

**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 R-12601, Water Right Application R-73929        )  
in the name of Obendorf Malheur Farms, LLC.                )        **PROPOSED FINAL ORDER**

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**Permit Information**

Application:	R-73929
Permit:	R-12601
Basin:	11 – Owyhee / Watermaster District 9
Date of Priority:	February 18, 1999
Source of Water:	Seepage water, tributary of Succor Creek, within the Owyhee Basin
Purpose of Use:	Wildlife enhancement, fish production, and recreation
Maximum Volume:	186.0 Acre-Feet (AF) each year

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***Please read this Proposed Final Order in its entirety.***

*In summary, the Department proposes to:*

- Grant an extension of time to complete construction of the water system from October 1, 1999 to October 1, 2020.
- Grant an extension of time to apply water to full beneficial use from October 1, 2000 to October 1, 2020.<sup>1</sup>

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.230 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315

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<sup>1</sup> Pursuant to ORS 537.230(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.

## **ACRONYM QUICK REFERENCE**

Department – Oregon Water Resources Department  
PFO – Proposed Final Order  
cfs – cubic feet per second  
gpm – gallons per minute  
AF – acre-feet

## **AUTHORITY**

**Generally, see ORS 537.230 and OAR Chapter 690 Division 315.**

**ORS 537.230(3)** provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, order an extension of time within which irrigation or other works 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 R-12601 was issued by the Department on January 7, 1999. The permit authorizes storage of up to 186.0 AF of water in Lonesome Reservoir from seepage water, tributary of Succor Creek, within the Owyhee Basin, for wildlife enhancement, fish production, and recreation. The permit specified actual construction work was to begin within one year from permit issuance, being January 7, 2000, construction of the water system was to be completed by October 1, 1999, and complete application of water was to be made on or before October 1, 2000.
2. On April 7, 2014, the Department issued a letter by certified mail, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit R-12601 would begin.

3. On June 9, 2014, the Department issued a letter by certified mail, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit R-12601 would begin.
4. On September 25, 2014, the Department issued a Cancellation of Certain Permit(s) to Appropriate Water for Permit R-12601, for failure to provide proof of appropriation of water under the terms and conditions of the permit as required under ORS 537.260.
5. On January 22, 2015, a Reinstatement of Permit R-12601 was issued by the Department.
6. On November 30, 2015, an assignment by proof from Phillip and Marilyn Geertson to Obendorf Malheur Farms LLC was recorded in the records of the Department.
7. The permit holder, Obendorf Malheur Farms, LLC, submitted an "Application for Extension of Time" to the Department on November 30, 2015, requesting the time to complete construction of the water system be extended from October 1, 1999 to October 1, 2020. The Department, determined that the permit holder's intent was also to request the time in which to accomplish beneficial use of water to the full extent under the terms of Permit R-12601 be extended from October 1, 2000, to October 1, 2020.
8. Notification of the Application for Extension of Time for Permit R-12601 was published in the Department's Public Notice dated December 8, 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> and/or 539.010(5)<sup>4</sup>.*

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

9. On November 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)]**

10. Actual construction of the water system began within 1 year of permit issuance, as specified in the permit. According to the application, construction of the water system began prior to permit issuance, with construction beginning in 1994.

According to a letter submitted November 8, 1999, to the previous land owner from the Department Dam Safety Section, the reservoir was found to be filled to capacity. 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 539.010(5) applies to surface water and ground water permits.

Department has determined the permit holder has satisfied the condition requiring beginning of construction of the water works.

**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.*

11. As of November 30, 2015, the permit holder states the remaining work to be completed consists of restoring the outlet gate/conduit; meeting all permit conditions, including installing a staff gage and submitting annual water measurement reports; completing construction of the water system; and applying water to full beneficial use.

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 R-12601 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)]**

12. The application states work was accomplished within the time allowed in the permit or previous extension as follows:
  - a. Construction of the water system began prior to October 1, 2000. Construction of the reservoir began in 1994.
  - b. Work completed during the original development time frame under Permit R-12601. The reservoir was completed and filled by November 8, 1999.

The Department has determined that work has been accomplished prior to permit issuance, which provides evidence of good cause and reasonable diligence from the appropriator towards the complete application of water to a beneficial use.

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

13. The application states a maximum rate of 223.0 AF of water has been stored in Lonesome Reservoir for wildlife enhancement, fish production, and recreation. This

exceeds the amount of water authorized under this permit. The authorized amount of water is 186.0 AF each year.

14. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2000.

The Department has determined that this extension will allow the staff gage installed after October 1, 2000, to satisfy compliance of the condition of a staff gage that measures the entire range and stage between full reservoir level dead pool storage must be installed in the reservoir, in an effort to make proof of beneficial use of the water as required by Permit R-12601. The Department has also determined that this extension will allow the permit holder to submit annual water use measurements, in an effort to make proof of beneficial use of the water as required by Permit R-12601.

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

15. The water right permit holder's conformance with the permit or previous extension conditions.
  - a. 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 staff gage has been installed, and (2) annual reports of the amount of water used each month have not been received by the Department.
  - b. 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 determined the permit holder did not comply with conditions of the permit, by not installing a staff gage in the reservoir. The Department has also determined the permit holder did not comply with conditions of the permit, by not submitting annual water use measurements to the Department, as required by Permit R-12601.

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

16. The applications states the permit holder has invested approximately \$8,000, which is about 24 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$25,000 investment is needed for the completion of this project.

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

17. The Department has found good faith of the appropriator under Permit R-12601.

**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:*

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)].

18. The amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit R-12601; 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 diversion is located on a tributary of Succor Creek, and is not located within a Withdrawn Area. The tributary of Succor Creek, is not located within or above a 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 diversion is not in a location listed by the Department of Environmental Quality as a water quality limited stream.
19. Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].
  - a. None have been identified.
20. Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].
  - a. None have been identified.

**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. None have been identified.

**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 537.230(3).
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 537.230 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. Based on Finding of Facts 10 through 17, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2020<sup>5</sup>, 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).

**Continued on the following page**

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<sup>5</sup>Pursuant to ORS 537.230(3), 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.

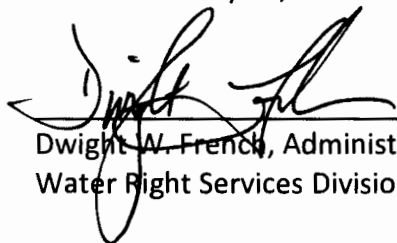
## PROPOSED ORDER

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 R-12601 from October 1, 1999 to October 1, 2020.

Extend the time to apply water to beneficial use under Permit R-12601 from October 1, 2000 to October 1, 2020.

DATED: January 12, 2016

  
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 **February 26, 2016**, 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.





Mailing List for Extension PFO Copies

PFO Date: January 12, 2016

Copies Mailed

Application: R-73929

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

Permit: R-12601

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

Original mailed to Applicant:

Obendorf Malheur Farms, Inc.  
26496 Deb Ln  
Parma, ID 83660

Copies sent to:

1. WRD - App. File R-73929/ Permit R-12601

Fee paid as specified under ORS 536.050 to receive copy:

2. None

Receiving via e-mail (10 AM Tuesday of signature date)

(DONE BY EXTENSION SPECIALIST)

3. WRD - Watermaster District 9, Ron Jacobs

CASEWORKER: CAC