

Oregon Water Resources Department
Water Right Services Division

Application for Extension of Time

In the Matter of the Application for an Extension of Time)	PROPOSED
for Permit G-13629, Water Right Application G-14813, in)	FINAL
the name of NuVista, LP)	ORDER

Permit Information

Application:	G-14813
Permit:	G-13629
Basin:	14 – Klamath / Watermaster District 17
Date of Priority:	July 31, 1998
Source of Water:	three wells in Sprague River Basin
Purpose or Use:	Irrigation of 613.9 acres, being 587.4 acres from Wells 1 and 2, and 26.5 from Well 3
Maximum Rate:	7.67 cubic feet per second (cfs), being 6.24 cfs from Well 1 and 6.68 cfs from Well 2, but not to exceed a maximum cumulative total of 7.34 cfs from Wells 1 and 2, and 0.33 cfs from Well 3

Please read this Proposed Final Order in its entirety as it contains additional conditions not included in the original permit.

In Summary, the Department proposes to:

- Grant an extension of time to apply water to full beneficial use from October 1, 2003, to October 1, 2022¹.
- Make the extension subject to certain conditions set forth below.

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.630 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315.

¹Pursuant to ORS 537.630(5), upon the completion of beneficial use of water allowed under the permit, the permittee shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permittee shall submit a map of the survey and a new or revised claim of beneficial use as deemed appropriate by the Department.

ACRONYM QUICK REFERENCE

Agent – Hollie Cannon
Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
Well 1 – KLAM 1611
Well 2 – KLAM 1618
Well 3 – KLAM 1628
cfs - cubic feet per second

AUTHORITY

Generally, see ORS 537.630 and OAR Chapter 690 Division 315.

ORS 537.630(2) provides in pertinent part that the Oregon Water Resources Department (Department) for good cause shown shall order and allow an extension of time within which irrigation or other works shall be completed or the right perfected. In determining the extension, the Department shall give due weight to the considerations described under ORS 539.010(5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right.

ORS 539.010(5) instructs the Director to consider: the cost of the appropriation and application of the water to a beneficial purpose; the good faith of the appropriator; the market for water or power to be supplied; the present demands therefor; and the income or use that may be required to provide fair and reasonable returns upon the investment.

OAR 690-315-0040 provides that in order to approve an application for an extension of time to complete construction or apply water to full beneficial use, the Department shall make the findings in OAR 690-315-0040(1) including a finding that there is “good cause” to approve the extension. OAR 690-315-0040(2)-(4) contains the factors that the Department must consider to make findings that support a “good cause” determination.

OAR 690-315-0050(5) states that extension orders may include, but are not limited to, any condition or provision needed to: ensure future diligence; mitigate the effects of the subsequent development on competing demands on the resource; and periodically document the continued need for the permit.

FINDINGS OF FACT

1. On April 16, 1999, Permit G-13629 was issued by the Department. The permit authorizes the use of up to 7.67 cfs of water from three wells in Sprague River Basin for irrigation use on 613.9 acres. The permit specified actual construction of the well to begin by April, 2000, and complete application of water was to be made on or before October 1, 2003.

2. On June 24, 2021, an assignment by proof from Clyde & Linda Collins, to, NuVista, LP, was recorded in the records of the Water Resources Department.
3. On August 11, 2021, the permit holder, NuVista, LP, submitted an "Application for Extension of Time" (Application) to the Department, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-13629 be extended from October 1, 2003, to October 1, 2023. This is the first permit extension requested for Permit G-13629.
4. On August 31, 2021, notification of the Application for Permit G-13629 was published in the Department's Public Notice. No public comments were received regarding the Application.
5. On September 13, 2021, the Department requested by email additional information and clarification of the information provided in the Application.
6. On April 3, 2023, the permit holder submitted an Amendment to the Application. The amendment was to provide an update on acres irrigated to date, the rate appropriated from each well, the work accomplished during the original development timeline under the permit, and to request the extension be provide to October 1, 2025.

Review Criteria [OAR 690-315-0040]

In order to approve an Application for an Extension of Time to complete construction and/or apply water to full beneficial use pursuant to ORS 537.230 or 537.630, or to begin construction, pursuant to ORS 537.248, the Department must make the findings in OAR 690-315-0040(1)(a) – (d).

Complete Extension of Time Application [OAR 690-315-0040(1)(a)]

7. On August 11, 2021, the Department received a completed Application and the fee specified in ORS 536.050 from the permit holder.

Start of Construction [OAR 690-315-0040(1)(b) and 690-315-0040(5)]

8. Construction of the wells began prior to permit issuance.
9. According to the well log received by the Department on January 30, 1962, construction of KLAM 1628 (Well 3) began November 3, 1961.

Based on Finding of Fact (FOF) 10 and 11, the Department has determined that the prosecution of the construction of the well began prior to April, 2000.

Good Cause [OAR 690-315-0040(1)(d)]

The Department must find that there is "good cause" to approve the extension. In making a "good cause" finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).

Reasonable Diligence of the Appropriator [OAR 690-315-0040(2)(a)]

In order to make a finding of "good cause" to approve the extension, the Department shall consider whether the applicant has demonstrated "reasonable diligence" in previous performance under the permit. OAR 690-315-0040(2)(a). In determining "reasonable diligence", the Department shall consider, but is not limited to, the following factors: a) The amount of construction completed within the time allowed in the permit or previous extension; b) The amount of beneficial use made of the water during the permit or previous extension time limits; c) Water right holder conformance with the permit or previous extension conditions; and d) Financial investments made toward developing the beneficial use of water.

Amount of Construction [OAR 690-315-0040(3)(a)]

The amount of construction completed within the time allowed in the permit.²

10. Construction of the KLAM 1611 (Well 1), KLAM 1618 (Well 2) and Well 3 began prior to permit issuance.
11. Work was accomplished during the original development time frame under Permit G-13629 is presumed to include construction of ditches, installation of wheel lines and a pivot.
12. Since October 1, 2003, a meter has been installed.

The Application provides evidence of progress of physical work made towards completion of the water system, during the original development timeline authorized by the permit. However, the Application does not provide evidence of additional work towards the development of the beneficial use in the nearly 20 years since the date for complete application of water.

Compliance with Conditions [OAR 690-315-0040(3)(c)]

The water right permit holder's conformance with the permit conditions.

13. Certificate of Water Right 72180, shares the same three Points of Appropriation as Permit G-13629, and contains the condition that a meter or measuring device be maintained. Based on this, it is clear that a meter was installed prior to October 1, 2003.
14. Though Certificate 72180 identifies that a meter would have been installed, it is unclear as to when these meter lost functionality.
15. The Department has considered the permit holder's compliance with conditions, and has identified the following concern. The record does is unclear that a meter or other suitable measuring device has been installed by October 1, 2003.

² "Actual Construction" is defined in OAR 690-315-0020(3)(d)(A)and(B) as physical work performed toward completion of the water system which demonstrates the water right permit holder's good faith and intention to complete the project with reasonable diligence. Actual construction does not include planning a diversion system, formulating a business plan, securing financing, letting contracts, purchasing but not installing equipment, surveying, clearing land or planting crops.

Based on FOF 13, 14, and 15, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-13629:

- " Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director."

In order to legally perfect the use of water under this permit, the permit holder must demonstrate that all conditions of the permit have been satisfied.

Beneficial Use of Water [OAR 690-315-0040(3)(b)]

The amount of beneficial use made of the water during the permit time limits.

16. According to the amendment to the Application, a maximum rate of 3.93 cfs of water has been appropriated, being a maximum of 3.6 cfs from Well 1 and Well 2, for irrigation of 291.6 acres and 0.33 cfs from Well 3 for irrigation of 26.5 acres by October 1, 2003. No additional irrigation has been developed since 2003.
17. According to email correspondence on February 21, 2023, from Hollie Cannon, agent for the permit holder, approximately 292 acres had been irrigated, being approximately 192 acres of primary irrigation, and 100 acres of supplemental irrigation.

Based on FOF 16, and 17, the Department has determined that a maximum of 291.6 acres have been irrigated.

Financial Investments to Appropriate and Apply Water to a Beneficial Purpose [OAR 690-315-0040(2)(b),(3)(d),(4)(d)]

18. According to the amendment to the Application, the actual costs for development of the permit are unknown and not estimated. The Application identifies \$32,750 for the construction of Well 2 and Well 3, and \$3,500 for the installation of replacement flow meters to replace the existing flow meters that are non-functional, but does not provide a cost to construct Well 1, or the cost of any of the water system.
19. No investment in the development of additional acres or additional rate has been made since at least 2003.

The Department has determined that the permit holder had made an investment, however, recent investments made have only been to install replacement meter and no additional investment in the development of the place of use or rate of appropriation has occurred in nearly 20 years.

Reasonable Diligence of the Appropriator [OAR 690-315-0040(2)(a)]

The Application provides evidence that work has been accomplished towards completion of the water system; the permit holder has not demonstrated compliance with permit conditions, a financial investment has been made, and; beneficial use of water has not been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit G-13629, enough to allow for a limited extension of time to

demonstrate compliance with all conditions of the permit. However, since no additional development of the authorized place of use or authorized rate of appropriation in nearly 20 years, the Department has determined the applicant has not demonstrated diligence sufficient to allow an extension of time to allow additional development additional beneficial use beyond what was irrigated as of October 1, 2003.

The Market and Present Demands for Water /OAR 690-315-0040(4)(a-f)

The Department's determinations of market and present demand for water or power to be supplied shall consider the requirements set forth under OAR 690-315-0040(4)(a-f). In accordance with OAR 690-315-0040(4), the Department shall consider, but is not limited to, the following factors when determining the market and the present demand for water or power to be supplied:

- *(a) The amount of water available to satisfy other affected water rights and scenic waterway flows;*
- *(b) Special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d);*
- *(c) The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife;*
- *(d) Economic investment in the project to date;*
- *(e) Other economic interests dependent on completion of the project; and*
- *(f) Other factors relevant to the determination of the market and present demands for water and power.*

OAR 690-315-0040(4)(a)

The amount of water available to satisfy other affected water rights and scenic waterway flows.

20. A review of the amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit G-13629; furthermore, water availability for other affected water rights and scenic waterway flows after the permit was issued is determined when an Application for a new water right is submitted.

OAR 690-315-0040(4)(b)

Special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d).

21. The points of appropriation for Permit G-13629, located within the Sprague River Basin, is not located within a limited or critical groundwater area.
22. Sprague River is located above Klamath Scenic Waterway.
23. The points of appropriation are not in an area listed by the Department of Environmental Quality as a water quality limited stream.

OAR 690-315-0040(4)(c)

The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife.

24. Sprague River is located within an area ranked "high" for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife.

OAR 690-315-0040(4)(d)

Economic interests dependent on completion of the project.

25. An approximate total of \$36,250 has been invested in the project.

OAR 690-315-0040(4)(e)

Other economic interests dependent on completion of the project.

26. Other economic interests dependent on completion of the project have not been identified.

OAR 690-315-0040(4)(f)

Other factors relevant to the determination of the market and present demand for water and power.

27. No other factors relevant to the determination of the market and present demand for water and power have been identified.

Fair Return Upon Investment [OAR 690-315-0040(2)(f)]

28. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date.

Other Governmental Requirements [OAR 690-315-0040(2)(g)]

29. Delay in the development of this project was not caused by any other governmental requirements.

Unforeseen Events [OAR 690-315-0040(2)(h)]

30. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-13629.

Denial of the Extension Will Result in Undue Hardship [OAR 690-315-0040(2)(i)]

31. The Application asserts a denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs.

Good Faith of the Appropriator [OAR 690-315-0040(2)(c)]

32. The Application provides evidence of good faith of the appropriator under Permit G-13629.

Based on FOF 8, 9, 10, 11, 15, 16, 18, and 25, the Department has determined that the applicant has shown good faith and reasonable diligence, enough to allow for an extension of time to demonstrate compliance with the condition requiring the installation of a meter, which occurred in June 2022. Based on FOF 16, and 19, the Department has determined that the applicant has not shown reasonable diligence in the development of the authorized place of use since at least 2003.

Duration of Extension [OAR 690-315-0040(1)(c)]

Under OAR 690-315-0040(1)(c), in order to approve an extension of time for water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

33. As of April 2, 2023, the remaining work to be completed consists of installing a new pivot to irrigate an additional 55.2 acres; and applying water to full beneficial use.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2025, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-13629 is not reasonable because allowing additional development of irrigated lane nearly 20 years after the completion date of the permit, when no additional development has occurred in nearly 20 years, is not reasonable.

Good Cause [OAR 690-315-0040(1)(d)]

The Department must find that there is "good cause" to approve the extension. In making a "good cause" finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).

The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and fair and reasonable return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the permit holder had no control, whether denial of the extension will result in undue hardship to the applicant and whether there are no other reasonable alternatives for meeting water use needs, any other factors relevant to a determination of good cause, and has determined that the applicant has shown that good cause exists for an extension of time to October 1, 2022, to allow for the demonstration of compliance with permit conditions, and to apply water to beneficial use pursuant to OAR 690-315-0040(1)(d).

LIMITATIONS AND CONDITIONS

1. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to mitigate the effects of the subsequent development on competing demands on the resource. The Department determined the need to place a "Development Limitation" on this extension of time in order to ensure no additional development occurs under this permit. This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary due to no additional work having been accomplished since 2003.

CONCLUSIONS OF LAW

1. The applicant has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The applicant has complied with the construction timeline requirements to begin actual construction as required by ORS 537.630, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. Based on Finding of Facts 8, through 33, application of water to beneficial use can be accomplished by October 1, 2022, as required by OAR 690-315-0040(1)(c).
4. The applicant can complete the project within the time period requested for the extension on the project but the extension is conditioned to mitigate the effects of subsequent development on competing demands on the resource, and is granted only for the reasonable time necessary to complete water development and apply water to beneficial use. OAR 690-315-0050(5).
5. The applicant has demonstrated good cause for the limited extension. OAR 690-315-0050(5).

PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department proposes to issue an order to:

Extend the time to apply water to beneficial use under Permit G-13629 from October 1, 2003, to October 1, 2023.

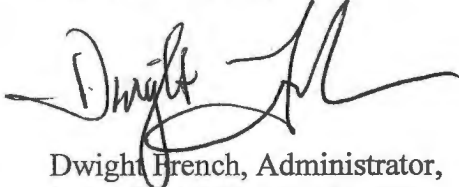
Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Development Limitation Condition**
The use of water under this permit is limited to no more than 291.6 acres of irrigation developed prior to October 1, 2003, and the appropriate rate associated with the number

of acres irrigated from each well as identified in the required Claim of Beneficial Use yet to be submitted, and allowed by the permit.

DATED: July 11, 2023



Dwight French, Administrator,
Water Right Services Division

*If you have any questions,
please check the information
box on the last page for the
appropriate names and
phone numbers.*

Protests

Pursuant to OAR 690-315-0060(1), the applicant or any other person adversely affected or aggrieved by the proposed final order may submit a written protest to the proposed final order. Protests must be received by the Water Resources Department no later than **August 25, 2023**, at this address: Oregon Water Resources Department, Water Right Services Division, 725 Summer St NE, Suite A, Salem, OR 97301-1266. Protests may not be submitted by electronic mail. OAR 690-002-0025(3).

Protests must be in writing and include all of the following:

- The name, address, and telephone number of the protestant
- A detailed description of the protestant's interest in the proposed final order, and, if the protestant claims to represent the public interest, a precise statement of the public interest represented
- A detailed description of how the action proposed in the proposed final order would impair or be detrimental to the protestant's interest
- A detailed description of how the proposed final order is in error or deficient, and how to correct the alleged error or deficiency
- If the applicant protests, a statement of whether a hearing is requested
- Citation of legal authority supporting the protestant, if known
- Proof of service of the protest on the water right permit holder, if protestant is other than the water right permit holder, and
- If you are the applicant, the protest fee of \$480 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$950 required by ORS 536.050.

Within 60 days after the close of the period for requesting a contested case hearing, the Director shall either issue a final order on the extension request, or schedule a contested case hearing if a protest has been submitted, and, upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or, the applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests. The

hearing will be conducted as provided in Oregon Revised Statutes (ORS) Chapter 183, and Oregon Administrative Rules (OAR) 137-003-0501 to 137-003-0700.

If the applicant does not request a hearing within 30 days after the close of the protest period, or if the request for a hearing is withdrawn, or the Department or the administrative law judge is notified that the protestant will not appear, or the protestant fails to appear, at a scheduled hearing, the Director may issue a Final Order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default.

A party may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 137-003-0555, an agency representative may represent a partnership, corporation, association, governmental subdivision or public or private organization if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

Notice Regarding Servicemembers: Active-duty service members have a right to stay proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-8260, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

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- If you have questions about statements contained in this document, please contact Jeffrey D. Pierceall at 503- 979-3213.
 - If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at (503) 979-9160.
 - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0900.
 - Address any correspondence to : Water Right Services Division
725 Summer St NE, Suite A
Salem, OR 97301-1266
Fax: 503-986-0901
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