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-13300, Water Right Application G-14447, in the name of Jerry T. Marshall	)))	PROPOSED FINAL ORDER

Permit Information

Application:	G-14447
Permit:	G-13300
Basin:	2 – Willamette / Watermaster District 18
Date of Priority:	January 22, 1997
Source of Water:	A well in the Willamette River Basin
Purpose of Use:	Irrigation of 21.0 Acres
Maximum Rate:	0.045 cubic foot per second (cfs)

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 apply water to full beneficial use from October 1, 2002 to October 1, 2024[1].
- 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.

[1] 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

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.

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-13300 was issued by the Department on January 21, 1998. The permit authorizes the use of up to 0.045 cfs of water from a well in the Willamette River Basin

for irrigation of 21.0 acres. The permit specified actual construction of the well was to begin on or by January 21, 1999 and complete application of water was to be made on or before October 1, 2002.

2. On August 30, 2013, 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 G-13300 would begin.

3. On January 16, 2014, the Department issued (Special Order Volume 91, Page 670) a Final Order for Cancellation of Certain Permit(s) to Appropriate Water under the provisions of ORS 537.260 for G-13300, for failure to make proof of appropriation of water under the terms and conditions of the permit.

4. On March 11, 2014, the Department received a request for reinstatement of Permit G-13300.

5. On March 13, 2014, the Department issued (Special Order Volume 91, page 920) a Order Granting Reconsideration, Reversing Cancellation Order, and Reinstating Permit G-13300.

6. The permit holder, Jerry T. Marshall, submitted an "Application for Extension of Time" to the Department on July 16, 2014, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-13300 be extended from October 1, 2002 to October 1, 2024. This is the first permit extension requested for Permit G-13300.

7. Notification of the Application for Extension of Time for Permit G-13300 was published in the Department's Public Notice dated July 22, 2014. 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[2], 537.248[3], 537.630[4] and/or 539.010(5)[5].

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

8. On July 16, 2014, the Department received a completed Application for Extension of Time and the fee specified in ORS 536.050 from the permit holder.

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[2]ORS 537.230 applies to surface water permits only.

[3]ORS 537.248 applies to reservoir permits only.

[4]ORS 537.630 applies to ground water permits only.

[5]ORS 539.010(5) applies to surface water and ground water permits.

Start of Construction *[OAR 690-315-0040(1)(b) and 690-315-0040(5)]*

9. Actual construction of the well began prior to the January 21, 1999 deadline specified in the permit. According to the permit holder, construction of Well 1 (CLAC 3315) began in 1945.

   According to the well log received by the Department, Well 1 (CLAC 3315) construction began in 1945. The Department has determined that the prosecution of the construction of the well began prior to January 21, 1999.

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.

10. As of July 16, 2014, the permit holder states the remaining work to be completed consists of gaining approval for a Permit Amendment for an additional point of appropriation, 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, 2024, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-13300 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)]

11. The application states, work was accomplished within the time allowed in the permit or previous extension as follows:

    a. Actual construction of the well began prior to the January 21, 1999 deadline specified in the permit. Well 1 (CLAC 3315) construction began and was completed in 1945.

    b. Work was completed during the original development time frame under Permit

G-13300. The permit holder installed irrigation and delivery system.

c. Since October 1, 2002, the permit holder has installed additional irrigation and delivery system and an unauthorized Well 2 (CLAC 3316) was deepened (CLAC 62654).

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)]

12. The application states no water from Well 1 (3315) has been put to beneficial use under Permit G-13300. An undisclosed amount of water has been appropriated from an unauthorized Well 2 (CLAC 62654) for irrigation of 11.0 acres.

13. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2002.

The Department has determined that water use from Well 2 (CLAC 62654) has been illegal use of water, as this well is an unauthorized well under Permit G-13300.

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

14. The permit holder has submitted the static water level measurements for March 2013 and 2014, required under Permit G-13300.

15. 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, (3) annual reports of the amount of water used each month have not been received by the Department, (4) Well 2 (CLAC 62654) is an unauthorized well being used for irrigation under Permit G-13300.

The Department has determined that this extension will allow the permit holder to apply for a Permit Amendment to add Well 2; install a meter on Well 2; submit March Static water levels; and water usage reports after 2002 to satisfy compliance of the permit conditions in an effort to make proof of beneficial use of the water as required by Permit G-13300

Failure to comply with permit conditions constitutes illegal use of water. 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)]

16. The application states the permit holder has invested about $45,000, which is approximately 50 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional $44,600 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 G-13300.

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 G-13300; 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-13300, located within the Willamette River Basin, is not located within a limited or critical ground water area. Willamette River is not located within or above any state or federal scenic waterway, however, 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)].

19. 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)].

20. None have been identified.

21. 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 a need to condition any use of Well 2 (CLAC 62654) with a "Permit Amendment." This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary due the use of an unauthorized well under Permit G-13300. This condition requires the permit holder to apply for a Permit Amendment by July 30, 2016 to add Well 2 (CLAC 62654) as an authorized well under Permit G-13300.

22. 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 2 of the "Conditions" section of this PFO, was determined to be necessary due to no additional work having been accomplished since 2007.

23. 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 3 of the "Conditions" section of this PFO to meet this condition.

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

24. 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)]

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

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

26. 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. 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. Based on Finding of Facts 9 through 17, full application of water to beneficial use can be accomplished by October 1, 2024, 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 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 21 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), a Permit Amendment condition that applies to any use of Well 2 (CLAC 62654) under Permit G-13300 in order to ensure future diligence and mitigate the effects of the subsequent development on competing demands on the resource.

7. As authorized in OAR 690-315-0050(5) and as described in Finding 22 above, the Department has established, as specified in the "Conditions" section of this PFO (2), a "Last Extension Condition" in order to ensure future diligence is exercised in the development and perfection of Permit G-13300.

8. As required by OAR 690-315-0050(6) and as described in Finding 23 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 3), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit G-13300.

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 apply water to beneficial use under Permit G-13300 from October 1, 2002 to October 1, 2024.

Subject to the following conditions:

CONDITIONS

1. **Permit Amendment Condition**
The use of Well 2 (CLAC 62654) is subject to this Permit Amendment Condition.

The permit holder shall apply for a Permit Amendment by July 30, 2016 to add Well 2 (CLAC 62654) under Permit G-13300.

2. **Last Extension Condition**
This is to be the last extension of time granted for Permit G-13300. Any future extensions of time requests will be denied.

3. **Checkpoint Condition**
The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2018, 2023.** ***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: March 15, 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 **April 29, 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.

Notice Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: http://legalassistance.law.af.mil

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- If you have questions about statements contained in this document, please contact Corey A Courchane at (503)986-0825.
- 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
  Fax: 503-986-0901 Salem, OR 97301-1266