

**Oregon Water Resources Department
Water Right Services Division**

Application for Extension of Time

In the Matter of the Application for an Extension of Time)
for Permit G-16206, Water Right Application G-16568,) PROPOSED FINAL ORDER
in the name of Nibler Family, LLC)

Permit Information

| | |
|-------------------|---|
| Application: | G-16568 |
| Permit: | G-16206 |
| Basin: | 2 – Willamette / Watermaster District 16 |
| Date of Priority: | November 18, 2005 |
| Source of Water: | A well (MARI 2355) in East Champoeg Creek Basin |
| Purpose of Use: | Nursery use on 123.4 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, 2011 to October 1, 2020.
- Grant an extension of time to apply water to full beneficial use from October 1, 2011 to October 1, 2020¹.

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

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.

FINDINGS OF FACT

Background

1. Permit G-16206 was issued by the Department on July 26, 2007. The permit authorizes the use of up to 2.0 cfs of water from a well (MARI 2355) in East Champoeg Creek Basin for nursery use on 123.4 acres. The permit specified construction of the water system was to be completed by October 1, 2011, and complete application of water was to be made on or before October 1, 2011.
2. The permit holder, Pat Nibler, trustee of Nibler Family, LLC, submitted an “Application for Extension of Time” to the Department on July 6, 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-16206 be extended from October 1, 2011 to October 1, 2020. This is the first permit extension requested for Permit G-16206.

3. Notification of the Application for Extension of Time for Permit G-16206 was published in the Department's Public Notice dated July 14, 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)]

4. On July 6, 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. Construction of the well began prior to the deadline specified in the permit. The permit holder states, that this permit added nursery use to irrigation use that was already certificated on the same property. The construction began before the permit was issued.

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 July 6, 2015, the permit holder states the remaining work to be completed consists of meeting all permit conditions, such as installing a meter, reporting water use; completing construction of the water system and applying water to full beneficial use.
7. 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-16206 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).

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.

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 accomplished within the time allowed in the permit or previous extension as follows:
 - a. Construction of the well and water system began prior to permit issuance. Construction of Well (MARI 2354) began October 15, 1974 and was completed November 1, 1974. Well (MARI 2354) was deepened beginning April 7, 1975 and was completed May 6, 1975 and was renamed (Well MARI 2355). The water conveyance system was also completed prior to permit issuance.
 - b. No work was completed during the original development time frame under Permit G-16206, as the well and conveyance system was completed prior to permit issuance.

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

9. According to the water user a maximum rate of 1.0 cfs of water has been appropriated from Well (MARI 2355) for nursery use on 104.4 acres.
10. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2011.

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 does not show that a meter or other suitable measuring device has been installed, and (2) 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.

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

12. As of July 6, 2015, the permit holder states they have invested approximately \$28,200, which is approximately 93 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$2,000 investment is needed for the completion 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-16206.

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-16206; 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-16206, located within the East Champoeg Creek Basin, is not located within a limited or critical ground water area. East Champoeg Creek 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)].

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. None have been identified.

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. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit G-16206, in that the permit holders were unaware of the permit conditions that 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 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).

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-16206 from October 1, 2011 to October 1, 2020.

Extend the time to apply water to beneficial use under Permit G-16206 from October 1, 2011 to October 1, 2020.

DATED: August 18, 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 **October 2, 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;

Mailing List for Extension PFO Copies

PFO Date: August 18, 2015

Copies Mailed

Application: G-16568

By: _____

Permit: G-16206

On: _____

Original mailed to Applicant:

Nibler Family, LLC
Pat Nibler
26060 South Bolland Road
Canby, OR 97013

Copies sent to:

1. WRD - App. File G-16568/ Permit G-16206
2. Aspen Rural Land Consulting
Eric Urstadt
39290 NW Murtaugh Rd.
North Plains, OR 97133

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 16, Joel Plahn

CASEWORKER: MAB