

**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-15460 (Modified by Permit Amendment T-10322), Water Right Application G-15528, in the name of Duncan W. Brinkley

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Permit Information

Application:	G-15528
Permit:	G-15460 (Modified by Permit Amendment T-10322)
Basin:	2 – Willamette / Watermaster District 20
Date of Priority:	June 8, 2001
Source of Water:	Three wells, plus an additional three wells per permit amendments T-9594 and T-10322 in Clackamas River Basin
Purpose of Use:	Nursery use on 124.8 Acres
Maximum Rate:	3.12 cubic feet per second (cfs)

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***\*\*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, 2020<sup>1</sup>.
- 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.

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<sup>1</sup>Pursuant 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-15460 was granted by the Department on July 10, 2003 to Duncan W. Brinkley, DBA Old Farmhouse Nursery. The permit authorizes the use of up to 3.12 cfs of water from three wells in Clackamas River Basin for nursery use on 124.8 acres. The permit specified complete application of water was to be made on or before October 1, 2007.

2. On October 20, 2003, a partial assignment from Duncan W. Brinkley DBA Old Farmhouse Nursery to Ryan Sik Shin and Young Hee Shin, was recorded in the records of the Department.
3. On December 10, 2003 the Department approved Permit Amendment T-9594 (Special Order Volume 58, Page 333) authorizing two additional points of appropriation under Permit G-15460 (Modified by Permit Amendment T-9594).
4. On January 30, 2007, an assignment by deed from Ryun Sik Shin and Young Hee Shin to Komsart Rattanapai and Jennifer Rattanapai, was recorded in the records of the Department.
5. On February 9, 2007, a partial assignment from Duncan W. Brinkley, Old Farmhouse Nursery to Leo Gentry Wholesale Nursery, Inc., was recorded in the records of the Department.
6. On August 28, 2007 the Department approved Permit Amendment T-10322 (Special Order Volume 73, Page 148) authorizing a change in the points of appropriation and adding an additional point of appropriation under Permit G-15460 (Modified by Permit Amendment T-10322). The location of Well 2 changed to a new location and was renamed Gentry Well 1. The location of Well 3 changed to a new location and was renamed Gentry Well 2. Permit G-15528 (modified by Permit Amendment T-10322) which is hereafter referred to simply as Permit G-15528.
7. On May 9, 2009, a partial assignment from Leo Gentry Wholesale Nursery, Inc. to Northwest Farm Credit Services, FLCA, Northwest Farm Credit Services, PCA, and Leo E. Gentry was recorded in the records of the Department.
8. One prior permit extension has been granted for Permit G-15460. The most recent extension request resulted in the full application of water being extended from October 1, 2007 to October 1, 2012.
9. The permit holder, Duncan W. Brinkley, submitted an "Application for Extension of Time" to the Department on December 5, 2014, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-15460 be extended from October 1, 2012 to October 1, 2020.
10. Notification of the Application for Extension of Time for Permit G-15460 was published in the Department's Public Notice dated December 16, 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 537.230<sup>2</sup>, 537.248<sup>3</sup>, 537.630<sup>4</sup> and/or 539.010(5)<sup>5</sup>.*

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

11. On December 5, 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)]**

12. Actual construction of the well began prior to the July 10, 2004 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.*

13. As of December 5, 2014, the remaining work to be completed consists of completing a permit amendment to add Gentry Domestic Well (CLAC 59769) to the permit, completing necessary changes to the system to allow use from Gentry Domestic Well (CLAC 59769), and Well 1 (on Brinkley property) to irrigate nursery stock on former Gentry portion of the permit, constructing an additional well, if necessary at either Gentry Well 2 or Gentry Well 3 location, meeting all permit conditions, and applying water to full beneficial use.
14. Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2020, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15460 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*

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<sup>2</sup>ORS 537.230 applies to surface water permits only.

<sup>3</sup>ORS 537.248 applies to reservoir permits only.

<sup>4</sup>ORS 537.630 applies to ground water permits only.

<sup>5</sup>ORS 539.010(5) applies to surface water and ground water permits.

*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)]*

15. 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 July 10, 2004 deadline specified in the permit. Well 1 (CLAC 19441) began construction July 26, 1994 and was completed July 27, 1994. A pump was installed, electrical hookup completed, and pressure tanks and other irrigation systems installed in 1994. Well 1 (CLAC19441) was deepened (CLAC 57291) and new pump installed August 20, 2001. Gentry Well 1 (CLAC 59817) began construction November 21, 2003 and was completed January 20, 2004.
  - b. Work was completed during the original development time frame under Permit G-15460. The permit holder constructed a reservoir, installed pumps and control systems for the well and reservoir, a filter system, an underground mainline system, and above-ground sprinkler system for the Gentry portion of the permit. A meter was installed on Gentry Well 1.
  - d. During the most recent extension period, being from October 1, 2007, to October 1, 2012, the permit holder pulled the pump, videoed the well, and then performed a rehabilitation on Gentry Well 1.

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

16. According to the water user a maximum rate of 0.29 cfs of water has been appropriated from Well 1 and Gentry Well for irrigation of 33.4 acres.
17. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2012.
18. Delay of full beneficial use of water under Permit G-15460 was due, in part, to insufficient financial resources on the Rattanapai's portion, economic recession on Gentry's portion, and the Brinkley's were unaware of permit conditions requiring installation of a meter, water use reporting, and water level measurements. The permit holder needs more time as they are in a unique position to be able to complete development of the water right. The Brinkleys are planning to purchase the Gentry property (which is dependent on approval of this extension request), as they plan to conduct nursery operations.

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

19. The permit holder has installed a water meter on Gentry Well 1, and submitted a static water level measurement required under Permit G-15460.
20. 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 on Well 1, Gentry Well 2, and Gentry Well 3, (2) the required March static water level measurements have not been consistently received by the Department, and (3) annual reports of the amount of water used each month have not been received 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)]*

21. As of December 5, 2014, the permit holder invested approximately \$516,200, which is approximately 67 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$250,000 investment is needed for the completion of this project.

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

22. The Department has found good faith of the appropriator under Permit G-15460.

*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:*

23. 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-15460;

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 points of appropriation for Permit G-15460, located within the Eagle Creek Basin, are not located within a limited or critical ground water area. Eagle Creek is above the Clackamas Scenic Waterway and, 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 points of appropriation are 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)].*

24. 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)].*

25. None have been identified.

26. 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 Item 1 of the "Conditions" section of this PFO to meet this condition.

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

27. 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 not caused by any other governmental requirements.

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

29. Unforeseen events extended the length of time needed to fully develop and perfect Permit G-15460, in that 2 of the 3 permit holders did not fully develop their properties within the conditions of the permit, restricting their ability to complete development of the project in a timely manner.

## **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, 2020, 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 required by OAR 690-315-0050(6) and as described in Finding 26 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit G-15460.



## 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-15460 from October 1, 2012 to October 1, 2020.

Subject to the following conditions:

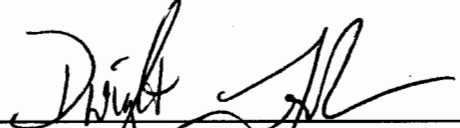
### CONDITIONS

**1. Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2019. 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: January 20, 2015

  
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 **March 6, 2015**, 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.

**NOTICE TO ACTIVE DUTY SERVICEMEMBERS:** Active Duty servicemembers have a right to stay these proceedings under federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.of.mil>

