

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-15126, Water Right Application G-15278, in the name of A and H Farms LLC

<u>Permit Information</u>	
Application:	G-15278
Permit:	G-15126
Basin:	7 – Umatilla / Watermaster District 5
Date of Priority:	November 16, 2000
Source of Water:	A well in Umatilla River Basin
Purpose of Use:	Irrigation use on 80.0 Acres
Maximum Rate:	1.0 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, 2009 to October 1, 2018¹.
- 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(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.

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-15126 was granted by the Department on July 31, 2002. The permit authorizes the use of up to 1.0 cfs of water from a well in Umatilla River Basin for irrigation use on 80.0 acres. The permit specified complete application of water was to

be made on or before October 1, 2006.

2. One prior permit extensions has been granted for Permit G-15126. The most recent extension request resulted in full application of water being extended from October 1, 2006 to October 1, 2009. In the Final Order dated November 15, 2007, the Department placed a Permit Amendment Condition which stated the permit holder must submit to the Department an application for a Permit Amendment under ORS 537.211, and receive Department approval to authorize a change in the point of appropriation form UMAT 53934 to the well currently being used to irrigate the place of use described in Permit G-15126. As of October 28, 2014, no Permit Amendment has been received by the Department.
3. The permit holder, Richard Hamilton submitted an "Application for Extension of Time" to the Department on April 18, 2014, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-15126 be extended from October 1, 2009 to October 1, 2018.
4. Notification of the Application for Extension of Time for Permit G-15126 was published in the Department's Public Notice dated May 6, 2014. 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 537.230², 537.248³, 537.630⁴ and/or 539.010(5)⁵.

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

5. On April 18, 2014, 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)]

6. 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.

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.

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.

7. As of April 18, 2014, the remaining work to be completed consists of:
 - a. Applying for a Permit Amendment for moving the authorized point of appropriation;
 - b. Installing a meter on the well;
 - c. Submitting initial and annual static water level measurements on the authorized point of appropriation. All measurements must be made by a certified water rights examiner, registered professional geologist, registered professional engineer, licensed well constructor or pump installer licensed by the Construction Contractors Board and submitted to the Department on forms provided by the Department; and
 - d. Applying water to full beneficial use using the authorized point of appropriation.
8. Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2016, is not enough time to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15126. The Department is proposing to have until October 1, 2018 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)]

9. Work was accomplished within the time allowed in the permit or previous extension as follows:
 - a. Construction of the well was completed prior to October 1, 2006. Construction of the authorized well (UMAT 53934) began August 15, 2000 and was completed

August 21, 2000.

- b. Work was completed during the original development time frame under Permit G-15126. The permit holder installed a circle and a pump.
- d. During the most recent extension period, being from October 1, 2006, to October 1, 2009, the following was accomplished:
 - Established a generator to power the site; and
 - Installed mainline pipes and sprinklers.

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

- 10. The following beneficial use of water was made during the permit or previous extension time limits:
 - a. Although approximately 80 acres have been irrigated using 1.0 cfs of water since the issuance of Permit G-15126 on July 31, 2002, the source of water is from well (UMAT 55842) not described in Permit G-15126, therefore, no beneficial use of water has been made from the well authorized under this permit.
 - b. Delay of full beneficial use of water under Permit G-15126 was due to the permit holder not applying for a Permit Amendment to change the point of appropriation. The permit holder needs more time in which to gain approval to authorize a change in the point appropriation from UMAT 53934 to well UMAT 558742 and then apply water to beneficial use.

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

- 11. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the record doesn't show that a meter or other suitable measuring device has been installed, (2) the required March static water level measurement have not been received by the Department on the well authorized under Permit G-15126, (3) the required March static water level measurements have not been measured by a certified water rights examiner, registered professional geologist, registered professional engineer, licensed well constructor or pump installer licensed by the Construction Contractors Board and submitted to the Department on forms provided by the Department.

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

- 12. As of April 18, 2014, the permit holder has invested approximately \$134,821, which is

the total projected cost for completing development of this project.

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

13. The Department has found good faith of the appropriator under Permit G-15126.

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:

14. 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)].

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-15126; 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. The point of appropriation for Permit G-15126, is located within the Umatilla River Basin, and is not located within a limited or critical ground water area. The Umatilla River is not located within or above any state or federal scenic waterway, however, it 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. The point of appropriation is not in an area listed by the Department of Environmental Quality as a water quality limited stream.

Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].

15. None have been identified.

Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].

16. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to ensure future diligence, and/or mitigate the effects of the subsequent development on competing demands on the resource. The Department determined the need to place a "Last Extension Condition" on this extension of time in order to ensure diligence is exercised in the development and

perfection of the water use permit. This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary due to the permit holder not meeting the permit Amendment Condition stipulated in the Final Order on November 15, 2007 for the previous extension of time.

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

17. 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)]

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

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

19. 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. Full application of water to beneficial use can be accomplished by October 1, 2018, as required by OAR 690-315-0040(1)(c).
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 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).
6. As authorized in OAR 690-315-0050(5) and as described in Finding 16 above, the Department has established, as specified in the "Conditions" section of this PFO (Item

1), a "Last Extension Condition" in order to ensure future diligence is exercised in the development and perfection of Permit G-15126.

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-15126 from October 1, 2009 to October 1, 2018.

Subject to the following conditions:

CONDITIONS

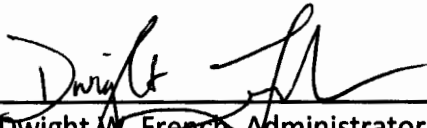
1. Last Extension Condition

This is to be the last extension of time granted for Permit G-15126. Any future extensions of time requests will be denied.

2. Permit Amendment Condition

By October 1, 2015 the permit holder must submit to the Department, an application for a Permit Amendment under ORS 537.211, for approval to authorize a change in the point of appropriation from the permitted well UMAT 53934 to the well (UMAT 55842) currently bring used to irrigate the place of use described in Permit G-15126.

DATED: November 4, 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.*

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 **December 19, 2014**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.
2. A written protest shall include:
 - a. The name, address and telephone number of the petitioner;
 - b. A description of the petitioner'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;
 - c. A detailed description of how the action proposed in the proposed final order would adversely affect or aggrieve the petitioner's interest;
 - d. A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;
 - e. Any citation of legal authority supporting the petitioner, if known;
 - f. Proof of service of the protest upon the water right permit holder, if petitioner is other than the water right permit holder; and
 - g. The applicant or non-applicant protest fee required under ORS 536.050.
3. Within 60 days after the close of the period for requesting a contested case hearing, the Director shall:
 - a. Issue a final order on the extension request; or
 - b. Schedule a contested case hearing if a protest has been submitted, and:
 - 1) Upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or
 - 2) The applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests.

- If you have questions about statements contained in this document, please contact Machele A Bamberger at (503)986-0802.
 - 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 503-986-0820.
 - 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