STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION - DIVISION OF WATER RIGHTS
NOVEMBER 16, 2010

ITEM 6

SUBJECT

CONSIDERATION OF AN ORDER DENYING RECONSIDERATION OF DIVISION ORDER DENYING PETITIONS FOR EXTENSION OF TIME AND CHANGE UNDER A PERMIT HELD BY LANGTRY FARMS LLC AND GUENOC WINERY, INC. ON BUTCHERKNIFE CREEK AND BUCKSNORT CREEK IN LAKE COUNTY

DISCUSSION

Langtry Farms LLC and Guenoc Winery, Inc. (Petitioner) requested that the development schedule authorized by water right Permit 16860C be extended and that changes in the point of diversion, source, distribution of storage, and place of use be approved. The Division concluded that the causes for approval of an extension of time were not met and consequently denied Petitioner's petition for extension of time relating to this Permit. Because no water has been put to beneficial use under this permit, the Division of Water Rights (Division) likewise denied Petitioner's petition for change relating to this Permit.

On January 21, 1977, the State Water Resources Control Board (State Water Board) issued Permit 16860, which was later divided into three separate permits. Permit 16860C authorizes storage of 5,350 acre-feet per annum (afa) in Ink Reservoir on Butcherknife Creek. Permit 16860C limits the maximum rate of diversion from Bucksnort Creek to offstream storage to 20 cubic feet per second (cfs).[1] The permit authorizes irrigation of a net acreage of 1,380 acres for domestic, irrigation, frost protection and heat control purposes.

Since the original permit deadlines, three time extensions were approved. The most recent time to complete construction ended on December 31, 1994, and the time to complete full beneficial use ended on December 31, 1995. The Project has not been constructed.

A water right permit allows a party to construct a water supply project and to put water to beneficial use in conformance with permitted conditions. Permits are issued with a specified limited amount of time to complete construction and put water to beneficial use pursuant to section 841 of the State Water Board's regulations. These periods may be extended by the State Water Board only upon a showing to the State Water Board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided, and that satisfactory progress will be made if an extension of time is granted. Subject to the State Water Board's continuing authority, a water right is vested based on actual diversion and use, and a water right license confirms the amount of water that has been beneficially used.

[1]This rate was mistakenly listed as 20 cfs instead of 10 cfs, as discussed in Order WR 2009-0019-DWR.

Petitioner asserts that significant funds have been expended on this Project since the previous time extension expired in 1995. Diligence is evaluated for the period when the permit and any subsequently issued time extensions were in effect. Expending funds to evaluate whether and how to change the initially permitted project, after expiration of the initial time to complete construction and beneficial use of water and three subsequent time extensions, cannot constitute diligence for purposes of compliance with the Water Code and the State Water Board's regulations. The Water Code requires diligence in commencing and completing construction and putting water to beneficial use, not just diligence in evaluating whether and how to proceed. In addition, much of the expended funds went to preparation of a California Environmental Quality Act (CEQA) document for not only the petitions at issue here, but also for a number of change petitions and a time extension petition for Petitioner's/Permittee's nine other rights. The nine rights combined total 11,856 afa, and the approved petitions combined the place of use and expanded the combined place of use from the existing 367 acres of vineyard and 1,452 acres of irrigated pasture and forage crops to 5,139 net acres of proposed vineyard within a gross area of 6,847 acres. Those approvals do not directly affect the causes for an extension of time for this particular permit.

As explained in more detail in the Order, the Order denies the subject petition for reconsideration.

POLICY ISSUE

Should the State Water Board adopt the proposed order?

FISCAL IMPACT

None.

REGIONAL BOARD IMPACT

None.

STAFF RECOMMENDATION

The State Water Board should adopt the proposed order.

State Water Board action on this item will assist the Water Boards in reaching Goal 6 of the Strategic Plan Update, 2008-2012: to enhance consistency across the Water Boards, on an ongoing basis, to ensure our processes are effective, efficient, and predictable, and to promote fair and equitable application of laws, regulations, policies, and procedures.

D R A F T

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2010-

In the Matter of Petition for Reconsideration of

LANGTRY FARMS LLC AND GUENOC WINERY, INC.

Regarding Order Denying Petitions for Extension of Time and Change

---

ORDER DENYING RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

On March 20, 2009, the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) issued State Water Board Order (Order) WR 2009-0019-DWR, denying petitions for extension of time and change submitted by Magoon Estate Limited (Permittee) for Permit 16860C (Application 24296C). The petitions were denied for non-diligence. Permit 16860C has been transferred to Langtry Farms LLC and Guenoc Winery, Inc. (Petitioner), who filed a petition for reconsideration dated April 20, 2009. The State Water Board granted reconsideration by Order WR 2009-0052-EXEC, ordering that Order WR 2009-0019-DWR be set aside and remanding the issue to the Division. On December 21, 2009, the Division issued Order WR 2009-0064-DWR, again denying the petitions for extension of time and change. Petitioner filed a petition for reconsideration dated January 19, 2010. Petitioner requests that this matter be considered by the Board.

2.0 GROUNDS FOR RECONSIDERATION

Any person interested in any application, permit or license affected by a State Water Board decision or order may petition for reconsideration of the decision or order. (Cal. Code Regs., tit. 23, § 768.[1] The legal bases for reconsideration are: (a) irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing; (b) the decision or order is not supported by substantial evidence; (c) there is relevant

---

[1] All further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

evidence which, in the exercise of reasonable diligence, could not have been produced; or (d) error in law.

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id*., subd. (a)(2)(A)-(C).)

3.0 LEGAL AND FACTUAL BACKGROUND

The relevant facts have previously been outlined in detail in Orders WR 2009-0019-DWR, WR 2009-0052-EXEC and WR 2009-0064-DWR. Briefly, the Division issued Permit 16860 to Permittee on January 21, 1977, pursuant to Application 24296. 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, with a maximum rate of diversion from Bucksnort Creek to offstream storage of 10 cubic feet per second (cfs). The permit authorizes irrigation of a net acreage of 1,380 acres for domestic, irrigation, frost protection and heat control purposes.

Permit 16860 originally required that construction work be completed by December 1, 1980, and that water be applied to the authorized use by December 1, 1981. Permittee has previously requested and received three extensions of time, the latest requiring completion of construction by December 31, 1994 and completion of full beneficial use by December 31, 1995.

On May 14, 1992, the Division inspected the project covered by Permit 16860 because Permittee had requested that the permit be divided in such a manner that the finished portions of the project be considered for licensing. On September 20, 1994, the Division split Permit 16860 into three parts – Permits 16860A, 16860B, and 16860C, and on July 19, 1995, the Division inspected the project for licensing of Permits 16860A and 16860B. Ink Reservoir had not been built.

On June 20, 1996, the Division received a Petition for Extension of Time seeking a 10-year extension. Between February 4, 1997 and December 4, 2002, Permittee proposed a number of alterations to the project, culminating in the currently proposed project. Permittee seeks the right to redistribute 1,660 afa from the previously proposed Ink Reservoir to Upper Bohn Reservoir storage, to change the source of water, and add one point of diversion and two points of rediversion. The place of use would be expanded to 4,611 acres.

On October 17, 2005, Permittee filed the most recent 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.

On March 24, 2006, the Division issued public notice of the 2005 petition for extension of time and re-notice of the change petition. The Department of Fish and Game (DFG) protested the petitions on environmental grounds, and questioned whether Permittee exercised due diligence in development of its project consistent with the requirements of section 844.

On December 15, 2008, Permittee changed the ownership of the project to Langtry Farms LLC and Guenoc Winery, Inc (Petitioner).

On March 20, 2009, the Division issued Order WR 2009-0019-DWR denying the petitions for extension of time and change petitions.

On April 20, 2009, Petitioner submitted a petition for reconsideration of Order WR 2009-0019-DWR and on July 30, 2009, the State Water Board's Executive Director issued Order WR 2009-0052-EXEC granting reconsideration in part and remanding to the Division "to review its action and issue a new order that includes adequate findings and conclusions to explain the action being taken." (Order WR 2009-0052-EXEC, p. 10.)

On December 21, 2009, the Division issued Order WR 2009-0064-DWR denying the petitions for extension of time and change.[2]

[2] The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the State Water Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board failed to complete its review of the

Petitioner timely filed a petition for reconsideration of Order WR 2009-0064-DWR dated January 19, 2010.

4.0 DISCUSSION

4.1 Order WR 2009-0064-DWR Is Consistent With Order WR 2009-0052-EXEC

Petitioner contends that Order WR 2009-0064-DWR fails to explicitly state the bases for its denial of the petitions for extension of time and change in violation of Order WR 2009-0052-EXEC. Order WR 2009-0052-EXEC identified as the deficiencies in the prior order that there was "relatively little in the way of explanation to bridge the analytic gap between [the] basic facts and the ultimate conclusion that Petitioner has not shown good cause for an extension" and that "some of the conclusions in the Order concerning the legal effect of prior actions by the State Water Board appear to be erroneous." (Order WR 2009-0052-EXEC, pp. 9-10.) Because the Executive Director found it "difficult to determine to what extent [Order WR 2009-0019-DWR] was based on those erroneous conclusions, or to determine whether the denial of the extension can be upheld for other reasons," this matter was remanded to the Division "to review its action and issue a new order that includes adequate findings and conclusions to explain the action being taken." (*Id.*, p. 10.) More specifically, the primary deficiencies identified by Order WR 2009-0052-EXEC are the Division's treatment of Order WR 96-002 "as having established a rule that no extensions will be granted after 1996" and the Division's seeming interpretation of a July 9, 2001 letter as having created a blanket rule that no time extension would be granted for permits in the Upper Putah Creek watershed for more than five years from the existing deadlines in the permits. (*Id.*, pp. 11-13.)

Petitioner suggests that "a careful line-by-line examination of [Order WR 2009-0064-DWR] reveals that it is largely identical to WR 2009-0019." (Petition, p. 2.) While the factual recitations in the two orders are, not surprisingly, "largely identical," consistent with Order WR 2009-0052-EXEC and unlike the prior Division order, Order WR 2009-0064-DWR does not contain the same analytic gaps and more adequately links the facts to the Division's conclusions. Order WR 2009-0064-DWR also does not rely on any of the erroneous legal interpretations identified as problems with Order WR 2009-0019-DWR.

---

petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; State Water Board Order WQ 98-05-UST at pp. 3-4.)

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.) A 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. (Cal. Code Regs., tit. 23, § 844, italics added.)

Order WR 2009-0052-EXEC briefly discusses Petitioner's contention that pending litigation raising concerns about the availability of water for appropriation is an adequate basis for deferring construction. While Petitioner again suggests that litigation prevented construction of the project during the most recent extension period, there is scant evidence to support diligence throughout the entire period authorized for construction and putting water to full beneficial use. Permit 16860 was issued on January 21, 1977, with an original deadline to complete construction by December 1, 1980, and to complete full beneficial use by December 1, 1981. By May 1992, Petitioner had only completed two smaller reservoirs, for which Petitioner requested that Permit 16860 be split and licenses issued. As expressed in paragraph 24 of Order WR 2009-0064-DWR, Permittee was asked for information supporting diligence during the period authorized for construction and putting water to beneficial use. Permittee submitted a document on February 17, 2004, which the Division considered and provided a response dated May 12, 2004. Contrary to Petitioner's contentions, Order WR 2009-0064-DWR does refer to Permittee's submittal, as well as the fact that the Division requested further information from Permittee after reviewing it. Thus it seems evident that the Division did in fact review this information and found it insufficient to substantiate diligence.

Petitioner also suggests that Permittee was not responsible for any delays; that any delay is attributable wholly to the Division. This contention is not supported by the facts. Between June 20, 1996 and December 4, 2002, Permittee proposed a number of alterations to the project. Permittee filed the most recent amended Petition for Extension of Time on October 17, 2005, for which the Division issued public notice on March 24, 2006. The Division then received protests on the petition. Because the currently proposed project bears little resemblance to the project for which Permit 16860C was issued, it is reasonable to expect that the Division's review would take some time. Petitioner has also not pointed to any delay on the Division's part in regards to Permittee's failure to complete the project during any of the previously authorized periods for construction or putting water to beneficial use. The fact that

the currently proposed project may be environmentally superior to the previously permitted project does not obviate the need for a demonstration of due diligence.

Petitioner contends that the Division likewise delayed completion of the required California Environmental Quality Act (CEQA) documentation. The Division notes in Order WR 2009-0064-DWR that the required CEQA document had not been completed as of 2005. (*Id*., para. 26.) It appears that Permittee first advised the Division on October 23, 2001, that due to changes in the project, the State Water Board would be lead agency for CEQA. (*Id*., para. 18.) On June 2, 2002, Permittee and the State Water Board entered into a Memorandum of Understanding (MOU) for completion of the CEQA document. (Petition, p. 8.) The document was prepared in accordance with a timeline appropriate for the size and scope of the proposed project before the State Water Board, using an environmental consultant selected by Permittee. Petitioner does not provide any additional information to support its contention that any delay in preparing the required CEQA document was due to the Division and not Permittee.

Petitioner expresses concern that the Division continues to rely upon its previous misinterpretation of a July 9, 2001 letter in violation of Order WR 2009-0052-EXEC. While the Division does indeed reference that letter in again denying Petitioner's petitions for extension of time and change, there does not appear to be any reliance by the Division on the previous erroneous interpretation. As stated in Order WR 2009-0052-EXEC, that letter "properly informed Permittees of the limited availability of water under their permits and the need to promptly complete their projects." The Division's continued reference to this fact in Order WR-2009-0064-DWR is therefore proper as part of the factual background for its decision. What Order WR 2009-0052-EXEC concluded was not proper was treating that letter as binding and creating a *de facto* rule denying all future time extensions. The Division does not rely on those improper conclusions in making its determination that satisfactory progress will not be made if an extension is granted.

Petitioner similarly points to the Division's continued reference to Order WR 96-002 in Order WR 2009-0064-DWR. As explained in Order WR 2009-0052-EXEC,

> the observations made by the State Water Board in Order WR 96-002 may be relevant to the due diligence issue, as well as to the issue whether issuance of an extension is in the public interest…. But Order WR 96-002 should not be treated as having established a rule that no extensions will be granted after 1996.

Simply because the Division's prior Order placed improper reliance on Order WR 96-002, it does not follow that Order WR 96-002 is wholly irrelevant to the matter at hand. Similar to the Division's treatment of the July 9, 2001 letter, the Division no longer relies on an erroneous interpretation of Order WR 96-002 in violation of Order WR 2009-0052-EXEC.

Order WR 2009-0052-EXEC directed the Division to explain "how the basic facts recited in its order relate to the ultimate conclusions regarding whether the requirements for an extension have been satisfied," and to "address any factual disputes raised by the petition." (*Id*., p.13.) Paragraphs 36-41 of Order WR 2009-0064-DWR express the Division's conclusions, as supported by the facts enunciated in the preceding 35 paragraphs, as to why Permittee has not shown good cause for the time extension pursuant to the requirements of section 844.

4.2 Other Issues

There still appears to be a dispute as to whether Permittee paid the required fees pursuant to the Condition 12 Settlement Agreement. This difference of opinion seems to be legal rather than factual. Permittee appears to have received notice of the required fees, even if not from the Division, and also appears to have paid what it believed to be the appropriate fee for its project. Petitioner and the Division disagree as to whether the appropriate fee for the project should be $1,350 or $2,100, based on the timing of Permittee's request to split its permits. Although included as factual background in Order WR 2009-0064-DWR, this disputed fact does not appear to form the basis for the Division's conclusions in Order WR 2009-0064-DWR. Therefore, the Division's failure to clearly resolve the fee payment issue is not a fatal defect in Order WR 2009-0064-DWR requiring reversal.

Likewise, there remains some dispute regarding the appropriate water duty for calculating Petitioner's needs. Resolution of this issue is also not necessary to find that Order WR 2009-0064-DWR is supported by the evidence.

Petitioner takes issue with paragraph 31 of Order WR 2009-0064-DWR, suggesting that the Division is ignoring recently issued approvals for several change petitions Petitioner submitted for other water rights it holds. Petitioner suggests that these approvals increase the place of use for Petitioner's water rights, necessitating full use under Permit 16860C. A careful reading of these approved change petitions contradicts Petitioner's contention. Those changes, as

approved by Orders WR 2009-0020-DWR, WR 2009-0021-DWR, and WR 2009-0022-DWR, are only applicable to Petitioner's other Permits/Licenses, not Permit 16860C. Approval of an extension of time for Permit 16860C is not a condition of those approvals, and those approvals do not affect the Division's determination regarding diligence.

Petitioner suggests that it was an error in law for Order WR 2009-0064-DWR to have been issued under Mr. Steven Herrera's signature. As Petitioner recognizes, State Water Board Resolution 2007-0057 grants the Deputy Director for Water Rights (Deputy Director) the authority to act on a request for an extension of time, and provides that the Deputy Director may redelegate that authority to the Assistant Deputy Director for Water Rights (Assistant Deputy Director). The Deputy Director has so redelegated this authority. Resolution 2007-0057 also authorizes the exercise by a senior member of the Division staff of authority which has been redelegated to the Assistant Deputy Director if the Assistant Deputy Director is absent or recused. The authority to act on a request for an extension of time has been specifically redelegated. It was therefore proper for Mr. Herrera to issue Order WR 2009-0064-DWR in the absence of the Assistant Deputy Director.

Petitioner also suggests that the authority to act on petitions for extension of time may not be delegated unless the total period of extension requested is less than 25 years, and that "only the [State Water Board] can issue an order approving or denying the petition." (Petition, p. 11.) Resolution 2007-0057 provides that "an extension may be *granted* only if (a) there are no competing projects that would be adversely affected; (b) there are no outstanding protests; and (c) the extension is for ten years or less and the period of the extension in combination with all extensions previously granted under delegated authority does not exceed fifteen years…." (Resolution 2007-0057, ¶ 4.2.7, italics added.) While Mr. Herrera could not have properly *granted* the petitions on the facts of this case, Petitioner is mistaken in suggesting that Mr. Herrera is without the authority to *deny* the petitions for extension of time and change at issue here as Order WR 2009-0064-DWR does.

Finally, Petitioner asserts that significant funds have been expended on this project since the previous time extension expired in 1996. While this may be true, the fact that Petitioner (or Permittee, as the case may be) has expended funds since 1996 in evaluating whether and how to change the initially permitted project does not support conclusions that the permittee has been diligent and will diligently pursue the project to completion if a time extension is granted.

The Water Code requires diligence in commencing and completing construction and putting water to beneficial use, not just diligence in evaluating whether and how to proceed. (See Water Code, §§ 1395-1398.) In addition, much of the expended funds went to preparation of a CEQA document for not only the petitions at issue here, but also for change petitions and a time extension petition for Petitioner's/Permittee's nine other rights. The nine rights combined total 11,856 af per annum, and the approved petitions combined the place of use and expanded the combined place of use from the existing 367 acres of vineyard and 1,452 acres of irrigation pasture and forage crop to 5,139 net acres of proposed vineyard within a gross area of 6,847 acres. Those approvals do not directly affect the causes for an extension of time for this particular permit. Although the Division should strive to make denials of time extension petitions for failure of diligence in a timely manner to avoid unnecessary expenditures by the permittee, here it is clear that much if not all of Permittee's/Petitioner's expenditures would have been necessary regardless of the timing of the Division's decision, based on the other change petitions pending at the time.

After fully considering all of Petitioner's contentions, Order WR 2009-0064-DWR is supported by substantial evidence and was appropriate and proper.

ORDER

IT IS HEREBY ORDERED THAT, for the foregoing reasons, Petitioner's petition for reconsideration is denied.

CERTIFICATION

The undersigned Clerk 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 16, 2010.

_____
Jeanine Townsend
Clerk to the Board