

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-16318, Water Right Application G-16826, in the name of John Ensz Farms LLC

Permit Information

Application:	G-16826
Permit:	G-16318
Basin:	12 – Malheur Lake / Watermaster District 10
Date of Priority:	April 9, 2007
Source of Water:	A well in Malheur Slough Basin
Purpose of Use:	Irrigation use on 160.0 Acres
Maximum Rate:	2.0 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 complete construction of the water system from October 1, 2012 to October 1, 2020.
- Grant an extension of time to apply water to full beneficial use from October 1, 2012 to October 1, 2020¹.
- 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-16318 was issued by the Department on May 16, 2008. The permit authorizes the use of up to 2.0 cfs of water from a well in Malheur Slough Basin for irrigation use on 160.0 acres. The permit specified construction of the water system was to be completed by October 1, 2012, and complete application of water was to be made on or before October 1, 2012.

2. On February 25, 2009, an assignment from Tammy and Barry Wilkinson to Don Nienke was recorded in the records of the Department.
3. The permit holder, John Ensz Farms LLC, submitted an "Application for Extension of Time" to the Department on April 30, 2015, 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-16318 be extended from October 1, 2012 to October 1, 2020. This is the first permit extension requested for Permit G-16318.
4. On May 4, 2015, an assignment from Don Nienke to John Ensz Farms, LLC was recorded in the records of the Department.
5. Notification of the Application for Extension of Time for Permit G-16318 was published in the Department's Public Notice dated May 12, 2015. 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)]

6. On April 30, 2015, 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)]

7. 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.

8. As of April 30, 2015, the permit holder states the remaining work to be completed consists of applying for and gaining approval of a Permit Amendment to add an

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.

additional point of appropriation and change a point of appropriation; completing construction of the water system; meeting conditions of the permit; and applying water to full beneficial use.

9. 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 complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit G-16318 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)]

10. According to the permit holder, 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, 2012. Well 1 (HARN 51551) began construction March 16, 2009 and was completed March 28, 2009. Construction of unauthorized Well 2 (HARN 51552) was completed in 2009.
 - b. Work was completed during the original development time frame under Permit G-16318. A center pivot system was installed.
 - c. Since October 1, 2012, the permit holder has constructed unauthorized Well 3 (HARN 51925).

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

11. Although approximately 160.0 acres have been irrigated using an unknown amount of water since the issuance of Permit G-16318 on May 16, 2008, the sources of water are from Well 2 (HARN 51552) and Well 3 (HARN 51925) not authorized in Permit G-16318, therefore, no beneficial use of water has been made from the well authorized under this permit.
12. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2012.

13. According to the permit holder, delay of full beneficial use of water under Permit G-16318 was due, in part, to insufficient yield of water from permitted Well 1 (HARN 51551). The permit holder needs more time in which to gain approval for the construction of an additional point of appropriation, a change in point of appropriation and place of use, in order to obtain the full quantity of water allowed under the permit.

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

14. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the required March static water level measurements have not been received by the Department, and (2) annual reports of the amount of water used each month have not been received by the Department. The Department has only received water use reports for years 2008 and 2014. 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.

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)]

15. As of April 30, 2015, the permit holder states they have invested \$120,000, which is the total projected cost for complete development of this project.

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

16. The Department has found good faith of the appropriator under Permit G-16318.

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)].

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-16318;

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-16318, located within the Malheur Slough Basin, is not located within a limited or critical ground water area. Malheur Slough 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 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)].

18. 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)].

19. None have been identified.

20. 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)]

21. 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 not caused by any other governmental requirements.

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

23. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit G-16318, in that the permit holders were faced with an insufficient yield of water from permitted Well (HARN 51551). The permit holder needs more time in which to gain approval for the construction of an additional point of appropriation, a change in point of appropriation and place of use, in order to obtain the full quantity of water allowed under the permit, which restricted 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. Completion of construction and 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 complete construction and 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 20 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-16318.

Continued on the following page

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 complete construction of the water system under Permit G-16318 from October 1, 2012 to October 1, 2020.

Extend the time to apply water to beneficial use under Permit G-16318 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: June 16, 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 **July 31, 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>

