

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

DIVISION OF WATER RIGHTS

Order WR 2009-0019-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 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. The Permittee requested, and on December 28, 1982, received an extension of time to complete construction by December 31, 1985 and complete full beneficial use by December 31, 1986.
5. The Permittee requested, and on April 28, 1988, received an extension of time to complete construction by December 31, 1989 and complete full beneficial use by December 31, 1990.

6. The Permittee requested, and on January 13, 1992, received an extension of time to complete construction by December 31, 1994 and complete full beneficial use by December 31, 1995.
7. On May 14, 1992, the Division inspected the project covered by Permit 16860. The 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.
8. On September 20, 1994, the Division split Permit 16860 into three parts, Permits 16860A, 16860B, and 16860C.
9. 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."
10. 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. There is no record that the State Water Board requested the \$2,100 fee. Nonetheless, the Permittee is a signatory of the Agreement, but did not pay the \$2,100 fee. 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. Permit 16860 fits in this category, because the water right was under one ownership, only a portion of the right was licensed and a Continuation Permit was requested on June 20, 1996 for Permit 16860C.
11. 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.
12. On February 4, 1997, the 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.
13. On August 2, 1999, the Permittee's agent informed the Division that the Permittee would like to withdraw the request for storage in Ink Reservoir pursuant to Permit 16860C as its construction was no longer being considered.
14. In a petition dated May 17, 2000, the Permittee increased the proposed place of use to 4,611 acres, and identified the points of diversion listed below in the description of the 2001 Notice of Petition. The petition states that Ink Reservoir is no longer contemplated. Therefore, the amount of water remaining under the permit would be 3,355 af, if the petition to redistribute water to Buckhorn Flat Reservoir and enlarge Upper Bohn Reservoir is approved.
15. The Division issued a notice of change and time extension petitions for Permit 16860C on March 16, 2001. The notice states that Ink Reservoir has not been built, and no water has been used under the permit. The Permittee has abandoned the Ink Reservoir project. Instead, the

Permittee proposes to construct a 2,500 af Buckhorn Flat Reservoir, and to increase the existing Upper Bohn Reservoir by 1,000 af to a total capacity of 3,760 af. The petitions seek to redistribute 1,695 af from the previously proposed Ink Reservoir to Buckhorn Flat Reservoir. The petitions also request redistribution of 1,660 af from the previously proposed Ink Reservoir to the 2,760 af capacity Upper Bohn Reservoir. The remaining 1,995 af for Ink Reservoir is abandoned and the Ink Dam will no longer be a point of diversion.

The Permittee petitioned to add five new points of diversion and redirection as follows: (a) Putah Creek Pump No. 2, (2) Upper Bohn Dam No. 1, (3) Upper Bohn Dam No. 2 (4) Bucksnot Creek, and (5) Buckhorn Flat Reservoir. The Permittee also petitioned to enlarge the place of use from 1,380 acres to 4,611 acres.

Permittee requested an extension of time to December 31, 2005 to complete construction and full beneficial use of water.

16. 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.
17. 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. The Permittee did not respond to the notification, did not file an objection and did not provide a showing that a longer extension was appropriate.
18. On July 23, 2001, Division staff discussed the proposed alternate project described in the March 16, 2001 petition notice to build a 2,500 af Buckhorn Flat Reservoir and increase the existing Upper Bohn Reservoir by 1,000 af with the Permittee. During the meeting, the Permittee's abandonment of Ink Reservoir was also discussed. The Permittee was advised during the July 23, 2001 meeting 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 with 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. The 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.
19. The 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, the 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.

20. On June 27, 2002, the 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.
21. On July 19, 2002, Division management and legal representatives met with the 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 the 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. In this case, the five-year extension from 1995 to 2000 had already passed. The Permittee stated that water availability issues and watershed litigation clouded development during the life of the permit. However, there was an acknowledgment that the Permittee had built other major structures during the same timeframe for Permits 16860A and 16860B. The Division asked how much of the delay was due to the Division and/or staff and how much was due to the project proponent. The project proponent did not answer the question.
22. On August 30, 2002, the June 27, 2002 amendment to the Petition for Change was withdrawn. The letter states: "We understand that your office has expressed some concern, in connection with the Applicant's diligence in proceeding under this Application, in having another change of mind on its project as evidenced by its filing the amendment on June 27, 2002."
23. On October 1, 2002, Division staff confirmed the withdrawal of the 2002 petition, and expressed concern that all of the authorized sources of water under Permit 16860C had been withdrawn. The petitioner seeks to add three new sources to the permit. The proposed new points of diversion are all located in a different part of the Putah Creek watershed than the originally proposed points of diversion. 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 from Butcherknife and Bucksnot Creeks to the three new sources was requested.
24. On November 15, 2002, the Permittee provided documentation regarding water availability as it related to moving the points of diversion.
25. On December 27, 2002, Division staff memorialized a December 4, 2002 telephone conversation in which the Permittee agreed to utilize only one point of diversion on Putah Creek. All other points of diversion had been eliminated.
26. The Division's May 12, 2004 letter clarifies the project elements that the Permittee was seeking to develop. In 2002, the Permittee amended the petitions that were noticed in 2001. The Division's letter clarified that when Permit 16860 was split into Permit 16860A, 16860B and 16860C, there was an error in assigning the rate of diversion to offstream storage. Permit 16860 originally authorized offstream diversion at a rate of 50 cfs. When the permit was split, 20 cfs was assigned to Permit 16860A, and 20 cfs was assigned to Permit 16860B. Consequently, only 10 cfs remains for assignment to Permit 16860C, not the 20 cfs identified in the permit. Accordingly, Division staff proposed to correct the error in assigning the rate of offstream storage for Permit 16860C when the pending petitions were processed.

The project had been revised from the project identified in the 2001 notice and 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 the 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 the 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. (tit. 23, CCR § 844.) 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 the Permittee's rights during the time interval covered by Permit 16860C. The Permittee was requested to document whether (1) 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 the 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 the Permittee that the petitions could not be addressed until a CEQA document was completed. Moreover, the 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 the 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 the 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 the Permittee, which has not developed its project pursuant to Permit 16860C, a priority over other applicants and permittees with unperfected rights.

27. On July 7, 2004, the 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. The Permittee contends that the intended use was pasture when the permit was issued. The Permittee stated that the water requirement for the 785 acres of pasture is 4.5 acre-feet 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 the 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.
28. The requested ten-year time extension ended in 2005, prior to resolution of the protest on the 1995 time extension petition and 1997 and 2000 change petitions. At that time, a CEQA document had not yet been completed.

29. On February 9, 2005, the 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. No water has been used under the permit.
30. On March 4, 2005, the Division advised the Permittee that the petition was not acceptable because the \$850 DFG fee had not been submitted, the petition had not been served on DFG and the Environmental Questionnaire was not submitted.
31. On March 15, 2005, the Permittee disagreed with the Division's March 4, 2005 findings.
32. The Division's August 17, 2005 letter addressed the disputed items, but also required that the Permittee state the length of time extension requested and identify the year when full beneficial use will occur.
33. On October 17, 2005, the 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.
34. On March 24, 2006, public notice of the 2005 petition for extension of time and renote of change petition was issued. The Permittee sought the right to redistribute 1,660 af from the previously proposed Ink Reservoir to Upper Bohn Reservoir storage. The proposal to store water in Buckhorn Flat Reservoir had been abandoned. Thus, the Permittee requested to add one point of diversion and two points of rediversion. The place of use would be expanded to 4,611 acres. The Permittee requested an extension to December 31, 2015 to complete construction and beneficial use of water.
35. 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 the 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." (tit. 23 CCR, § 844.) However, the 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.
36. 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.
37. The Permittee's July 17, 2006 response to protest states that the Permittee had previously addressed the due diligence issue in its report on diligence to the State Water Board. The July 17 letter does not identify the date of the report on diligence to the State Water Board.
38. On August 14, 2007, Division staff met with the 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. Magoon plans to pull the non-popular grapes and replant with \$12.99 to \$39.99 a bottle varieties. Magoon 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.

39. On December 15, 2008, Permittee changed the ownership of the project to Langtry Farms LLC and Guenoc Winery, Inc.
40. The Progress Reports by Permittee have continuously documented that there has been no water diversion and use.
41. 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.
42. Permittee has not shown that due diligence has been exercised. Permittee indicated that uncertainty regarding water available pursuant to Condition 12 precluded development of Ink Reservoir. Moreover, there was adjudication litigation from 1990 through 1996 concerning Condition 12. The adjudication does not explain the failure to commence construction prior to 1990. Moreover, despite the ongoing adjudication, Magoon constructed the 200 af capacity Big Basin Reservoir (License 13414) in 1990 and the 560 af capacity Cassidy Reservoir (Permit 16861) in 1992.

In Order WR 96-002, the State Water Board stated that Condition 12 has been in effect for 39 years. Upstream permittees have had a reasonable time in which to develop and put water to reasonable beneficial use. (Order WR 96-002, p. 6. footnote 14.) Since the State Water Board has determined that adequate time was provided to construct facilities, failure to timely construct is construed as lack of due diligence. The Division notes that the State Water Board finding resulted from, and considered, the adjudication.

43. Permittee has not shown that failure to comply with previous time requirements has been occasioned by obstacles that could not be reasonably avoided. The Permittee offers the adjudication and pending litigation as the basis for failing to construct facilities. As noted previously, Permittee constructed Big Basin and Cassidy Reservoirs during the time period when the litigation was pending. Moreover, Order WR 96-002 did not find the adjudication to be an impediment to development. To the contrary, Order WR 96-002 states that Permittees have had a reasonable time in which to develop and put water to reasonable beneficial use.
44. 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 petitions, 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. 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 project.

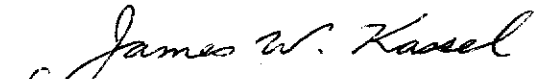
The Permittee was advised that only five-year extensions of time would be considered in this watershed due to the significant competition for the limited available water supply. Permittee did not file an objection. The five-year extension period ended in 2000. In 2000, Permittee had not resolved the DFG protest and a CEQA document had not been prepared for the petitions.

45. Permittee has previously informed the Division that it lacks funding for any project that does not involve the requested expansion in the place of use.
46. Permittee has not shown good cause for the time extension.

47. 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 watershed¹. 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. Allowing the Permittee to proceed would substantially reduce the amount of water available for appropriation and could mean that pending applications or requests for continuation permits would have to be denied. It is unfair to afford the Permittee, which has not developed a project under its rights and has abandoned the permitted project, a priority over other applicants and permittees with unperfected rights.
48. The Permittee has not constructed any water diversion facilities 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 the petition is 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


for Victoria A. Whitney
Deputy Director for Water Rights

Dated: **MAR 20 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 in Lake and Napa Counties upstream of Lake Berryessa .