

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

DIVISION OF WATER RIGHTS

In the Matter of Permit 17941 (Application 25765)

Berglund Family Vineyards

**ORDER APPROVING EXTENSION OF TIME,
APPROVING CHANGE, AMENDING PERMIT, AND
ISSUING LICENSE**

SOURCE: Unnamed Stream

COUNTY: Napa

WHEREAS:

1. Permit 17941 was issued to William R. Berglund and Barbara L. Berglund on July 30, 1980, pursuant to Application 25765 and the permit was subsequently assigned to Berglund Family Vineyards on April 23, 1996. The permit authorizes storage of 100 acre-feet (af) of water per annum and replenishment of 100 af from an Unnamed Stream and Burton Creek for irrigation, frost protection, and heat control on 100 acres from November 1 through May 15 of the succeeding year. Permit 17941 required that full beneficial use of water be made by December 1, 1984.
2. Permittee requested, and on June 4, 1985, the Division of Water Rights (Division) granted, an extension of time to commence or complete construction work and apply the water to full beneficial use. The time extension order required construction to be complete by December 1, 1986, and that water be fully used by December 1, 1987.
3. Permittee requested, and on October 25, 1988, the Division granted, an extension of time that required construction to be complete by December 31, 1990, and that water be fully used by December 31, 1992.
4. The permittee filed a Request for License of Permit 17941 on April 27, 1992.
5. The Division conducted a licensing inspection on August 2, 1995, and found that the project had been modified and consisted of two 49 af reservoirs (Upper and Lower Reservoirs) for a total of 98 af rather than one 100 af reservoir. The Division's inspection report indicated that 1995 was the year of maximum use, with 92 af used to irrigate approximately 35 acres of Sudan grass. The inspection report states that an extension of time would be required to cover the year of maximum use. A change petition would also be required to add the point of diversion and point of rediversion for Lower Reservoir. Division field inspection staff requested proof of irrigation at the place of use and documentation of irrigation as a beneficial use on additional acreage during the 1991 season of diversion. Inspection staff also requested that the permittee's agent provide finalized reservoir topography of the capacities of the reservoirs. The Division subsequently received photographs and a topographical map of the irrigated place of use.

6. The permittee signed the Request for License form on June 18, 1996, which also constitutes:
(a) a petition for change to add a point of diversion/rediversion at Lower Reservoir, redistribution of storage, and to reduce the place of use to irrigation of a net 35 acres within a gross of 68 acres; and (b) a petition for extension of time to consider the 1995 diversion quantities for licensing purposes. Public notice of the petitions for change and extension of time was issued on December 11, 1996, and no protests were received.
7. The permittee's agent, by letter dated January 21, 2005, indicated that the permittee had developed about 68 acres of vineyard. Permittee stated that conversion of 35 acres of grasses to 100 acres of vineyard does not require more water than the 92 af confirmed to have been used during the 1995 Division inspection. Therefore, additional vineyard could be developed without exceeding the historical use of 92 af. The letter also indicated that the point of diversion on Burton Creek had not yet been constructed and that the Applicant agreed to drop that point of diversion from the permit.
8. In a November 8, 2006 email to the Division, permittee stated that no additional vineyard would be planted. The existing vineyard is approximately 80 gross acres. Water use would not exceed 92 af per year.
9. As noted in the Initial Study/Mitigated Negative Declaration (MND), the vineyard is comprised of 68 acres within a gross area of 80 acres. On December 14, 2010, Division staff re-checked the vineyard area and determined that the gross area is actually 83 acres.
10. The State Water Resources Control Board (State Water Board) has determined that the petition for change to add a point of diversion/rediversion at Lower Reservoir, redistribution of storage, and to reduce the place of use does not constitute the initiation of a new right nor operate to the injury of any other lawful user of water. The State Water Board has also determined that good cause for such change has been shown.
11. The State Water Board may grant an extension of time within which to commence or complete construction work or apply water to beneficial use upon a showing of good cause. (Wat. Code, § 1398.) Permittee must show that: (1) due diligence has been exercised; (2) failure to comply with previous time requirements has been occasioned by obstacles which could not be reasonably avoided; and (3) satisfactory progress will be made if an extension of time is granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay.
12. Permittee has shown that due diligence has been exercised. The project is complete and there will be no new construction under the extension of time. Permittee has requested the extension of time to cover the maximum year of water use in 1995 when the Division conducted the field inspection.
13. Permittee has shown that failure to comply with previous time requirements has been occasioned by obstacles that could not be reasonably avoided. The permittee reconfigured the reservoir design from a single reservoir to two reservoirs after the Loma Prieta earthquake, due to new information on dam safety. The permittee also changed the crop type from pasture to vineyard due to marketing considerations.
14. Permittee has shown that satisfactory progress will be made if a time extension is granted. The permittee completed development of the project prior to December 31, 1995, the end of the requested time extension period.
15. Permittee has shown good cause for the time extension for licensing purposes.

16. The State Water Board has delegated the authority to act on requests for an extension of time and change petitions to the Deputy Director for Water Rights (Deputy Director) pursuant to Resolution No. 2007-0057. (Resolution No. 2007-0057, sections 4.2.4 and 4.2.7) Resolution No. 2007-0057 authorizes the Deputy Director to redelegate this authority to the Assistant Deputy Director for Water Rights. This authority has been so redelegated.
17. Pursuant to Resolution No. 2012-0029, the State Water Board has delegated authority to the Deputy Director of the Division to administer the duties required under the California Environmental Quality Act (CEQA). The Deputy Director has redelegated this authority to the Assistant Deputy Director (Resolution No. 2012-0029, section 4.10).
18. On September 23, 2009, the Division issued a notice of intent to adopt an MND (SCH No. 200909071) for the project. (Cal. Code Regs., tit. 14, § 15072.) The MND reflects the State Water Board's independent judgment and analysis. After considering the document, the State Water Board determined that the proposed project, with mitigation measures, will not have a significant effect on the environment. The documents or other material, which constitute the record, are located in the files held by the State Water Board, Division of Water Rights. The State Water Board will issue a Notice of Determination for this project within five days of the date of this Order.

In addition to any obligation the State Water Board may have under CEQA, the Board has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 [189 Cal.Rptr. 346].) There is no evidence that approval of the change and extension of time petitions, with the inclusion of mitigation measures from the MND to minimize impacts to biological resources, will have any adverse impacts on public trust resources.
19. The permit conditions relating to the continuing authority and water quality objectives of the State Water Board should be updated to conform to California Code of Regulations, title 23, section 780, subdivisions (a) & (b).
20. Fish, wildlife and plant species have been or may be listed under the federal Endangered Species Act and/or the California Endangered Species Act. A condition should be placed in the permit making the permittee aware of obligations resulting from these acts.
21. A term has been added to require measurement of water diverted under the permit to comply with Water Code section 1605.

NOW, THEREFORE, IT IS ORDERED THAT THE STATE WATER BOARD, DIVISION OF WATER RIGHTS, HEREBY APPROVES THE PETITIONS FOR CHANGE AND EXTENSION OF TIME, AND ISSUANCE OF LICENSE.

THE LICENSE SHALL CONTAIN THE FOLLOWING AMENDED PERMIT CONDITIONS:

1. The continuing authority condition shall be updated to read as follows:

Pursuant to California Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this license including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the State Water Board may be exercised by imposing specific requirements over and above those contained in this license with a view to eliminating waste of water and to meeting the reasonable water requirements of licensee without unreasonable draft on the source. Licensee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this license and to determine accurately water use as against reasonable water requirement for the authorized project. No action will be taken pursuant to this paragraph unless the State Water Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the State Water Board also may be exercised by imposing further limitations on the diversion and use of water by the licensee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the State Water Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution article X, section 2; is consistent with the public interest and is necessary to preserve or restore the uses protected by the public trust.

(0000012)

2. The water quality objectives condition shall be updated to read as follows:

The quantity of water diverted under this license is subject to modification by the State Water Board if, after notice to the licensee and an opportunity for hearing, the State Water Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the State Water Board finds that: (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

(0000013)

3. The following Endangered Species act condition shall be added:

This license does not authorize any act that results in the taking of a threatened or endangered species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish & Game Code, §§ 2050-2097) or the federal Endangered Species Act (16 U.S.C.A. §§ 1531-1544). If a "take" will result from any act authorized under this water right, the licensee shall obtain authorization for an incidental take prior to construction or operation of the project. Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this license.

(0000014)

4. For the protection of public trust resources the following term shall be added:

In compliance with section 5937 of the Fish and Game Code, if storage or diversion of water authorized by this license is by means of a dam, licensee shall allow sufficient water at all times to pass through a fishway or, in the absence of a fishway, allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dam; provided that, during a period of low flow in the stream, upon approval of the California Department of Fish and Game, this requirement will be satisfied if sufficient water is passed through a culvert, waste gate, or over or around the dam to keep in good condition any fish that may be planted or exist below the dam if it is impracticable or detrimental to pass the water through a fishway. In the case of a reservoir, this provision shall not require the passage or release of water at a greater rate than the unimpaired natural inflow into the reservoir.

(0140069)

5. The bypass may be measured at the USGS stream gage located on Putah Creek near Guenoc (USGS 11453500). If this measurement site is utilized, the gage shall read as follows to document compliance with the above bypass requirement:

- a. 96.7 cfs from December 1 through February 28 (4 cfs in Burton Creek)
- b. 24.2 cfs from March 1 through April 30 (1 cfs in Burton Creek)
- c. 12.1 cfs from May 1 through May 15 and November 1 through November 30 (0.5 cfs in Burton Creek)

To verify the accuracy of using the Guenoc gage, within 180 days of issuance of the amended water right, (a) Permittee shall take measurements to compare real-time site-specific data to the Guenoc gage data. A minimum of two measurements shall be taken below the confluence of the Unnamed Stream (source of point of diversion) on Burton Creek to make this comparison, and (b) Permittee shall document that the substitute gage provides accurate information for this site. Any future correlations must be completed within 30 days of request by Division staff.

In the absence of such documentation, Permittee shall measure bypass below the confluence of the Unnamed Stream (source of point of diversion) on Burton Creek.

(0140060M)

6. No water shall be diverted under this license unless licensee has installed a device on Burton Creek, satisfactory to the State Water Board, which is capable of measuring the flows required by the conditions of this license. In lieu of installing a measuring device, Licensee may satisfy this requirement through use of a U.S. Geological Survey (USGS) stream gage. Should the USGS stream gage device be abandoned or discontinued in the future, Licensee shall notify the Deputy Director within seven days of the discontinuance, and within 180 days of the discontinuance, Licensee shall either identify an alternative USGS stream gage device for use, or install and maintain a measuring device on Burton Creek.

(0140204M)

7. Licensee shall maintain records of the amount of water diverted and used to enable the State Water Board to determine the amount of water that has been applied to beneficial use pursuant to Water Code section 1605.

(0000015)

8. The license shall include the following mitigation measures from the MND:

- a. Licensee shall be responsible for complying with all applicable regulations from the Napa County Agricultural Commissioner's Office for the use of soil stabilizers, pesticides, herbicides, and other regulated chemicals on the place of use.

- b. Licensee shall prevent any debris, soil, silt, cement that has not set, oil, or other such foreign substance to enter into or be placed where it may be washed by rainfall runoff into the waters of the State.
- c. The licensee shall maintain a 50-foot-wide setback around the reservoirs as shown on Setback Map No. SB-01 dated March 13, 2008, on file with the Division of Water Rights. No new ground disturbing activities shall occur within the setback area, with the exception of occasional equipment access necessary for continued operation of the reservoirs. Equipment access within the setback area shall be limited to only activities necessary for the ongoing management of the setback area and operation of the reservoirs and shall incorporate best management practices to minimize disturbance to water, soils, and vegetation. Natural vegetation shall be preserved and protected within the setback area. Planting of native riparian vegetation within the setback area is allowed.
- d. The licensee shall obtain approval of the United States Fish and Wildlife Service, Sacramento Endangered Species Office, and the California Department of Fish and Game prior to any future reservoir dredging operations. Licensee shall submit to the Deputy Director for Water Rights evidence of the agencies approval prior to any future reservoir dredging operations. The licensee shall refrain from disturbing emergent (wetland) vegetation in the reservoir during dredging operation.
- e. No ground disturbing activities shall occur within the wetland area, including, but not limited to, grading, herbicide spraying, roads, fencing, and use or construction of storage areas. Planting, maintenance, and irrigation of native wetland vegetation within the setback area are allowed.
- f. The archaeological sites CA-Nap-21, CA-Nap-387, CA-Nap-389 and CA-Nap-388 located in the reconnaissance report by Archaeological Consulting and Research Services, Inc. shall be excluded from the place of use. These sites shall not be otherwise impacted by any developments related to the proposed water storage, distribution and use. Such impacts would include dams, dikes, storage locations, pipelines, canals or ditches, and any other surface or subsurface disturbance related to the proposed water use.

The archaeological sites identified as CA-Nap-21, CA-Nap-387, CA-Nap-388 and CA-Nap-389 shall not be impacted by any subsurface disturbances (e.g., ripping, trenching, grading, or installation of buried pipelines). Discing of the archaeological deposits will continue to be allowed. Further development of these archaeological sites may be allowed following the completion of a cultural resources mitigation program, the expense of which would be entirely borne by the licensee. The mitigation program would have to be designed and completed by a professional archaeologist and subject to approval by the Deputy Director for Water Rights.

- g. In order to protect the three archaeological sites identified as CA-NAP-21, CA-NAP-387, and CA-NAP-389/803 in the report titled Limited Archaeological Investigations at the Berglund Property, Pope Valley, California by Eileen Barrow, B.A. and Thomas M. Origer, M.A. dated October 24, 2008, revised December 19, 2008, licensee shall be subject to the following restrictions for ongoing agricultural operations and any activities involving replanting of vines on the archaeological sites within the place of use pursuant to the license issued on Application 25765:
 - i. Vine removal shall be done as non-invasively as possible, by pulling the vines either vertically or roughly horizontally using a tractor and chain, as demonstrated in the video titled Vine Removal, accompanying the above referenced report. Vine removal shall occur only while the soil is moist down to six inches, and vines shall be replanted in the same location as the vines that were removed;

- ii. No trenching, or other mechanical disturbance, including ripping below the disc zone shall be allowed;
 - iii. Cultivation (discing) is allowed for weed control and general vineyard maintenance; and
 - iv. No artifacts or other materials shall be removed from the sites.
- h. Should any buried archaeological materials be uncovered during project activities, such activities shall cease within 100 feet of the find. Prehistoric archaeological indicators include: obsidian and chert flakes and chipped stone tools; bedrock outcrops and boulders with mortar cups; ground stone implements (grinding slabs, mortars and pestles) and locally darkened midden soils containing some of the previously listed items plus fragments of bone and fire affected stones. Historic period site indicators generally include: fragments of glass, ceramic and metal objects; milled and split lumber; and structure and feature remains such as building foundations, privy pits, wells and dumps; and old trails. The Deputy Director for Water Rights shall be notified of the discovery, and a professional archaeologist shall be retained by the licensee to evaluate the find and recommend appropriate mitigation measures. Proposed mitigation measures shall be submitted to the Deputy Director for Water Rights for approval. Project-related activities shall not resume within 100 feet of the find until all approved mitigation measures have been completed to the satisfaction of the Deputy Director for Water Rights.
- i. If human remains are encountered, then the licensee shall comply with section 15064.5 (e) (1) of the CEQA Guidelines and the Health and Safety Code section 7050.5. All project-related ground disturbances within 100 feet of the find shall be halted until the county coroner has been notified. If the coroner determines that the remains are Native American, the coroner will notify the Native American Heritage Commission to identify the most-likely descendants of the deceased Native Americans. Project-related ground disturbance, in the vicinity of the find, shall not resume until the process detailed under section 15064.5 (e) has been completed and evidence of completion has been submitted to the Deputy Director for Water Rights.
9. All other conditions of Permit 17941 are still applicable and are incorporated in the license. The attached license is issued. The license contains the terms approved by this Order.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:
JAMES W. KASSEL

Barbara Evoy, Deputy Director
Division of Water Rights

Dated: JUL 27 2012