

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- grant an extension of time to complete construction of the water system from October 1, 1998 to October 1, 2020;
- grant an extension of time to apply water to full beneficial use from October 1, 1998 to October 1, 2020.

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources

City – City of Bend

PFO – Proposed Final Order

WMCP – Water Management and Conservation Plan

Units of Measure

cfs – cubic feet per second

gpm – gallons per minute

AUTHORITY

Generally, see **ORS 537.630** and **OAR Chapter 690 Division 315**.

ORS 537.630(2) provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, shall order and allow an extension of time, for the completion of the well or other means of developing and securing the ground water or for complete application of water to beneficial use. 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 690-315-0080 provides in pertinent part that the Department shall make findings to determine if an extension of time for municipal and/or quasi-municipal water use permit holders may be approved to complete construction and/or apply water to full beneficial use.

FINDINGS OF FACT

Background

1. Permit G-11380 was granted by the Department on November 18, 1991. The permit authorizes the use of up to 10.0 cfs of water from four wells (Outback Wells 1, 2, 3, and 4) within the Deschutes River Basin, for municipal use. It specified that construction of the water development project was to be completed by October 1, 1993, and that complete application of water was to be made on or before October 1, 1994.
2. One prior permit extension has been granted for Permit G-11380. The most recent extension request resulted in the completion dates for construction and full application of water being extended to October 1, 1998.
3. On April 1, 1998, the Department approved Permit Amendments T-7845 and T-7852 (Special Order Volume 52, Page 279) authorizing two additional points of appropriation (Bear Creek Well 1 and Airport Well 2) under Permit G-11380.
4. The permit holder, the City of Bend (City), submitted an "Application for Extension of Time" to the Department on September 24, 1998, requesting the time to complete construction of the water system and to apply water to full beneficial use under the terms of Permit G-11380 (modified by Permit Amendments T-7845 & T-7852) be extended from October 1, 1998 to October 1, 2003.
5. Due to an ongoing permit extension rulemaking, the Department placed all pending Applications for Extension of Time for municipal and quasi-municipal permits on hold and did not require municipal and quasi-municipal water use permit holders to submit Applications for Extension of Time until the new rules were adopted.
6. Municipal and quasi-municipal water use permit extension rules OAR 690-315-0070 through 690-315-0100 were adopted by the Water Resources Commission November 1, 2002, were further revised, filed with the Secretary of State, and became effective on November 22, 2005.
7. The permit holder, the City, submitted a new "Application for Extension of Time" to the Department on October 31, 2003, consistent with the Division 315 rules, requesting the time to complete construction of the water system and to apply water to full beneficial use under the terms of Permit G-11380 (modified by Permit Amendments T-7845 & T-7852) be extended from October 1, 1998 to October 1, 2020.
8. Notification of the City's Application for Extension of Time for Permit G-11380 (modified by Permit Amendments T-7845 & T-7852) was published in the Department's Public Notice dated November 4, 2003. No public comments were received regarding the extension application.
9. On June 30, 2005, August 3, 2007, September 4, 2007, and September 10, 2007, the City

submitted additional information to supplement their Application for Extension of Time.

Review Criteria for Municipal Quasi-Municipal Water Use Permits [OAR 690-315-0080(1)]

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 690-315-0080. This determination shall consider the applicable requirements of ORS 537.230¹, 537.248², 537.630³ and/or 539.010(5)⁴

Complete Extension of Time Application [OAR 690-315-0080(1)(a)]

10. On October 31, 2003, the Department received a completed Application for Extension of Time and the fee required by ORS 536.050 from the City.

Start of Construction [OAR 690-315-0080(1)(b)]

11. Ground water permits held by municipal corporations for municipal purposes are not subject to the requirement to begin actual construction work within one year from the date of approval of the application.⁵

Duration of Extension [OAR 690-315-0080(1)(c)(d)]

Under OAR 690-315-0080(1)(c), (d), in order to approve an extension of time for municipal and quasi-municipal water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

12. The remaining work to be accomplished under Permit G-11380 (modified by Permit Amendments T-7845 & T-7852) consists of completing construction of the water system and completing application of water.
13. The permit holder has appropriated the total 10.0 cfs of water authorized under Permit G-11380 (modified by Permit Amendments T-7845 & T-7852) for municipal purposes. There is no "undeveloped portion" of the Permit G-11380 (modified by Permit Amendments T-7845 & T-7852) under OAR 690-315-0010(6)(g).

¹ ORS 537.230 applies to surface water permits only.

² ORS 537.248 applies to reservoir permits only.

³ ORS 537.630 applies to ground water permits only.

⁴ ORS 537.010(5) applies to surface water and ground water permits.

⁵ Section 5, chapter 410, Oregon Laws 2005, provides:

Sec. 5. (2) The amendments to ORS 537.230 and 537.630 by sections 1 and 2 of this 2005 Act apply to requests for extensions of time to complete construction or to perfect a water right made before, on or after the effective date of this 2005 Act, whether or not construction has commenced under a permit prior to the request.

(3) All final orders by the department that resulted in the issuance of a water right permit, the issuance of a water right certificate or the approval of an extension of time to complete construction or to perfect a water right for a municipal use that were issued before the effective date of this 2005 Act are not subject to challenge in an administrative or judicial proceeding with respect to the requirement to commence and complete construction within a specified period of time. [2005 c.410 §5]

14. In addition to the 10.0 cfs of water allowed under Permit G-11380 (modified by Permit Amendments T-7845 & T-7852), the City holds the following rights:
- Permit G-8565 for 2.45 cfs of water from Westwood Well;
 - Initiated under Permit G-4946 for 16.04 cfs of water are the following:
 - 0.9 cfs from River Wells 1 and 2 (Certificate 68702),
 - 7.57 cfs from River Wells 1 and 2, Pilot Butte Wells 1 and 2, and Copper Stone Well (T-7009), and
 - 4.87 cfs from River Wells 1 and 2, Pilot Butte Wells 1 and 2, and Bear Creek Wells 1 and 2 (T-9408),
 - 2.70 cfs of water remains in permit status;
 - Permit G-11379 (modified by Permit Amendment T-8342) for 8.0 cfs of water from four wells;
 - Permit G-4435 (modified by Permit Amendment T-8783) for 7.75 cfs of water from eleven wells;
 - Permit G-16178 for 12.0 cfs of water from three wells,
 - Permit G-16177 for 12.0 cfs of water from three wells,
 - 21.1 cfs of water from Tumalo Creek under Certificates 31411 and 31665, Transfer B-112 and a Court Decree; and
 - 15.0 cfs of water from Bridge Creek under Permit S-49823.

The City's water right certificates, permits and transfers total 68.24 cfs of ground water and 36.1 cfs of live flow (surface) water.

15. According to the City's 2004 Water Management and Conservation Plan (WMCP) (Table 2-5, Page 2-9), and updated information provided by the City on September 10, 2007, the City has beneficially used up to 40.63 cfs of ground water, being 6.35 cfs from Permit G-4435 (modified by Permit Amendment T-8783), 10 cfs from Permit G-11380 (modified by Permit Amendments T-7845 and T-7852), 16.04 cfs from water rights initiated under Permit G-4946, 1.73 cfs from Permit G-8565, and 6.51 cfs from Permit G-11379 (modified by Permit Amendment T-8342). The City intends to make full beneficial use of all of its groundwater permits to meet its long-term needs. According to information provided by the City, Permits G-4435, G-8565, and G-11379 are not currently at maximum beneficial use due to current well capacity limitations. The City also intends to fully develop permits G-16177 and G-16178 (and required mitigation) over the next 20 years.

16. According to the City's 2004 WMCP (Table 2-5, Page 2-9), and the updated information provided by the City on September 10, 2007, the City has also beneficially used up to 16.4 cfs of surface water under its surface water rights from Tumalo Creek and Bridge Creek. As described in the City's WMCP (Pages 2-5 to 2-9), the City's firm supply of surface water is 11.72 cfs. Water authorized under the City's 1983 priority Bridge Creek permit (Permit S-49823) is largely unavailable during irrigation season based on a stipulated agreement with Tumalo Irrigation District, which is incorporated into the permit. The use of 6.0 cfs of water from Tumalo Creek is unrestricted, while 15.1 cfs is subject to reduction based on low flows in Tumalo Creek, which can occur as frequently as once every four years.
17. According to updated information provided by the City on September 4, 2007 which is based on their 2004 WMCP, the 2006 maximum day demand is 48.6 cfs of water.
18. According to the City, in 2006 the City of Bend Water Service Area had a population of approximately 52,941. The City expects to serve a population of approximately 69,396 residents by the year 2020, which calculates to be an average population growth rate of approximately 1.8 percent per year.
19. The City has projected that their peak day demand will be approximately 70.6 cfs of water in the year 2020.
20. Full development of Permit G-11380 (modified by Permit Amendments T-7845 & T-7852) is needed to address the present and future water demands of the City.
21. The City's request for an extension of time until October 1, 2020 to complete construction of the water system and to apply water to full beneficial use under the terms of Permit G-11380 (modified by Permit Amendments T-7845 & T-7852) is both reasonable and necessary.

Good Cause [OAR 690-315-0080(1)(e) and (3)(a-g) and (4)]

The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0080(3).

Reasonable Diligence and Good Faith of the Appropriator [OAR 690-315-0080(3)(a),(c) and (4)]

Reasonable diligence and good faith of the appropriator must be demonstrated during the permit period or prior extension period as a part of evaluating good cause in determining whether or not to grant an extension. In determining the reasonable diligence and good faith of a municipal or quasi-municipal water use permit holder, the Department shall consider activities associated with the development of the right including, but not limited to, the items set forth under OAR 690-315-0080(4) and shall evaluate how well the applicant met the conditions of the permit or conditions of a prior extension period.

22. Prior to the issuance of Permit G-11380 on November 18, 1991, the City constructed two wells.
23. Work was accomplished (specified in the Application for Extension of Time) during the original development time frame under Permit G-11380.

24. During the last authorized extension period, being October 3, 1993 to October 1, 1998, the City completed Outback Well 2, received approval from OWRD for Permit Amendments T-7845 and T-7852, drilled Bear Creek Well 1 and completed a WMCP.
25. Since the end of the last authorized extension period, the City completed Outback Wells 3 and 4, began production from Bear Creek Well 1, completed the Airport Well, updated their WMCP, completed installation of water meters at all remaining un-metered dwellings served by the City's water distribution system, and mounted a conservation and education program.
26. As of October 31, 2003, the permit holder has invested \$6,521,000, which is approximately 81 percent of the total projected cost for complete development of this project. The City anticipates needing up to an additional \$1,560,000 investment for the completion of this project
27. Since the issuance of Permit G-11380 (modified by Permit Amendments T-7845 & T-7852) on November 18, 1991, the total authorized amount of 10.0 cfs has been appropriated from six wells for beneficial municipal purposes under the terms of this permit.
28. The Department has considered the City's compliance with conditions, and did not identify any concerns.

Financial Investment and Cost to Appropriate and Apply Water to a Beneficial Purpose
[OAR 690-315-0080(3)(b)]

29. As of October 31, 2003, the permit holder has invested \$6,521,000, which is 81 percent of the total projected cost for complete development of this project. The City anticipates an additional \$1,560,000 investment is needed for the completion of this project.

The Market and Present Demands for Water [OAR 690-315-0080(3)(d)]

30. As described in Findings 13 through 20 above, the City has indicated, and the Department finds that the City must rely on all their existing ground water and surface water rights.
31. The City expects a population increase, on average, of 1.8 percent per year over a fifteen year period, being 2005 through 2020.
32. Given the current water supply situation of the City, as well as current and expected demands, there is a market and present demand for the water to be supplied under Permit G-11380 (modified by Permit Amendments T-7845 & T-7852).

Fair Return Upon Investment [OAR 690-315-0080(3)(e)]

33. Use and income from the permitted water development project result in reasonable returns upon the investment made in the project to date.

Other Governmental Requirements [OAR 690-315-0080(3)(f)]

34. According to the City, delay in the development of this project was caused, in part, by the uncertainties surrounding use of groundwater in the Deschutes Basin and the associated mitigation requirements which have provided an additional layer of governmental requirements that has been an impediment to development of the City's water rights holdings.

Events which Delayed Development under the Permit [OAR 690-315-0080(3)(g)]

35. According to the City, delay of development under Permit G-11380 (modified by Permit Amendments T-7845 & T-7852) was due, in part, to the development of other water rights in sections of the City where the most rapid growth had been occurring.

Maintaining the Persistence of Listed Fish Species [OAR 690-315-0080(1)(f) and (2)]

The Department's determination regarding maintaining the persistence of listed fish species shall be based on existing data and advice of the Oregon Department of Fish and Wildlife (ODFW). The determination shall be limited to impacts related to stream flow as a result of use of the undeveloped portion of the permit and further limited to where, as a result of use of the undeveloped portion of the permit, ODFW indicates that stream flow would be a limiting factor for the subject listed fish species.

36. Permit G-11380 (modified by Permit Amendments T-7845 & T-7852) is not subject to an evaluation regarding maintaining the persistence of listed fish species because there is no "undeveloped portion" of the Permit G-11380 (modified by Permit Amendments T-7845 & T-7852) under OAR in 690-315-0010(6)(g).

CONCLUSIONS OF LAW

1. The City 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(2).
2. The City has submitted a complete extension application form and the fee specified under ORS 536.050(1)(k), as required by OAR 690-315-0080(1)(a).
3. Pursuant to Section 5, Chapter 410, Oregon Laws 2005, the permit holder is not required to demonstrate that actual construction of the project began within one year of the date of issuance of the permit, as otherwise required by OAR 690-315-0080(1)(b).
4. The time requested to complete construction and apply water to full beneficial use is reasonable, as required by OAR 690-315-0080(1)(c).
5. Completion of construction and full application of water to beneficial use can be completed by

October 1, 2020⁶ pursuant to OAR 690-315-0080(1)(d).

6. 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 the fair return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the water right permit holder had no control, and the Department has determined that the City has shown good cause for an extension of time to complete construction of the water system and to apply the water to full beneficial use pursuant to OAR 690-315-0080(1)(e).
7. There is no undeveloped portion of the permit to be considered under OAR 360-315-0080(1)(f).

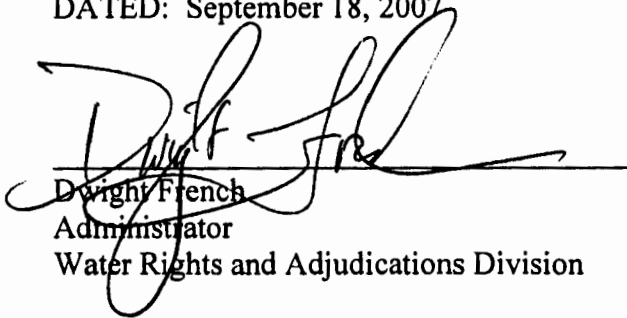
Proposed Order

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-11380 (modified by Permit Amendments T-7845 & T-7852) from October 1, 1998 to October 1, 2020.

extend the time to apply the water to beneficial use under Permit G-11380 (modified by Permit Amendments T-7845 & T-7852) from October 1, 1998 to October 1, 2020.

DATED: September 18, 2007


Dwight French
Administrator
Water Rights and Adjudications Division

If you have any questions, please check the information box on the last page for the appropriate names and phone numbers.

⁶ Pursuant to ORS 537.630(4), upon the completion of beneficial use of water allowed under the permit, the permit holder 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 permit holder shall submit a map of the survey and the claim of beneficial use.

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 protest and request a contested case hearing on the proposed final order. Your request for contested case hearing must be in writing and must be received by the Water Resources Department no later than **November 2, 2007** being 45 days from the date of publication of the proposed final order in the Department's weekly public notice.
2. A written request for contested case hearing 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 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 protest fee required under ORS 536.050, if petitioner is other than the water right permit holder.
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 request for contested case hearing 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 any questions about statements contained in this document, please contact Ann L. Reece at 503-986-0827.

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 Dwight French at 503-986-0819.

If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0801.

Address any correspondence to: Water Rights and Adjudications Division
725 Summer St NE, Suite A
Salem, OR 97301-1266

Fax: 503-986-0901