

**Oregon Water Resources Department
Water Right Services Division**

Application for Extension of Time

In the Matter of the Application for an Extension of Time for	)	PROPOSED
Permit G-15381, Water Right Application G-15187, in the	)	FINAL ORDER
name of James Wolff	)	TO DENY

Permit Information

Application:	G-15187
Permit:	G-15381
Basin:	16 – Umpqua / Watermaster District 21
Date of Priority:	July 11, 2000
Source of Water:	two wells, within the Currin Creek Basin
Purpose or Use:	nursery operations on 18.42 acres
Maximum Rate:	0.891 cubic foot per second (cfs), being 0.67 cfs from Well #1 and 0.824 cfs from Well #2

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.

In Summary, the Department proposes to:

- Deny an extension of time to apply water to full beneficial use from October 30, 2018, to October 1, 2028.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
Well 1 – CLAC 14538
Well 2 – not constructed
cfs – cubic foot 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.

FINDINGS OF FACT

1. On April 3, 2003, Permit G-15381 was issued by the Department. The permit authorizes the use of up to 0.891 cfs of water from two wells, within the Currin Creek Basin, being 0.67 cfs from Well #1 and 0.824 cfs from Well #2, for nursery operations on 18.42 acres. The permit specified complete application of water was to be made on or before October 1, 2007.
2. On November 6, 2014, an assignment by proof from Rene J. Huurman, to James Wolff, was recorded in the records of the Water Resources Department.
3. On January 30, 2006, a Claim of Beneficial Use was submitted, indicating all 18.42 acres had been developed for nursery operation from one well.
4. One prior permit extension has been granted for Permit G-15381. The Final Order on Extension of Time, issued February 13, 2015, resulted in the completion dates for

construction and full application of water being extended from October 1, 2007, to October 1, October 30, 2018.

5. On April 7, 2023, the permit holder 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-15381 be extended from October 30, 2018, to October 1, 2028.
6. On April 25, 2023, notification of the Application for Extension of Time for G-15381 was published in the Department's Public Notice. No public comments were received regarding the extension application.

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 April 7, 2023, 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 well began prior to permit issuance.
9. According to the well log received by the Department on December 5, 1978, construction of CLAC 14538 (Well 1) began November 10, 1978.

Based on Finding of Fact (FOF) 8, and 9, the Department has determined that the prosecution of the construction of the well began prior to October 1, 2007.

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 previous extension.¹

10. During the most recent extension period, being from October 1, 2007, to October 1, October 30, 2018, no additional construction or development occurred.

The Application does not provide evidence of progress of physical work made towards completion of the water system.

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

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

11. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns for Well 1.

The Department has determined that the permit holder has demonstrated compliance with permit conditions for Well 1 as required by Permit G-15381.

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

The amount of beneficial use made of the water during the permit or previous extension conditions.

12. The Application asserts a maximum rate of .067 cfs of water has been appropriated from the Well 1 for nursery operations on 18.42 acres.
13. No water has been appropriated from Well 2.
14. The Application indicates that 18.42 acres of nursery operation use occurred under the permit between 2003 and 2008, and no use has occurred between 2008, and 2022.
15. According to the Application, delay in full beneficial use was due in part to the previous owner filed for bankruptcy and the bank took possession of the property in 2008. Between 2008, to 2014, removal of irrigation infrastructure and vandalism of the site occurred. Since acquiring the property in 2014, a fire in one of the buildings on the property and litigation pertaining to the fire.

Beneficial use of water from Well 1 has been demonstrated under this permit as all permit conditions were satisfied by October 30, 2018.

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

¹ "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.

16. The Application identifies an investment of approximately \$25,000 in the development of the authorized use. This investment occurred prior to October 1, 2008.
17. The Application identifies expenditures to clean the site from the vandalism that occurred, and investments toward conversion of buildings and constructing corrals.

Based on FOF 16, and 17, the Department has determined that an investment has been made in the development of the authorized use, however no additional investment towards the development of the authorized water use has occurred since at least 2008. Though investments have been made to clean the property and to convert the property to current needs, these investments were not towards additional development of the use authorized by the permit.

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

The Application does not provide evidence of progress towards completion of the water system during the most recent extended time period, being October 1, 2007, to October 30, 2018; the permit holder has demonstrated compliance with all permit conditions for Well 1, and; beneficial use has been demonstrated from Well 1. The Department has determined the applicant has not demonstrated the minimum necessary for the Department to find reasonable diligence towards complete application of water to a beneficial use.

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.

18. 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-15381; 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).

19. The points of appropriation for Permit G-15381, located within the Currin Creek Basin, are not located within a limited or critical groundwater area.
20. Currin Creek and tributaries have been withdrawn from future appropriation by Special Order Volume 7, Page 71, issued September 22, 1950.
21. Currin Creek is located above Clackamas Scenic Waterway.
22. 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.

23. Currin Creek 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.

24. An approximate total of \$25,000 has been invested in the project. No investment towards additional development has occurred during the most recent extension of time period.

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

Other economic interests dependent on completion of the project.

25. The Application asserts other economic interests as manufacturers, suppliers and outside contractors to which business would be given by continued operation.

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

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

26. 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)]

27. 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)]

28. Delay in the development of this project was caused by any other governmental requirements.

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

29. Unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-15381, in that clean-up from vandalism that occurred prior to acquiring the property; and a fire and resulting litigation that occurred.

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

30. A denial of the extension would not result in undue hardship.

The Department has determined that though additional development of the permit will not be authorized with the denial of this extension of time, the investment made in the development of the permit prior to October 30, 2018, could be maintained upon submittal of a Claim of Beneficial Use detailing the development of the permit prior to the current permit holder of record acquiring the property.

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

31. The Application does not provide evidence of good faith of the appropriator under Permit G-15381.

Based on Findings of Fact 10, 13, 16, and 17, the Department finds that the Applicant has not demonstrated good faith in previous performance during the most recent extension of time period, being October 1, 2007, to October 30, 2018.

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.

32. As of April 7, 2023, the Application identifies the remaining work to be completed consists of completing construction of the water system, including the construction of Well 2, meeting all permit conditions, and applying water to full beneficial use.

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 not shown that good cause exists for an extension of time to apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

CONCLUSIONS OF LAW

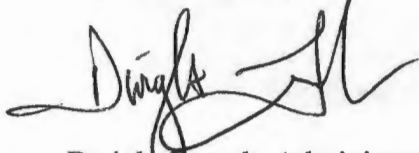
1. The permit holder has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The permit holder has complied with the time allowed for construction work under the permit pursuant to ORS 537.630 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. The Application established that there has been no additional construction, no additional financial investment, and no additional beneficial use was developed; and reasonable diligence toward developing the project has not been demonstrated during the most recent extension of time period, being 2007, to October 30, 2018. The permit holder has not shown that good cause exists for an extension of time apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

PROPOSED ORDER

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

Deny the time to apply water to beneficial use under Permit G-15381 from October 30, 2018, to October 1, 2028.

DATED: July 11, 2023



Dwight Branch, 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

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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