

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
Permit G-17103, Water Right Application G-17535, in the)
name of U.S. Bank National Association, as custodian/trustee)
for Federal Agricultural Mortgage Program)

**PROPOSED
FINAL ORDER
TO DENY**

Permit Information

Application: G-17535
Permit: G-17103
Basin: 7 – Umatilla / Watermaster District 21
Date of Priority: February 15, 2012
Source of Water: North Well in China Creek Basin and South Well in Eightmile
Canyon Basin
Purpose or Use: agriculturee uses, irrigation of 685.7 acres
Maximum Rate: 5.57 cubic feet per second (cfs)

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 complete construction of the water system from December 6, 2018, to October 1, 2033.
- Deny an extension of time to apply water to full beneficial use from December 6, 2016, to October 1, 2033.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
South Well – GILL 50842 (Start Card 1032659)
FOF – Finding of Fact
PFO – Proposed Final Order
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.

FINDINGS OF FACT

1. On December 6, 2013, Permit G-17103 was issued by the Department. The permit authorizes the use of up to 5.57 cfs of water from North Well in China Creek Basin and South Well in Eightmile Canyon Basin for agriculturee uses, irrigation of 685.7 acres. The permit specified completion of construction and complete application of water was to be made within five years from the date of permit issuance, being December 6, 2016.
2. On March 7, 2023, an assignment by proof from Jerry Leslie, Alkali Farms Corporation, to U.S. Bank National Association, as custodian/trustee for Federal Agricultural Mortgage Program was recorded in the records of the Water Resources Department.
3. On February 28, 2023, Kirk Maag, agent for the permit holder submitted an “Application for Extension of Time” (Application) to the Department, requesting both the time to complete construction of the water system and the time to apply water to full beneficial use under the terms and conditions of Permit G-17103 be extended from December 6, 2016, to October 1, 2033. This is the first permit extension requested for G-17103.

4. On March 28, 2023, notification of the Application for Extension of Time for G-17103 was published in the Department's Public Notice. No public comments were received regarding the extension application.
5. On February June 2, 2023, the Agent for the permit holder submitted additional information to supplement their Application for Extension of Time. The additional information included information about the well log and temporary abandonment status of the well.

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)]

6. On February 28, 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)]

7. According to the well log received by the Department on June 2, 2023, construction of GILL 50842 (South Well) began October 26, 2016. South Well has been partially back filled and has been temporarily abandoned. South Well is not complete.

Based on Finding of Fact (FOF) 7, the Department has determined that the prosecution of the construction of the well began prior to October 1, December 6, 2016.

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 or previous extension.¹

8. No additional work beyond beginning construction of South Well was accomplished during the original development time frame under Permit G-17103.
9. Since December 6, 2016, no additional work has been accomplished.

The Department has determined that though construction of South Well began within the time required by the permit, South Well has not been completed, and has been partially back filled and temporarily abandoned.

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

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

10. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the record does not show that a meter or other suitable measuring device has been installed, (2) the required March static water level measurements have not been received by the Department, (3) a dedicated measuring tube has not been installed, (4) annual reports of the amount of water used each month have not been received by the Department, and (5) South Well has not been completed to acquire water from a single aquifer within the Columbia River Basalt Group. The Department recognizes that it is the intent of the permit holder to comply with all permit conditions at the time the conditions become applicable.

Based on FOF 10, the Department has determined that the permit holder has not demonstrated compliance with permit conditions as required by Permit G-17103.

Failure to comply with permit conditions constitutes illegal use of water. Beneficial use of water under this permit, therefore, has not yet been demonstrated. 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 or previous extension conditions.

11. No water has been appropriated from any well under this permit.

Based on FOF 11, the Department has determined beneficial use of water has not yet been demonstrated under this permit because no water has been appropriated and not all permit conditions were satisfied by December 6, 2016.

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.

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

12. An investment of \$795,499, which is approximately 20 percent of the total projected cost for complete development of this project, has been made. An additional \$3,230,000 investment is estimated for the completion of this project.

Based on FOF 12, the Department has determined that the permit holder had made an investment, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

The Application provides evidence of progress towards completion of the water system; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use has not been demonstrated. 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.

13. 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-17103; 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).

14. The points of appropriation for Permit G-17103, located within the China Creek and Eightmile Canyon Basin, are not located within a limited or critical groundwater area.
15. China Creek and Eightmile Canyon are not located within or above any state or federal scenic waterway.
16. 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.

17. China Creek and Eightmile Canyon are located within an area ranked "low" 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.

18. An approximate total of \$795,499 has been invested in the project.

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

Other economic interests dependent on completion of the project.

19. The Application did not identify economic interests other than those of the applicant's that may be dependent on completion of the project.

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

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

20. 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)]

21. 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)]

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

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

23. Unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-17103, in that the serious health issues and death of one of the original permit holders delayed completion of the project.
24. The Application also identifies financial distress of the original permit holder and the COVID-19 Pandemic as additional unforeseen events. The financial distress resulted in a foreclosure in May of 2021.

The Department does not consider the COVID-19 Pandemic as an unforeseen event which delayed the development of the authorized use under the permit because the permit completion date was prior to the outbreak of the pandemic.

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

25. According to the Application, denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs. The Application identifies the value of the property with the appurtenant water right would result in a higher selling price, that would otherwise be possible. The potential reduced value of the underlying property could result in one or more creditors receiving less compensation.

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

26. The Application does not provide evidence of good faith of the appropriator under Permit G-17103.

Though the Application identifies that construction of one well started prior to the date required in the permit, the well was not completed and has been partially backfilled and temporarily abandoned. The Application does not provide evidence of good cause to allow for an extension of time.

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.

27. As of February 28, 2023, the remaining work to be completed consists of completing construction of South Well, beginning construction of North Well, installation of pumps and irrigation system; meeting all permit conditions, and applying water to full beneficial use.
28. According to the Application, the current permit holder of record does not intend to develop the authorized use under the permit, and indicate that development may be completed by a future purchaser of the property.

The Department cannot find that the applicant can complete the project or apply water to full beneficial use within the time requested for the extension because the permit holder intends for a future property owner to pursue development of the authorized 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 Application identifies the primary purpose of the extension of time is to allow for a great value of the underlying property upon its sale. The Permit was issued in December 2013, with a completion date of December 5, 2018. The request to provide an additional ten years beyond the date of the Application for Extension of Time, with no actual plan to develop the authorized use, is not reasonable.

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 complete construction and 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 to begin under the permit pursuant to ORS 537.630 as required by OAR 690-315-0040(1)(b).
3. The permit holder has not demonstrated that good cause exists as required by OAR 690-315-0040(2) because reasonable diligence in performance of developing the authorized use under the permit as required by OAR 690-315-0040(3).

4. The Application established that there has been minimal construction, which does not provide for reasonable diligence toward developing the authorized use. The permit holder has not shown that good cause exists for an extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1).

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 complete construction of the water system under Permit G-17103 from December 6, 2018, to October 1, 2033.

Deny the time to apply water to beneficial use under Permit G-17103 from December 6, 2016, to October 1, 2033.

DATED: January 2, 2024



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 February 16, 2024, 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>.

- 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 Will Davidson at 503-507-2749.
- 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