

Mailing List for Extension PFO Copies

PFO Date: June 23, 2015

Copies Mailed

Application: G-17077

By: \_\_\_\_\_

Permit: G-16576

On: \_\_\_\_\_

Original mailed to Applicant:

Tygh Valley Orchards, LLC  
11805 SW Lynnfield Lane  
Portland, OR 97225

Copies sent to:

1. WRD - App. File G-17077/ Permit G-16576
2. TENNESON ENGINEERING CORP.  
LARRY TOLL  
3313 WEST SECOND STREET, SUITE 100  
THE DALLES, OR 97058

Fee paid as specified under ORS 536.050 to receive copy:

3. None

Receiving via e-mail (10 AM Tuesday of signature date)  
(DONE BY EXTENSION SPECIALIST)

4. WRD - Watermaster District 3, Robert Wood

CASEWORKER: CAC

**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-16576, Water Right Application G-17077, in the name of Tygh Valley Orchards, LLC

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Permit Information

Application:	G-17077
Permit:	G-16576
Basin:	5 – Deschutes / Watermaster District 3
Date of Priority:	June 27, 2008
Source of Water:	A well in Threemile Creek Basin
Purpose of Use:	Supplemental Irrigation of 108.68 Acres
Maximum Rate:	1.0 cubic foot 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 complete construction of the water system from September 10, 2014 to October 30, 2019.
- Grant an extension of time to apply water to full beneficial use from September 10, 2014 to October 30, 2019<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(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.

**FINDINGS OF FACT**

*Background*

1. Permit G-16576 was issued by the Department on September 10, 2009. The permit authorizes the use of up to 1.0 cfs of water from a well in Threemile Creek Basin for supplemental irrigation of 108.68 acres. The permit specified construction of the water system was to be completed by September 10, 2014, and complete application of water was to be made on or before September 10, 2014.

2. The permit holder, Tygh Valley Orchards, LLC, submitted an "Application for Extension of Time" to the Department on May 8, 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-16576 be extended from September 10, 2014 to October 30, 2019. This is the first permit extension requested for Permit G-16576.
3. Notification of the Application for Extension of Time for Permit G-16576 was published in the Department's Public Notice dated May 19, 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 537.230<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)]**

4. On May 8, 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)]**

5. 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.*

6. As of May 8, 2015, the permit holder states the remaining work to be completed consists of constructing the well; installing a pump and totalizing flow meter; completing construction of the water system; meeting all permit conditions; and applying water to full beneficial use, by appropriating 1.0 cfs of water authorized by the permit on 108.68 acres for supplemental irrigation.
7. Given the amount of development left to occur, the Department has determined that

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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.

the permit holder's request to have until October 30, 2019, 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-16576 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)]**

8. According to the permit holder, work was not accomplished within the time allowed in the permit as follows:
  - a. Construction of the well was not completed prior to September 10, 2014.
  - b. No work was completed during the original development time frame under Permit G-16576.
  - c. Since September 10, 2014 the permit holder has installed an irrigation pond, transformers, a pump house with a 50 H.P. pump, a 40 H.P. pump with main lines, and wheel lines.

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

9. According to the water user no water has been appropriated from the well for supplemental irrigation.
10. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by September 10, 2014.
11. According to the permit holder, delay of full beneficial use of water under Permit G-16576 was due, in part, to a poor economy. The permit holder states revenues from agricultural products have been negative due to initialization of organic blueberry orchard.

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

12. 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, (2) the required March static water

level measurements have not been received by the Department, and (3) annual reports of the amount of water used each month have not been received by the Department.

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. 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.

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

13. As of May 8, 2015, the permit holder states no investment was made towards development of the project prior to the complete application of water to the beneficial use on September 10, 2014. The permit holder states they have invested approximately \$187,000, which is approximately 68.75 percent of the total projected cost for complete development of this project after September 10, 2014. The permit holder anticipates an additional \$85,000 investment is needed for the completion of this project.

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

14. The Department has found good faith of the appropriator under Permit G-16576.

*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:*

15. 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-16576; 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-16576, located within the White River Basin, is not located within a limited or critical ground water area. White River is above The Deschutes 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 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)].*

16. 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)].*

17. None have been identified.

18. 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 no work having been accomplished within the time allowed in the permit.

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

19. 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)]*

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

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

21. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit G-16576, in that the permit holder was faced with a negative agricultural economy and continued annual freeze damage to previous cherry orchard, creating additional costs to remove and replace by planting and starting organic blueberry orchard. This 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 30, 2019, 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 authorized in OAR 690-315-0050(5) and as described in Finding 18 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-16576.

**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-16576 from September 10, 2014 to October 30, 2019.

Extend the time to apply water to beneficial use under Permit G-16576 from September 10, 2014 to October 30, 2019.

Subject to the following conditions:

### CONDITIONS

1. **Last Extension Condition**

This is to be the last extension of time granted for Permit G-16576. Any future extensions of time requests will be denied.

DATED: June 23, 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 **August 7, 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>

