

**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-7123, Water Right Application G-6692)	PROPOSED FINAL ORDER
in the name of Glen and Glenda Hudspeth, and)	
Michael Buck)	

Permit Information

Application File G-6692 Permit G-7123

Basin: 12 – Malheur Lake / Watermaster District 10

Date of Priority: January 13, 1975

Authorized Use of Water

Source of Water: Four Wells within the Silvies River Basin

Purpose of Use: Irrigation of 460.8 Acres

Maximum Rate: 5.8 Cubic Feet per Second (cfs), being 1.92 cfs from each of
Wells 2 & 3, and 0.96 cfs from each of Wells 4 & 5

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

Please read this Proposed Final Order in its entirety.

This Proposed Final Order applies only to Permit G-7123, water right Application G-6692.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time for complete construction of the water system from October 1, 1978 to October 1, 1979.

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources
PFO – Proposed Final Order

Units of Measure

cfs – cubic feet per second
gpm – gallons per minute

AUTHORITY

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

ORS 537.630(1) provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, order an extension of time within which: irrigation or other works shall be completed; the well or other means of developing and securing ground water 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) provides in pertinent part that the Water Resources Director, for good cause shown, may extend the time within which the full amount of the water appropriated shall be applied to a beneficial use. This statute 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 therefore; and the income or use that may be required to provide fair and reasonable returns upon the investment.

OAR 690-315-0040 provides in pertinent part that the Water Resources Department shall make findings to determine if an extension of time may be approved to complete construction and/or apply water to full beneficial use.

FINDINGS OF FACT

Background

1. Permit G-7123 was granted by the Department on April 4, 1977. The permit authorizes the use of up to 5.8 cfs, being 1.92 cfs from each of Wells 2 & 3, and 0.96 cfs from each of Wells 4 & 5, all within Silvies Creek Basin, for irrigation of 460.8 acres. The permit specified construction of the water system was to be completed by October 1, 1978, and complete application of water was to be made on or before October 1, 1979.
2. The permit was originally issued to Meadowland Ranches, Inc. On April 29, 1976 the permit was assigned to Haskell F. and Ruby Sloan.
3. On November 27, 1978 the Department received a letter from Haskell F. Sloan stating they needed an extension of time.
4. On January 4, 1979, the Department sent a letter to Mr. and Mrs. Sloan with instructions for submitting the application along with an enclosed Extension of Time Application.
5. On January 29, 1979, the Department received a "Notice of Completion of Construction" stating construction of the works described in Permit G-7123 was completed on November 29, 1978 (Department "Form B"), and a "Notice of Complete Application of Water to a Beneficial Use" (Department "Form C") stating the water appropriated under Permit G-7123 was completely applied to beneficial use in accordance with the terms of the permit on November 29, 1978. The forms were submitted by "Triticale Breeders, Inc. by Virginia L. Norris," who was not a permit holder of record.
6. On February 14, 1979, the Department sent a letter to Triticale Breeders, Inc and copied Haskell F. and Ruby Sloan. The main body of the letter is as follows:

We have received the notices of completion of construction and complete use of water as allowed under the terms of the permits No. G-7123.... Our records show Haskell and Ruby Sloan as holders of the permits so we are unable to take action on the statements. If the Sloans have no further interest in the permits, an assignment from them to you should be made. An assignment form with the proper application and permit numbers entered is enclosed for this purpose. It will have to be signed by Haskell F. & Ruby Sloan and returned along with a \$2.00 assignment recording fee.

I have also enclosed applications for an extension of time limits of the permits since you have stated that the construction work of the water systems were not completed until after October 1, 1978. A fee of \$10.00 must accompany each application. Upon receipt of the properly executed assignment forms and the applications, we will take action on your notices of completion of construction and use of water.

7. On April 14, 2006, a portion of the permit was assigned from Haskell F. and Ruby Sloan to Michael C. Buck. On July 8, 2013 the other portion of the permit was assigned to

Glen A. and Glenda R. Hudspeth. The deed shows the property was transferred to Hudspeth Exchange WXS060127, LLC in 2006. The Department records show Michael C. Buck, and Glen A. and Glenda R. Hudspeth as the permit holders of record.

8. One of the permit holders, Glen A. and Glenda R. Hudspeth, submitted an "Application for Extension of Time" to the Department on July 8, 2013, requesting the time to complete construction of the water system be extended from October 1, 1978 to October 1, 2016, and the time to apply water to full beneficial use under the terms and conditions of Permit G-7123 be extended from October 1, 1979 to October 1, 2016. This is the first permit extension requested for Permit G-7123.
9. Notification of the Application for Extension of Time for Permit G-7123 was published in the Department's Public Notice dated July 16, 2013. No public comments were received regarding the extension application.

Review Criteria [OAR 690-315-0040]

The time limits to complete construction and/or apply water to full beneficial use may be extended if the Department finds that the permit holder has met the requirements set forth under OAR 690-315-0040. This determination shall consider the applicable requirements of ORS 537.230¹, 537.248², 537.630³ and/or 539.010(5)⁴.

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

10. On July 8, 2013, the Department received a completed Application for Extension of Time 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)]

11. Actual construction of the four wells began prior to the April 4, 1978 deadline specified in the permit.

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.

12. Construction of Wells 2 (HARN 563), 3 (HARN 562), 4 (HARN 561) and 5 (HARN 566) was completed by 1974.
13. Evidence in the record, being the B and C Forms as discussed in Finding of Fact 5, above, *suggests* that construction of the water system was completed by November 29, 1978, and that complete application of water to a beneficial use was completed by

¹ ORS 537.230 applies to surface water permits only.

² ORS 537.248 applies to reservoir permits only.

³ ORS 537.630 applies to ground water permits only.

⁴ ORS 539.010(5) applies to surface water and ground water permits.

November 29, 1978. While complete application of water occurred prior to the deadline specified in the permit, construction of the water system did not. Thus an extension of time is needed to October 1, 1979.

14. The Department has determined that an extension of time until October 1, 1979, to complete construction of the water system under the terms and conditions of Permit G-7123 is reasonable and necessary.
15. The Department has determined that the permit holder's request to have until October 1, 2016, to complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit G-7123 is not reasonable as a result of lack of due diligence since October 1, 1979 in developing the water use under the terms and conditions of the permit. The Department recommends submitting a Claim of Beneficial Use that demonstrates beneficial use under the terms and conditions of the permit through October 1, 1979, or alternatively applying for a new water right for his portion of the permit.

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

The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0040(2).

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

The Department's determination of reasonable diligence shall consider the requirements set forth under OAR 690-315-0040(3)(a-d). In accordance with OAR 690-315-0040(3), the Department shall consider, but is not limited to, the following factors when determining whether the applicant has demonstrated reasonable diligence in previous performance under the permit:

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

16. Work was accomplished within the time allowed in the permit or previous extension as follows:
 - a. Construction of the well and water system began prior to the April 4, 1978 deadline specified in the permit.
 - b. The record suggests that water was applied to full beneficial use by November 29, 1978, which was within the original development time frame under Permit G-7123.
 - c. The record suggests that construction of the water system occurred by November 29, 1978, about 2 months after the development time frame for the completion of construction under Permit G-7012.
 - d. From November 29, 1978 to July 8, 2013 there is no evidence in the record or in the extension application of current use of the irrigation system or current beneficial use of water from Well 3 (HARN 562), or Well 5 (HARN 566), a

period of almost 35 years. To the contrary, the extension application states that Well 3 (23s/32E-13da) and Well 5 (23s/32E-13ca) have neither a measuring device installed nor records of the amount of ground water withdrawn, which are two conditions of the permit. In work yet to be accomplished, the applicant indicates 750 feet of mainline needs to be buried, power needs to be brought to the two wells, and pumps and bowls need to be installed; and to apply water to approximately 160 acres.

- e. The extension application, as it pertains to Wells 3 and 5, shows that to date, no work has been accomplished on the water system 1978, a period of over 35 years. Although recently these two wells were inspected and ground surveys were done to for a proposed irrigation project and to establish flood irrigation boundaries, these activates are not considered evidence of progress make toward completion of the water development and application to full beneficial use. (See Oregon Administrative rule 690-315-0020(e)(A)-(C).)
- f. In the extension application, the applicant indicates that Phase 1 of the irrigation project will be completed no later than 2015, and that Phase 2 of the irrigation project will be completed no later than 2016. This is up to 37 years past the development deadlines specified in the permit.

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

- 17. The following beneficial use of water was made during the permit or previous extension time limits:
 - a. Since the issuance of Permit G-7123 on April 4, 1977, it is not known how many acres were irrigated from the four wells. Currently there is no irrigation occurring from Wells 3 and 5.
 - b. Delay of full beneficial use of water under Permit G-7123 was due, in part, to the previous owners' financial difficulties and to the current owner having a different vision for use of the water than originally planned.

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

- 18. The water right permit holder's conformance with the permit or previous extension conditions.
 - a. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: although the record suggests that beneficial use of water was made by November 29, 1978, (1) the record indicates that a meter or other suitable measuring device has not been installed on Wells 3 or 5, and (2) that a complete record of the amount of ground water withdrawn has not been kept.
 - b. 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.

Financial Investments [OAR 690-315-0040(3)(d)]

19. Financial investments made toward developing the beneficial water use.
 - a. As of July 8, 2013, the permit holder has invested approximately \$3,564 which is approximately 7 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$46,564 investment is needed for the completion of this project.

Cost to Appropriate and Apply Water to a Beneficial Purpose [OAR 690-315-0040(2)(b)]

20. As of July 8, 2013, the permit holder has invested approximately \$3,564 which is approximately 7 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$46,564 investment is needed for the completion of this project.

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

21. The Department has not found good faith of the appropriator under Permit G-7123.

The Market and Present Demands for Water [OAR 690-315-0040(2)(d-e)]

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:

22. The amount of water available to satisfy other affected water rights and scenic waterway flows; 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); or the habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife [OAR 690-315-0040(4)(a-c)].
 - a. 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-7123; furthermore, water availability for other affected water rights and scenic waterway flows after the permit was issued is determined at such time that such application for a new water right is submitted. The points of appropriation for Permit G-7123, located within the Silvies River Basin, are not located within a limited or critical ground water area. The Silvies River is not located within or above any state or federal scenic waterway, however it is 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. The points of appropriation are not in an area listed by the Department of Environmental Quality as a water quality limited stream.

23. Economic investment in the project to date [OAR 690-315-0040(4)(d)].
 - a. As of July 8, 2013, the permit holder has invested approximately \$3,564.
24. Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].
 - a. None have been identified.
25. Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].
 - a. None have been identified.

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

26. 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)]

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

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

28. None have been identified.

CONCLUSIONS OF LAW

1. The applicant is entitled to apply for an extension of time to complete construction and/or completely apply water to the full beneficial use pursuant to ORS 537.630(1).
2. 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).
3. The applicant complied with begin actual construction timeline requirements pursuant to ORS 537.630 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. Completion of construction and full application of water to beneficial use cannot be accomplished within the time requested; as a result of lack of due diligence in developing the water use under the terms and conditions of the permit, the applicant's request is not being granted as requested.

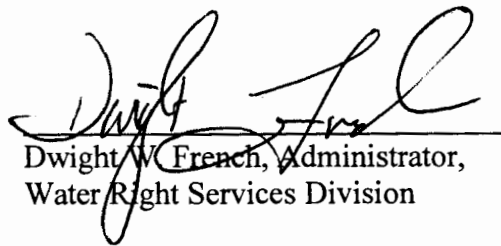
5. The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and fair and reasonable return upon the investment, the 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 application of water to beneficial use, or to complete construction of the water system beyond October 1, 1979 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:

Extend the time for complete construction of the water system under Permit G-7123 from October 1, 1978 to October 1, 1979.

DATED: April 15, 2014


Dwight W. 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.*

Proposed Final Order Hearing Rights

1. Under the provisions of OAR 690-315-0100(1) and 690-315-0060, 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. The written protest must be received by the Water Resources Department no later than **May 30, 2014**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.

