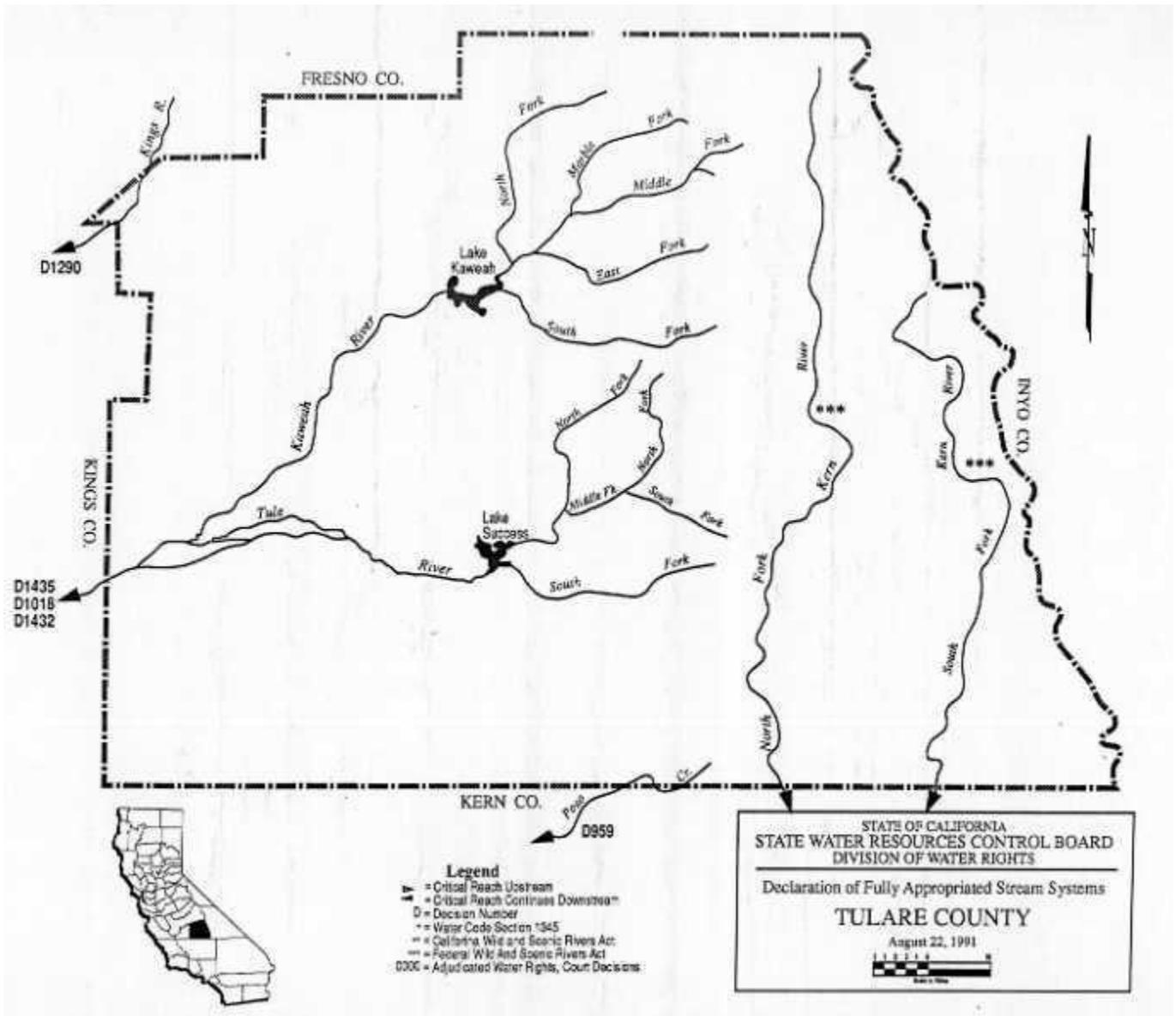
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