

**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-16655, Water Right Application G-17085,) PROPOSED FINAL ORDER
in the name of Scenic Fruit Company)

Permit Information

Application:	G-17085
Permit:	G-16655
Basin:	2 – Willamette / Watermaster District 20
Date of Priority:	July 17, 2008
Source of Water:	Well 1 (CLAC 5200), Well 2, Well 3, Well 4, Well 5 and Well 6 in Deep Creek Basin
Purpose of Use:	Agriculture uses, nursery use on 120.0 acres, primary irrigation to make up a deficiency in rate on 110.0 acres and supplemental irrigation of 10.0
Maximum Rate:	1.5 cubic feet per second (cfs), being no more than 0.8 cfs for primary irrigation to make up a deficiency in rate, and 0.13 cfs for supplemental irrigation; further limited to 0.58 cfs from each well

Please read this Proposed Final Order in its entirety as it contains 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 March 11, 2015 to October 1, 2025.
- Grant an extension of time to apply water to full beneficial use from March 11, 2015 to October 1, 2025¹.
- Make the extension subject to certain conditions set forth below.

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.

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.

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-16655 was issued by the Department on March 11, 2010. The permit authorizes the use of up to 1.5 cfs (being no more than 0.8 cfs for primary irrigation to make up a deficiency in rate, and 0.13 cfs for supplemental irrigation; further limited to

0.58 cfs from each well) of water from Well 1 (CLAC 5200), Well 2, Well 3, Well 4, Well 5 and Well 6 in Deep Creek Basin for agriculture uses, nursery use on 120.0 acres, primary irrigation to make up a deficiency in rate on 110.0 acres and supplemental irrigation of 10.0 acres. The permit specified construction of the water system was to be completed by March 11, 2015, and complete application of water was to be made on or before March 11, 2015.

2. The permit holder, Hugh Eisele owner of Scenic Fruit Company, submitted an "Application for Extension of Time" to the Department on December 24, 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-16655 be extended from March 11, 2015 to October 1, 2025. This is the first permit extension requested for Permit G-16655.
3. Notification of the Application for Extension of Time for Permit G-16655 was published in the Department's Public Notice dated January 5, 2016. 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 December 24, 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 before the complete construction date specified in the permit, as being March 11, 2015. Construction of Well 1 (CLAC 5200) began March 13, 1997.

According to the well log received by the Department on July 10, 1997, construction of Well 1 (CLAC 52000) began March 13, 1997. The Department has determined that the prosecution of the construction of the well began prior to March 11, 2015.

Duration of Extension [OAR 690-315-0040(1)(c)]

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.

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 December 24, 2015, the permit holder states the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, 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, 2025, 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-16655 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)]

7. According to the permit holder, work was accomplished within the time allowed in the permit or previous extension as follows:
 - a. Construction of Well (CLAC 52000) was completed prior to March 11, 2015.
 - b. Work was completed during the original development time frame under Permit G-16655. The permit holder installed main lines, drip irrigation, and manifolds for irrigation on 71.0 Acres.

The Department has determined that work has been accomplished within the time allowed in the permit, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

8. The application states a maximum rate of 1.5 cfs of water has been appropriated from Well 1 (CLAC 52000) for irrigation use on 71.0 acres. This exceeds the amount of water authorized under this permit. The authorized amount of water is 1.5 cfs, being no more than 0.8 cfs for primary irrigation to make up a deficiency in rate, and 0.13 cfs for

supplemental irrigation; further limited to 0.58 cfs from each well).

The Department has determined beneficial use of water has been made by March 11, 2015 on 71.0 acres.

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

9. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns.
10. Since March 2000, the permit holder has installed a totalizing flow meter, submitted the annual water use records, and submitted the static water level measurements required under Permit G-16655 on Well 1 (CLAC 52000).

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

11. As of December 24, 2015, the application states the permit holder has invested about \$86,800, which is approximately 22 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$300,000 investment is needed for the completion of this project.

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

12. The Department has found good faith of the appropriator under Permit G-16655.

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:

13. 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-16655; 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 points of appropriation for Permit G-16655, located within the Deep Creek Basin, are not located within a limited or critical ground water area. Deep

Creek is located above the Clackamas Scenic Waterway, and is located within an area ranked "highest" 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 points of appropriation are 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)].

14. 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)].

15. None have been identified.
16. 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)]

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. 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 537.630(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. Based on Finding of Facts 5 through 12, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2025, as required by OAR 690-315-0040(1)(c).
4. 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).

5. As required by OAR 690-315-0050(6) and as described in Finding 16 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-16655.

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-16655 from March 11, 2015 to October 1, 2025.

Extend the time to apply water to beneficial use under Permit G-16655 from March 11, 2015 to October 1, 2025.

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, 2021. 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: February 9, 2016


Dwight 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 **March 25, 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.

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.

- If you have questions about statements contained in this document, please contact Machele A Bamberger at (503)986-0802.
 - 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 Patricia McCarty at 503-986-0820.
 - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0900.
 - Address any correspondence to : Water Right Services Division
725 Summer St NE, Suite A
Salem, OR 97301-1266
- Fax: 503-986-0901

Mailing List for Extension PFO Copies

PFO Date: February 9, 2016

Copies Mailed

Application: G-17085

By: _____

Permit: G-16655

On: _____

Original mailed to Applicant:

Scenic Fruit Company
7510 SE Altman Road
Gresham, OR 97080

Copies sent to:

1. WRD - App. File G-17085/ Permit G-16655

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 20, Amy Kim

CASEWORKER: MAB