GEORGE C. FOTINOS, AND OTHERS

ORDER GRANTING TIME EXTENSION,
DELETING PERMITTED SOURCE, AND
ADJUSTING RELATIVE PRIORITIES

PERMIT 17461 (APPLICATION 24379)
TWO UNNAMED STREAMS TRIBUTARY
TO THE NAPA RIVER

NAPA COUNTY

Order WR 88-26

DECEMBER 15, 1988

STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA
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ENVIRONMENTAL AFFAIRS AGENCY
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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit 17461 (Application 24379)	ORDER:	WR 88- 26
GEORGE C. FOTINOS, et al., Permittees and Petitioners.	SOURCE:	Two unnamed streams tributary to the Napa River
	COUNTY:	Napa

ORDER GRANTING PETITION FOR AN EXTENSION OF TIME, DELETING BUHMAN CREEK AS A PERMITTED SOURCE, AND ADJUSTING RELATIVE PRIORITIES

BY THE BOARD:

1.0 INTRODUCTION

The Board having initiated statutory revocation proceedings; the permittees having requested a hearing; the permittees having filed a Petition for Extension of Time; notice of hearing having been given; a hearing having been held on October 19, 1988 by the State Water Resources Control Board (Board); permittees having appeared and presented testimony and exhibits at the hearing; the evidence having been duly considered; the Board finds as follows:

2.0 PERMIT 17461

Application 24379 was filed on May 25, 1973 and the Board issued Permit 17461 on October 23, 1978. The permit authorizes diversion of 25 acre-feet per annum

to storage from September 1 of each year to June 1 of the succeeding year for purposes of irrigation, frost protection, recreation, and wildlife enhancement. One point of diversion is authoriied on each of two unnamed streams both tributary to the Napa River. The larger tributary is also known as Buhman Creek, and for purposes of this order, the larger tributary will be referred to as Buhman Creek. The smaller tributary will be referred to as the unnamed stream.

As originally issued, permit conditions 8 and 9 required the permittees to complete construction of the, project on or before December 1, 1981 and to demonstrate complete application of the water to the proposed uses on or before December 1, 1982.

3.0 BACKGROUND

The Board's staff inspected the proposed project on May 3 and May-26, 1983. The inspections revealed that no work had been started on the project and there was no evidence that the pennittees had exercised due diligence in pursuing the project. Consequently, Board staff recommended that the permit be revoked. However, after being advised of the death of one of the permittees, the Board determihed that good cause existed for an extension of time and on May 10, 1984 adopted an

order which granted the permittees a time extension (WR 1n). The order extended the time for completion of construction until December 1, 1985 and extended the time for making beneficial use of the water until December 1, 1986.

Board staff inspected the project for a second time on May 20, 1987. The inspection revealed that no work had been started on the project and there was no evidence that the permittees had exercised due diligence in pursuing the project. Again, Board staff recommended that the permit be revoked.

By letter dated January 5, 1988 (WR 1l), the permittees were advised to submit a request for revocation of the permit and to reapply for a new water right permit when and if they decide to construct the reservoir. By letter dated January 26, 1988 (WR 1k), the permittees stated that financial problems had prevented commencement of construction of the project and that financing for the project had finally been secured. The permittees also requested an extension of time to begin construction.

By letter dated February 16, 1988 (WR lj), the permittees were notified that lack of money was not a valid

reason for granting additional time to complete a project; however, forms were provided for filing a petition for an extension of time. The permittees were advised that statutory revocation procedures would be commenced if the Board did not receive the forms within 30 days.

By certified letter dated April 26; 1988 (WR li), the Board initiated statutory revocation procedures pursuant to Water Code Section 1410, et seq. By letter dated May 6, 1988 (WR lh), the permittees requested a hearing and informed the Board that they intended to start construction in May 1988. However, on August 11, 1988, the permittees contacted the Board to inform staff that they had applied for a county grading permit and that they would begin construction upon receipt of the permit (WR 1d). Board staff advised the permitteed that they were proceeding at their own risk since the time to complete construction had expired and revocation proceedings had begun. Further, the perrtiittees were advised that a Petition for Extension of Time had not been received as requested in the Board's letter dated February 16, 1988 (WR lj).

On August'25, 1988, the Board received a Petition for Extension of Time (WR le). On September 7 and 8, 1988,

the permittees contacted the Board to report that the reservoir had been constructed (WR lb and lc). Construction of the reservoir was confirmed by staff field inspection on September 14, 1988 (WR la). The irrigation system has not been completed yet.

4.0 HEARING **ISSUES**

The following issues were noticed for hearing on September 19, 1988:

"1. Should Permit 17461 (Application 24379) be revoked for failure to complete the project and put the water to beneficial use?

"2. Should the permittees be granted an extension of time to complete construction and put the water to beneficial use?

"3. If an extension of time is granted, to what dates should the time be extended?

"4. If an extension of time is granted, should the priority of Permit 17461 be changed relative to. the priorities of other applications, permits, and licenses which authorize the diversion of water from the same source of water and were filed or issued after May 25, 19731"

5.0 **APPLICABLE LAW**

Water Code Section 1410, et seq., applies to the revocation of permits. Section 1410(a) states:

"There shall be cause for revocation of a permit if the work is not commenced, prosecuted with due diligence, and completed or

the water applied to beneficial use as contemplated in the permit and in accordance with this division and the rules and regulations of the Board."

Title 23; California Code of Regulations Section 840, et seq., applies to &tensions of time. Section 844 states:

"An extension of time within which to complete an application, to commence or complete construction work or apply water to full beneficial use will be granted only upon such conditions as the board determines to be in the public interest and upon a showing to the board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that 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. The board may, in its discretion, require a hearing upon notice to the permittee and such other parties as the board may prescribe."

6.0 DELETION OF BUHMAN CREEK FROM PERMIT 17461

We find that in Buhmari Creek, water is available only during the rainy season and that water must be stored in order to be used during the irrigation season. There are numerous water users on Buhman Creek with rights which are junior to Permit 17461. These water users could be prejudiced by the permittees' development of the project at this time.

In the cover letter attached to the Notice of Intent to Appear, the permittees stated that they did not intend to use point of diversion number one from Buhman Creek (Permittees 2). Further, during the hearing, the permittees stipulated that point of diversion number one could be deleted from Permit 17461 and that Buhman Creek could be deleted as a source of water for Permit 17461. By deleting Buhman Creek as a source of water, any adverse impacts to the water users on Buhman Creek due to the permittees' development of the project at this time will be avoided. Therefore, point of diversion number one will be deleted from Permit 17461 and Buhman Creek will be deleted as a source of water for Permit 17461.

7.0 ADJUSTMENT OF WATER RIGHTS PRIORITIES

The Clos du Val Wine Company, Ltd. (Clos du Val) holds the only water right (Application 25561, Permit 17739) on the unnamed stream which is junior to Permit 17461. Clos du Val pursued its project diligently and complied with the terms of its permit.

When it is in the public interest, the Board is authorized to adjust the priorities of water rights. United States v. SWRCB (1986) 182 Cal.App.3d 82, 132, 227 Cal.Rptr. 161, 189; Water Code Section 1253.

We find that in the unnamed stream, water is available only during the rainy season and that water must be stored for use during the irrigation season. Further, there is not always enough water to satisfy the demands of all of the diverters from the unnamed stream. During the hearing, the permittees stipulated to Permit 17461 being made junior in priority to all existing priorities on the unnamed stream. Only Permit 17739 of Clos du Val would be affected by this change in priority. Because Clos du Val diligently pursued its project while the permittees did not, inadequate water is available for all rights in all years, and the permittees have agreed to accept a priority junior to that of Clos du Val, we find that it is in the public interest to adjust the relative priority of Permits 17461 and 17739.

8.0 **COMPLIANCE WITH CALIFORNIA ENVIRONMENTAL QUALITY ACT**

The revocation action, including the change in priority of Permit 17461, is exempt from the California Environmental Quality Act (CEQA) (Public Resources Code Section 21000, et seq.) because it is an enforcement action. 14 California Code of Regulations 15321. A negative declaration was prepared on Application 24379 pursuant to 14 CCR 15070, et seq., on July 7, 1978. A

second negative declaration is unnecessary for the Board's action in approving the time extension on the same project described in Application 24379 (Permit 17461) because the project will be reduced in scope and there will be no additional environmental impacts resulting from the project.

9.0 CONCLUSION

There appears to be cause to revoke the permit or to grant a time extension in this matter. The permittees exercised due diligence in pursuing the project only after the revocation proceedings had begun. The reasons given by the permittees for not starting construction earlier were a lack of finances to pursue the project, a death in the family, and temporary disability of one of the permittees. These reasons are not generally accepted as good cause for delay. 23 CCR 844. However, since the reservoir has been constructed, the permittees are now diligently pursuing the project, and the permittees have agreed to stipulations to hold harmless other water users (Sections 6.0 and 7.0), we find that it is in the public interest to grant a time extension in this matter with conditions implementing the stipulations'rather than to revoke the permit and require the permittees to reapply. More specifically, we conclude:

1. Permit 17461 should be amended to delete point of diversion number one and Buhman Creek as a source of water.

2. It is in the public interest to adjust the relative priority of Permit 17461 and 17739.

3. It is in the public interest to approve the Petition for Extension of Time.

ORDER

IT IS HEREBY ORDERED that:

1. Point of diversion number one listed in condition 2 shall be deleted from Permit 17461.

2. The unnamed stream which is also known as Buhman Creek shall be deleted from condition 1 as a source of water for Permit 17461;

3. Condition 16 shall be added to Permit 17461:

> This permit is junior, in priority to the appropriative water rights of Clos du Val Wine Company, Ltd., under Application 25561 (Permit 17739).

4. Condition 8 of Permit 17461 is amended to read as follows:

Said construction work shall be completed on or before December 1, 1990.

5. Condition 9 of Permit 17461 is amended to read as follows:

Complete application of the water to the proposed use shall be made on or before December 1, 1992.

6. The last sentence of Condition 5 of Permit 17461 is deleted (limiting diversion of water from Buhman Creek).

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on December 15, 1988.

AYE: W. Don Maughan
Darlene E. Ruiz
Edwin H. Finster
Eliseo M. Samaniego
Danny Walsh

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marche'
Administrative Assistant to the Board