

Oregon Water Resources Department
Water Right Services Division

PROPOSED FINAL ORDER

In the Matter of the Application for an Extension of Time for Permit G-15110, Water Right Application G-15541 in the name of Tracey Lyon

Permit Information

Application File:	G-15541
Permit:	G-15110
Basin:	14 – Klamath / Watermaster District 17
Date of Priority:	June 21, 2001
Source of Water:	2 wells in the Lost River Basin
Purpose of Use:	Irrigation of 327.7 Acres
Maximum Rate:	4.0 Cubic Feet per Second (cfs)

****Please read this Proposed Final Order in its entirety as it may contain 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, 2012 to October 1, 2025¹.
- 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(4), 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

Department – Oregon Department of Water Resources

PFO – Proposed Final Order

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 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.

OAR 690-315-0050(6) requires the Department, for extensions exceeding five years, to establish checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between checkpoints will not exceed five year periods.

FINDINGS OF FACT

Background

1. Permit G-15110 was granted by the Department on July 24, 2002. The permit authorizes the use of up to 4.0 cfs of water from 2 wells in the Lost River Basin for irrigation of 327.7 acres. The permit specified complete application of water was to be made on or before October 1, 2006.

2. One prior permit extension has been granted for Permit G-15110 which resulted in the completion date for full application of water being extended from October 1, 2006 to October 1, 2012.
3. The permit holder submitted a Claim of Beneficial Use on September 14, 2012, but *Proof to the Satisfaction of the Director* was not established since the location of the source well in the claim was substantially different than the permitted location and the Department's records lacked a March static water level following well construction as required by the permit. The Claim Summary identified a measured amount of water appropriated as 6.06 cfs and 321.5 acres developed for irrigation.
4. The permit holder submitted a second "Application for Extension of Time" to the Department on January 24, 2013, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-15110 be extended from October 1, 2012 to October 1, 2014. This is the second permit extension requested for Permit G-15110.
5. Notification of the Application for Extension of Time for Permit G-15110 was published in the Department's Public Notice dated February 12, 2013. No public comments were received regarding the extension application.
6. On May 31, 2013, the permit holder submitted clarifying information by electronic mail to supplement the Application for Extension of Time requesting the extension be for 10 to 12 years to drill a second well and to file a permit amendment to authorize the location of the first well. Therefore, the extension application is amended to change the requested deadline for applying water to beneficial use from October 1, 2014 to October 1, 2025.

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 537.230², 537.248³, 537.630⁴ and/or 539.010(5)⁵.

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

7. On January 24, 2013, the Department received a completed Application for Extension of Time and the fee specified in ORS 536.050 from the permit holder.

²ORS 537.230 applies to surface water permits only.

³ORS 537.248 applies to reservoir permits only.

⁴ORS 537.630 applies to ground water permits only.

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

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

8. Senate Bill 300 (1999 legislation) eliminated the requirement that holders of new surface water and ground water permits start construction on water projects within one year after the Department issues the permit. Senate Bill 300 applies to any application for a permit filed after October 23, 1999, including this application.

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.

9. As of January 24, 2013, the remaining work to be completed consists of establishing a well location authorized by the permit or through receiving Department approval for a permit amendment, drilling the second well, and applying water to full beneficial use up to 327.7 acres as permitted.
10. Given the amount of development left to occur, the Department has determined that the permit holder's request to have an additional 12 years to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15110 is both reasonable and necessary.

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)]

11. Work was accomplished within the time allowed in the permit or previous extension as follows:
 - a. Work was accomplished during the original timeframe.
 - b. During the most recent extension period, being from October 1, 2006, to October 1, 2012, the following was accomplished:
 - Construction of the well was completed on April 29, 2010, prior to the October 1, 2012 extended completion date.

- Pumps, mainline, handline and center pivots have been installed for irrigation of 321.5 acres.

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

12. The following use of water was made during the permit or previous extension time limits:
- a. Since the issuance of Permit G-15110 on July 24, 2002, a maximum rate of 6.06 cfs of water has been reportedly pumped from well KLAM 57366 for irrigation of 321.5 acres, however this does not yet constitute beneficial use since all permit conditions have not been met.

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

13. 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: (1) the measured rate of pumping from the well exceeds the authorized amount of water for irrigation under this permit of 4.0 cfs, (2) the source well KLAM 57366 is not located in an area authorized by the permit.
 - 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)]

14. Financial investments made toward developing the beneficial water use.
- a. As of January 24, 2013, the permit holder has invested approximately \$125,000.

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

15. As of January 24, 2013, the permit holder has invested approximately \$125,000.

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

16. The Department has found good faith of the appropriator under Permit G-15110.

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:

17. 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-15110; 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-15110, located within the Lost River Basin, are not located within a limited or critical ground water area. Lost River is not located within or above any state or federal scenic waterway, it is not located within a priority area for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, but 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.
18. Economic investment in the project to date [OAR 690-315-0040(4)(d)].

As of January 24, 2013, the permit holder has invested approximately \$125,000.
19. Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].

None have been identified.
20. Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].

Permit G-15110 contains a condition that states the use of water from the well shall be discontinued or reduced if substantial interference with a senior water right occurs. To date no known substantial interference has occurred.
21. OAR 690-315-0050(6) requires the Department to place a checkpoint condition on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. A "Checkpoint Condition" is specified under the "Conditions" section of this PFO to meet this condition.

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

22. 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)]

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

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

24. 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. Full application of water to beneficial use can be accomplished by October 1, 2022, as required by OAR 690-315-0040(1)(c).
4. 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 apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).
5. As required by OAR 690-315-0050(6) and as described in Finding 21 above, the Department has established, as specified in the "Conditions" section of this progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit G-15110.

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-15110 from October 1, 2012 to October 1, 2025, subject to the following conditions:

1. Checkpoint Condition

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2017 and by October 1, 2022**. ***A form will be enclosed with your Final Order.***

- (a) At each checkpoint, the permit holder shall submit and the Department shall review evidence of the permit holder's diligence towards completion of the project and compliance with terms and conditions of the permit and extension. If, after this review, the Department determines the permit holder has not been diligent in developing and perfecting the water use permit, or complied with all terms and conditions, the Department shall modify or further condition the permit or extension to ensure future compliance, or begin cancellation proceedings on the undeveloped portion of the permit pursuant to ORS 537.260 or 537.410, or require submission of a final proof survey pursuant to ORS 537.250;
- (b) The Department shall provide notice of receipt of progress reports in its weekly notice and shall allow a 30 day comment period for each report. The Department shall provide notice of its determination to anyone who submitted comments.

DATED: April 29, 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 **June 13, 2014**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.

