

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2003 - 0003

In the Matter of
Permit 20821A (Application 30119A) of
**Alan Hardin Trust, Donald Hardin Trust,
and Jeanne Hardin Trust**

SOURCE: Three unnamed streams and Hardin Creek

COUNTY: Napa

ORDER REVOKING PERMIT 20821A

BY THE BOARD:

1.0 BACKGROUND

Wallace Hardin filed Application 30119 on April 28, 1992. On January 26, 1996, the Division of Water Rights (Division) of the State Water Resources Control Board (SWRCB) issued permit 20821 to Alan Hardin Trust, Donald Hardin Trust, and Jeanne Hardin Trust (permittees). By Order dated December 10, 1997, the Division split permit 20821 into two permits because 40 acres of the land in the place of use and a portion of the water right had been sold to Twiggy Lam. Permit 20821A belongs to the Hardins and Permit 20821B belongs to Twiggy Lam. Only Permit 20821A is the subject of this order.

Permit 20821A authorizes 196 acre-feet per annum to be collected in four 49 acre-foot capacity reservoirs from November 1 of each year to May 31 of the succeeding year. One of the reservoirs is an offstream reservoir, the other three are onstream reservoirs. Water can be diverted from the stream system to the offstream reservoir at a rate of 10 cubic feet per second. The purposes of use are stockwatering and recreation at the four proposed reservoirs and domestic use, frost protection, heat control, and irrigation on 246 acres.

Permit 20821A contains terms that have deadlines for completing construction and putting the water to full beneficial use. The time to complete construction ended on December 31, 1998. The time to complete full beneficial use of water ended on December 31, 1999.

On December 28, 1998, the permittees filed a Petition for Extension of Time in which they requested a ten-year time extension to construct their project and put the water to beneficial use. In the petition, Alan Hardin stated that construction and use of water were not completed within the time allotted in the permit because of lack of time and money. (DWR Permitting Team (DWR) Exhibit 1, p. 3; DWR Exhibit 3.) Further, in a letter to the Division dated May 29, 2001, Alan Hardin stated that construction had not been initiated because of lack of money. As of that date, he stated that he did not have money to proceed with the project. (*Ibid.*)

Permittees are required to submit annual progress reports on forms furnished by the SWRCB. The 1995, 1996, and 1997 Progress Reports by Permittee show that no construction has occurred and that no water has been put to beneficial use. (DWR Exhibit 7.) The permittees have not submitted any of the required progress reports since 1997. (DWR Exhibit 1, p. 3; DWR Exhibit 3.)

2.0 REVOCATION PROCEEDINGS

In reviewing a Petition for Extension of Time, Division staff must determine whether there is cause for extension of time in accordance with section 844 of title 23 of the California Code of Regulations. 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

(Italics added.)

Division staff determined that good cause did not exist to recommend that an extension of time be given to the permittees. (Reporter's Transcript (RT), p. 21.) Section 844 explicitly states that lack of finances is not good cause for delay. Because the permittees stated that the reason they needed an extension of time is that they did not have the time or money to develop the project authorized by Permit 20821A, and that they have done no work to construct the project or put the water to beneficial use, Division staff commenced revocation proceedings pursuant to Water Code section 1410, et seq., and title 23, California Code of Regulations section 850, et seq. (*Ibid.*) The statutory and regulatory provisions authorize revocation of permits if "work is not commenced, prosecuted with due diligence, and completed or the water applied to beneficial use as contemplated in the permit" (Water Code, § 1410, subd. (a)).

On July 9, 2001, the Chief of the Division issued a Notice of Proposed Revocation of Permit 20821A because the permittees failed to submit any information to show that (1) due diligence had been exercised since permit issuance; (2) failure to comply with previous time requirements had been caused by obstacles that could not reasonably be avoided; and (3) satisfactory progress would be made if a time extension was granted. (DWR Exhibit 3.)

Alan Hardin requested a hearing on the proposed revocation. A hearing was scheduled and a Notice of Hearing was issued October 10, 2002. The only issue contained in the Notice of Hearing is:

Should Permit 20821A (Application 30119A) be revoked in accordance with Water Code Section 1410 for failure to prosecute with due diligence the construction of the project and to put the water to beneficial use as contemplated in the permit?

On behalf of the permittees, only Donald Hardin complied with the requirements set forth in the Notice of Hearing regarding submittal of a Notice of Intent to Appear. He did not comply with the requirements to submit written testimony in advance and to serve copies of his Notice of Intent to Appear and exhibits on the list of persons to exchange information, including Division of Water Rights Permitting Team. (RT, pp. 6-11.) Neither Alan Hardin nor Jeanne Hardin complied with any of the pre-hearing submittal requirements. (RT, pp. 12-13.) Donald Hardin

and Alan Hardin attended the hearing that was held on November 4, 2002. Jeanne Hardin did not attend the hearing.

The testimony at the hearing established that good cause does not exist to authorize a time extension to the permittees. Neither Donald Hardin nor Alan Hardin contradicted or rebutted any of the facts set forth in the Notice of Proposed Revocation or any of the testimony given by the witness for the Division at the hearing. Although the permittees claim that they now have the money to proceed with constructing the project, they did not provide any proof at the hearing. The permittees have not secured any of the other permits required prior to commencing construction such as a Streambed Alteration Agreement from the Department of Fish and Game (permit condition 19) or an approved erosion control plan from Napa County (permit condition 20). (RT, p. 21.) The permittees have not submitted the designs for the totalizing flow meters or other devices to measure Hardin Creek diversions and stream bypass flows (permit condition 15). (*Ibid.*) The permittees have not submitted engineering plans or contracts for construction. (*Ibid.*)

The permittees claim that poor communication among family members is the cause of the lack of diligence in pursuing their project. (RT, pp. 24, 28.) The SWRCB finds that poor communication is not a valid excuse for lack of diligence because it is not an “obstacle which could not reasonably be avoided” nor is it a “condition incident to the enterprise” as set forth in section 844 of title 23 of the California Code of Regulation.

Section 844 also requires the SWRCB to consider the public interest in determining whether there is good cause to grant an extension of time to the permittees. The project authorized by Permit 20821A is located in the upper Putah Creek watershed. There is heavy competition for water in this watershed. (RT, p. 23; DWR Exhibit 1, pp. 4-5.) In 1990, the Solano County Water Agency, et al., filed a complaint in the Sacramento County Superior Court to adjudicate all of the water rights in the upper Putah Creek watershed. Negotiations among the parties resulted in the March 10, 1995 Condition 12 Settlement Agreement. (DWR Exhibit 1, pp. 4-5; DWR Exhibit 9.) Alan Hardin, Donald Hardin, and Jeanne Hardin signed the Settlement Agreement. (DWR Exhibit 10.) On February 27, 1996, the SWRCB adopted Order WR 96-002

that directed the Chief of the Division to modify the conditions of permits and licenses subject to the Settlement Agreement. On March 1, 1996, the court approved the Settlement Agreement. (DWR Exhibit 11.)

The Settlement Agreement establishes a limited quantity of water that can be used in the upper Putah Creek watershed. Once the limited supply is exhausted, no further appropriative water rights can be issued. If existing permittees and licensees do not maintain their water rights, the amount of water no longer used pursuant to the revoked permit or license becomes part of the reservation of water for the county in which the place of use for the permit or license was located. Any water included in the reservation can be assigned to new users. The Watermaster is responsible for tracking the amount of water available under the reservation. As of March 30, 2001, the Watermaster reported that the Napa County reservation of water for new appropriative water rights is 415 acre-feet. There are applications on file for a total of 2808.8 acre-feet. (DWR Exhibit 1, p. 5; DWR Exhibit 9.)

The Division reviews whether permittees are exercising due diligence to ensure that the very limited available water resources are assigned to those persons that diligently develop their projects. In reviewing the permittees' project, the Division determined that no diligence has been shown. We agree.

3.0 CONCLUSION

The SWRCB finds and concludes that:

1. The permittees have failed to exercise due diligence to commence construction and put the water to beneficial use as authorized by Permit 20821A.

2. Failure to comply with the completion dates set forth in Permit 20821A was not caused by obstacles that could not reasonably be avoided. Lack of time and money is not a satisfactory excuse for failure to diligently pursue the project authorized by Permit 20821A.

3. The permittees did not offer any evidence at the hearing to show that satisfactory progress would be made if a time extension were granted.

4. The public policy of maximizing beneficial use of water in an area with very limited available water resources is furthered by making the water that would have been used under Permit 20821A available to those persons next in priority to develop their projects in accordance with the Settlement Agreement.

5. Permit 20821A should be revoked.

ORDER

IT IS HEREBY ORDERED that Permit 20821A is revoked.

CERTIFICATION

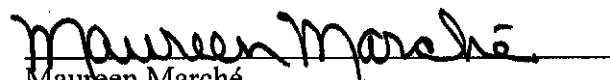
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on February 19, 2003.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz
Gary M. Carlton

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Clerk to the Board