

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ORDER WR 2009-0064-DWR

In the Matter of Permit 16860C (Application 24296C)
Langtry Farms LLC and Guenoc Winery, Inc.

**ORDER DENYING PETITIONS FOR EXTENSION OF TIME
AND CHANGE**

SOURCE: (1) Butcherknife Creek tributary to Putah Creek, and
(2) Bucksnot Creek tributary to Putah Creek
COUNTY: Lake

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

WHEREAS:

1. The State Water Resources Control Board (State Water Board), Division of Water Rights (Division) issued Permit 16860 to Magoon Estate Limited (Permittee) on January 21, 1977 pursuant to Application 24296. As explained later, Permit 16860 was eventually divided into three permits. Permit 16860C authorizes storage of 5,350 acre-feet per annum (afa) in Ink Reservoir located on Butcherknife Creek. The maximum rate of diversion from Bucksnot Creek to offstream storage is 20 cubic feet per second. The permit authorizes irrigation of a net acreage of 1,380 acres. The purposes of use are domestic, irrigation, frost protection and heat control.
2. During the 1970s, the State Water Board commenced adding conditions to permits in the Upper Putah Creek watershed 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."

This was referred to as Condition 12 in the permits. Permit 24296 includes Condition 12.
3. Permit 24296 originally required that construction work be completed by December 1, 1980, and that the water be applied to the authorized use by December 1, 1981.
4. Permittee requested and received three extensions of time on December 28, 1982, April 28, 1988, and January 13, 1992. The time to complete construction was extended to December 31, 1994 and the time to complete full beneficial use was extended to December 31, 1995.
5. On May 14, 1992, the Division inspected the project covered by Permit 16860. Permittee had requested that the permit be divided in such manner that the finished portions of the project be

considered for licensing. The inspection report documents that Ink Reservoir had not been built.

6. On September 20, 1994, the Division split Permit 16860 into three parts, Permits 16860A, 16860B, and 16860C. Permit 16860C was for Ink Reservoir, a facility which had not been built in the 17 years since permit issuance.
7. The March 10, 1995 Condition 12 Settlement Agreement (Agreement) states that holders of permits as to which a portion of the water has been placed to beneficial use prior to December 31, 1995 shall pay the State Water Board an additional fee of \$2,100.00 at the time license is offered by the State Water Board if a Continuation Permit is still desired. (Agreement, I, 3b.) "[T]his Agreement authorizes permittees to obtain Continuation Permits only if all applicable fees required under this Section are paid to the SWRCB. Requests for related SWRCB actions shall not be processed until the required fees are paid, and shall be dismissed if fees are not received within six months after notification by the SWRCB."

There is no record of the Division having requested the fee for Permit 16860C, even though the fee is applicable for this filing. However, on April 1, 1996, the Upper Putah Creek Watershed Watermaster sent a fee schedule to the large licensees, including the Permittee's agent, with a cover letter explaining the fees. The \$2,100 fee covers the Division's cost for re-inspecting projects requesting a continuation permit for a portion of the right and a license for another portion of the right. Even though Permittee did not pay the required fee, Permittee requested a continuation permit on June 20, 1996 for Permit 16860C.

8. On July 19, 1995, the Division inspected the project for licensing of Permits 16860A and 16860B. The inspection report documents that the Ink Reservoir had not been built under Permit 16860C.
9. On June 20, 1996, the Division received a Petition for Extension of Time, seeking a 10-year extension. The petition states that the uncertainty of the availability of water remaining for appropriation under the Condition 12 watershed reservation, on which a lawsuit was filed by Solano County Water Agency et al in 1990 (which was not resolved until March 1996) created uncertainty about the feasibility of proceeding with the project. The proposed Ink Reservoir would provide water for irrigation of an additional 786 acres.
10. In Order WR 96-002, the State Water Board stated that Condition 12 has been in effect for 39 years, and that upstream permittees have had a reasonable time in which to develop and put water to reasonable beneficial use. (Order WR 96-002, p. 6. footnote 14.) The Division notes that the State Water Board finding resulted from, and considered, the adjudication.
11. On February 4, 1997, Permittee petitioned to change the project to store 1,690.5 af in proposed Buckhorn Flat Reservoir and 1,660 af in a proposed enlarged Upper Bohn Reservoir and reserve the remaining 1,999.5 af for the proposed Ink Reservoir. The place of use would increase from 1,380 acres to 1,768 acres.
12. On August 2, 1999, Permittee's agent informed the Division that Permittee would like to withdraw the request for storage in Ink Reservoir pursuant to Permit 16860C as its construction was no longer being considered.
13. In a petition dated May 17, 2000, Permittee proposed to increase the place of use from 1,380 acres to 4,611 acres, change the points of diversion and source and redistribute water from Ink Reservoir to a proposed 2,500 af capacity Buckhorn Flat Reservoir and store 1,000 af in Upper Bohn Reservoir. Ink Reservoir would not be built, and the permit would be reduced to 3,355 af. The new points of diversion would be on Putah Creek, at Upper Bohn Dam, and on Bucksnot Creek.

14. The Division issued a notice of change and time extension petitions for Permit 16860C on March 16, 2001.
15. The Department of Fish and Game (DFG) protested the petitions. On May 31, 2001, the Division accepted the protest insofar as it related to construction of the new Buckhorn Flat Reservoir and enlargement of the Upper Bohn Reservoir.
16. On July 9, 2001, the Division advised all permittees in the Upper Putah Creek watershed that pursuant to the March 10, 1995 Agreement, there is a limited quantity of water remaining for assignment to new applications. The Division needs to maintain accurate data on the quantity of unappropriated water that is available for the new applications. Accordingly, we are evaluating whether projects have been timely developed under existing permits. Any water that is not required to meet the needs of existing permittees may be available for other uses. The Division advised the permittees that it intended to limit future time extensions to five years in this watershed. The Division provided opportunity to object to the proposed five-year extension limit and required that any objections be accompanied by information to support a finding that a longer time extension is appropriate. Permittee did not respond to the notification, did not file an objection and did not provide a showing that a longer extension was appropriate.
17. On July 23, 2001, Division staff discussed development under the permit with Permittee, and advised Permittee of the need to proceed diligently with preparation of a California Environmental Quality Act (CEQA) document. A work plan was requested by September 21, 2001 that included the following: (a) a timeline for completing the CEQA document, (b) a timeline for obtaining the county grading and use permits for reservoir construction and vineyard planting, (c) a timeline for completion of the development and construction activities, including: (i) documentation of total project cost and evidence that project funding has been obtained, (ii) the date when clearance from the Department of Water Resources, Division of Safety of Dams for Buckhorn Flat Reservoir and Upper Bohn Reservoir enlargement would be obtained, and (iii) the date when construction contracts would be signed; (d) a timeline for obtaining a streambed alteration agreement from DFG; and (e) a timeline for obtaining an Army Corps of Engineers section 404 permit (33 U.S. C. § 1344.) or information to document that a 404 permit is not needed. Permittee was warned that failure to provide the documentation would be considered a lack of due diligence, and the permit would be subject to revocation.
18. Permittee's October 23, 2001 response states that enlargement of Upper Bohn Reservoir will cost \$500,000. The cost for development of the additional 3,231 acres of vineyard averages about \$10,000 per acre (roughly \$32 million). Buckhorn Flat Reservoir is no longer contemplated. Accordingly, Permittee informed the Division that the CEQA lead agency would switch from Lake County to the State Water Board. A streambed alteration agreement and most other permits would not be obtained until the CEQA document was completed. The other issues identified in the July 23 letter were also addressed. There was no estimate when construction contracts would be signed.
19. On June 27, 2002, Permittee filed an amendment to the petition to change Permit 24296C. The petition states that Buckhorn Flat Reservoir is abandoned. 3,355 af will be stored in Upper Bohn Reservoir. The remaining 1,995 af under this right is abandoned.
20. On July 19, 2002, Division management and legal representatives met with Permittee's legal and engineering representatives due to concern about the due diligence criteria in the Division's July 23, 2001 correspondence. The Division advised Permittee that the diligence issue is examined during the period when the permit was in effect (prior to December 31, 1995) and the likelihood of completion should an extension be granted. Permittee stated that water availability issues and watershed litigation clouded development during the life of the permit. However, Permittee

acknowledged having built the major reservoirs under Permits 16860A and 16860B during the development period for Permit 16860C.

21. On August 30, 2002, Permittee withdrew the June 27, 2002 amendment to the Petition for Change.
22. On October 1, 2002, Division staff expressed concern that Permittee sought to add three new water sources to the permit. The proposed new points of diversion are located in a different part of the Putah Creek watershed than the permitted points of diversion. Thus, Division staff requested documentation that there would be no change in water availability, or the dates when water is available, as a result of moving the points of diversion to new sources. Permittee provided the requested documentation on November 15, 2002.
23. On December 27, 2002, Division staff memorialized a December 4, 2002 telephone conversation in which Permittee agreed to utilize only one point of diversion on Putah Creek. All other points of diversion had been eliminated.
24. The Division's May 12, 2004 letter clarifies the revised project configuration. Permittee now requests to move 2,660 af of storage from Ink Reservoir to Upper Bohn Reservoir. Also, the place of use would be increased from 1,538 acres to 6,847 acres.

The Division advised Permittee that three time extensions had previously been granted for Permit 16860C, and if the current time extension was not approved the permit would be revoked because there are no project facilities and no beneficial use of water has occurred.

The May 12 letter responds to the following contention from Permittee's February 17, 2004 submittal:

"Magoon Estate, Limited, has exercised as much diligence as was possible under the unusual circumstances in the upper Putah watershed...It would be a clear abuse of discretion for the Board to deny the Magoon petitions upon the basis of lack of diligence."

The response states that petitions for extension of time will be granted only upon such conditions that the board determines to be in the public interest and upon showing to the board's satisfaction that diligence has been exercised. When evaluating the diligence issue, the State Water Board will evaluate all relevant information including an evaluation of the diversion and storage facilities built or enlarged pursuant to Permittee's rights during the time interval covered by Permit 16860C. Permittee was requested to document whether (a) it had a need for additional water supplies to serve the authorized place of use for the permit, after taking into consideration all other rights held by Permittee, and (b) the additional quantity of water needed to serve the authorized place of use for the permit. The information was requested to cover the last, authorized time extension period, which ended on December 31, 1995.

The May 12 letter also advised Permittee that the petitions could not be addressed until a CEQA document was completed. Moreover, Permittee was advised that the State Water Board would consider all pertinent facts, including the issue of whether granting the petitions would be in the public interest, and whether Permittee has made a showing that it has exercised due diligence pursuant to Cal. Code of Regs. section 844. The upper Putah Creek adjudication placed severe restrictions on future water development in the upper Putah Creek watershed. The Division stated that allowing Permittee to proceed would substantially reduce the amount of water available for appropriation by others and could mean that pending applications or requests for continuation permits would have to be denied. We intend to address the issue of whether it is appropriate and in the public interest to afford Permittee, which has not developed its project

pursuant to Permit 16860C, a priority over other applicants and permittees with unperfected rights.

25. On July 7, 2004, Permittee responded to the Division's request for information on additional water supplies needed to serve the existing place of use. The authorized place of use is 1,380 acres. Of this acreage, 785 acres is not covered by other water rights of Magoon. Permittee contends that the intended use was pasture when the permit was issued. Permittee stated that the water requirement for the 785 acres of pasture is 4.5 af per acre, resulting in an additional demand for 3,577.5 afa to develop the permitted place of use. The response ignored the fact that Permittee has already developed 367 acres of vineyard within the authorized place of use. (Draft Environmental Impact Report (DEIR), July 2006, p. 1-1.) Vineyard uses less water than irrigated pasture. Vineyard has a water duty of 1.23 af per acre (0.76 af per acre for irrigation and 0.47 af per acre for frost protection). (Tenth Annual Report of the Upper Putah Creek Watershed Watermaster.) Moreover, the water duty for pasture in this watershed is 3.07 af per acre. (ibid.) Consequently, the response did not provide accurate information for the Division to consider.
26. In 2005, Permittee had still not resolved the protests on the 1995 time extension petition and 1997 and 2000 change petitions. Also, a CEQA document had not yet been completed.
27. On February 9, 2005, Permittee filed another Petition for Extension of Time. The petition states that no construction was completed under Permit 16860C during the last extension period and no money was spent on the project during the last extension period. A time extension of eight years after issuance of an Order on the change petitions was requested. The petition also confirms that no water has been used under the permit.
28. The petition was superceded on October 17, 2005, when Permittee filed an amended Petition for Extension of Time. The estimated date for completion of construction and full beneficial use of water in the amended petition is December 31, 2015. The petition confirms that water use has not begun and attributes the non-use to the fact that the change and time extension petitions have not been approved.
29. On March 24, 2006, public notice of the 2005 petition for extension of time and renote of change petition was issued. Permittee sought the right to redistribute 1,660 af from the previously proposed Ink Reservoir to Upper Bohn Reservoir storage, add one point of diversion and two points of rediversion. The place of use would be expanded to 4,611 acres. Permittee requested an extension to December 31, 2015 to complete construction and beneficial use of water.
30. DFG protested the petitions and the protest has not been resolved. Although the environmental elements of the DFG protest are addressed in the EIR prepared for the petitions and could potentially be dismissed (Wat. Code, § 1335), the issue of whether Permittee exercised due diligence in development of its project is an unresolved protest issue. Specifically, DFG states that a key requirement for granting an extension of time is a showing that the "failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided." (Cal. Code Regs., tit. 23, § 844.) However, Permittee does not allege unavoidable obstacles to explain why water has not yet been put to full beneficial use. Inasmuch as the protest has not been resolved, the time extension petition cannot be approved.
31. The 2006 DEIR, Alternative 2, evaluates development if the petitions for change and time extension were denied and finds that there is sufficient water currently available to convert the 1,452 acres of pasture already developed within the existing place of use to a different crop because vineyard will take less water than irrigated pasture.

32. Permittee's July 17, 2006 response to protest states that Permittee had previously addressed the due diligence issue in February 17, 2004 report on diligence to the State Water Board.
33. On August 14, 2007, Division staff met with Permittee's representatives who advised the Division that the financing that was previously in place for this project expired in June 2006. The market for grapes is low right now. Permittee plans to pull the non-popular grapes and replant with varieties that market for \$12.99 to \$39.99 a bottle. Permittee currently had no money for the project. The expansion in place of use was needed in order to get funding, which had been lined up with a different entity. Loan maturation for the new financing is in April 2009.
34. On December 15, 2008, Permittee changed the ownership of the project to Langtry Farms LLC and Guenoc Winery, Inc.
35. The Progress Reports by Permittee have continuously documented that there has been no water diversion and use.
36. 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.
37. Permittee has not shown that due diligence has been exercised. Permittee did not build the permitted facility, Ink Reservoir, and has abandoned construction of the reservoir. Permittee offers uncertainty regarding water available pursuant to Condition 12 as a basis for failing to construct the facility. All permits issued in the upper Putah Creek watershed with a priority date after October 29, 1945 contain Condition 12. The condition highlights the need to complete development promptly, because the availability of water for permits after October 29, 1945 was contingent upon development of the permitted projects before a license was issued for the Solano Project. The U.S. Bureau of Reclamation had applied for a license in 1992, and it was anticipated that a license could be issued in 1996. (See Order WR 96-002 at pp. 4-5.)
38. Permittee also offers the adjudication litigation from 1990 through 1996 as a reason for failing to timely construct Ink Reservoir. Although Permittee did not build Ink Reservoir, Permittee completed Big Basin Reservoir in 1990 (200 af reservoir under License 13414) and Cassidy Reservoir in 1992 (560 af reservoir under Permit 16861). Moreover, the litigation does not address the fact that Permittee did not build the reservoir prior to 1990, and has no plans to construct the reservoir now. Permittee has not shown that failure to comply with previous time requirements has been occasioned by obstacles that could not be reasonably avoided.
39. Permittee has not shown that satisfactory progress will be made if a time extension is granted. In prior petitions, Permittee estimated that it would complete construction in 1988, and then in 1994. In its 1996 petition, Permittee states that it would complete construction in 2004. In its 2005 petition, Permittee states that construction will be completed in 2015. The Ink Reservoir has been abandoned. Consequently, Permittee is unable to document progress on the permitted facility. Permittee was previously granted three time extensions and has yet to complete the project, and has not shown any change in circumstances that could facilitate action toward completion of the permitted project.

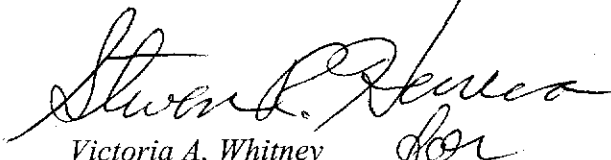
Permittee has informed the Division that it lacks funding for any project that does not involve the expansion in the place of use. Since the time to complete development under Permit 16860C has ended and water has not been put to beneficial use, the Division must evaluate whether it is

appropriate to extend the construction and development periods under the permit prior to evaluating the requested changes to the project (change in source, point of diversion, place of storage, and place of use). Because Permittee lacks the required financial resources to proceed with the permitted project, there is no basis for finding that satisfactory progress will be made on the permitted project. (Cal. Code Regs., tit. 23 § 840.)

40. The State Water Board will grant an extension of time within which to commence or complete construction work or apply water to beneficial use only upon such conditions determined to be in the public interest. The adjudication placed severe restrictions on future water development in the upper Putah Creek watershed.¹ The January 2008 12th Annual Watermaster Report for the Upper Putah Creek Watershed documents that only 246 af of water remains in the reservation for assignment to new applications in Napa County and 4,166 af in Lake County. The quantity of water remaining for assignment to new applications is based on the assigned depletion in each county, minus water assigned to existing filings. Once the reservations are gone, no additional water right permits may be issued. Permittee has not proceeded with the Ink Reservoir Project. This has effectively reduced the quantity of water remaining in the reservation for pending applications in the upper Putah Creek watershed, meaning that pending and future applications in excess of the reservation would have to be denied. It is contrary to the public interest to allow the Permittee to continue to reserve water in "cold storage" under its permit to the detriment of other applicants in the watershed.
41. For the above stated reasons, Permittee has not shown good cause for the time extension pursuant to the requirements of California Code of Regulations, title 23, section 844. Therefore, Permittee's petition for extension of time should be denied.
42. Permittee did not construct Ink Reservoir under Permit 24296C. Since the time extension is denied, there is no time to develop a project pursuant to the change petition. Consequently, no further consideration of the change petition is necessary, and it should likewise be denied.

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

STATE WATER RESOURCES CONTROL BOARD


Victoria A. Whitney *for*
Deputy Director for Water Rights

Dated: **DEC 21 2009**

¹ The signatories to the Agreement have agreed that the right to develop water under existing Condition 12 terminated on December 31, 1995; however, the U.S. Bureau of 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. (Order 96-002, p. 7.) Once the reservation is exhausted, there will be no more water for assignment to new water rights or further development of undeveloped rights, in Lake and Napa Counties upstream of Lake Berryessa.