

**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-15734, Water Right Application G-16146, in ) PROPOSED FINAL ORDER  
the name of Tuckness Farms, Inc. )

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Permit Information

Application: G-16146  
Permit: G-15734  
Basin: 10 – Malheur / Watermaster District 9  
Date of Priority: December 8, 2003  
Source of Water: A well in Malheur River Basin  
Purpose of Use: Supplemental irrigation use on 283.9 acres  
Maximum Rate: 2.0 cubic feet per second (cfs)

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***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, 2009 to October 1, 2025<sup>1</sup>.
- 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.

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<sup>1</sup>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

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(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-15734 was issued by the Department on October 14, 2004. The permit authorizes the use of up to 2.0 cfs of water from a well in Malheur River Basin for supplemental irrigation use on 283.9 acres. The permit specified complete application of water was to be made on or before October 1, 2009.
2. On December 7, 2015, 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-15734 would begin.
3. The permit holder, Dana E. Tuckness, President of Tuckness Farms, Inc., submitted an "Application for Extension of Time" to the Department on January 25, 2016, requesting the time to apply water to full beneficial use to be extended from October 1, 2009 to October 1, 2025.
4. Notification of the Application for Extension of Time for Permit G-15734 was published in the Department's Public Notice dated February 9, 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 537.230<sup>2</sup>, 537.248<sup>3</sup>, 537.630<sup>4</sup> and/or 539.010(5)<sup>5</sup>.*

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

5. On January 25, 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)]**

6. Construction of the water system began prior to the complete application of water date specified in the permit, being October 1, 2009. The permit holder states, construction of the well began June 1, 2003.

According to the well log received by the Department on June 30, 2003, Well (MALH 52052) construction began May 10, 2003. The Department has determined that the prosecution of the construction of the well began prior to October 1, 2009.

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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 537.630 applies to ground water permits only.

<sup>5</sup>ORS 539.010(5) applies to surface water and ground water permits.

**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.*

7. As of January 25, 2015, the permit holder states the remaining work to be completed consists of installing a pump and connecting to current underground main line, 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 accomplish the application of water to beneficial use under the terms and conditions of Permit G-15734 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)]**

8. The application states, work was accomplished within the time allowed in the permit or previous extension as follows:
  - a. Construction of the well was completed prior to permit issuance. Construction of Well (MALH 52052) began May 10, 2003 and was completed June 5, 2003. Well (MALH 52052) was reconditioned, beginning October 30, 2003 and was completed on November 2, 2003. Well (MALH 52052) was re-identified as Well (MALH 52210), and here forward will be referred to as Well (MALH 52210).
  - b. No work was completed during the original development time frame under Permit G-15734, as a majority of the work was accomplished prior to permit issuance.

The Department has determined that no work has been accomplished since permit issuance, which provides evidence of marginal good cause and lack of reasonable diligence towards the complete application of water to a beneficial use.

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

9. The application states no water has been appropriated from Well (MALH 52210) for supplemental irrigation use on 283.9 acres.
10. Beneficial use of water has not yet been demonstrated under this permit because no water has been appropriated and no permit conditions were satisfied by October 1, 2009.
11. According to the permit holder, delay of full beneficial use of water under Permit G-15734 was due, in part, to the high cost of the project, as this is a supplemental source. The permit holder has had sufficient water from the primary source authorized under Certificate 75691, and according to the Application for a Permit to Use Ground Water submitted to the Department on December 1, 2003, the permit holder has planned to develop this source to make up any deficiency in the rate received from the primary right under Certificate 75691. The permit holder needs more time in which to obtain the full quantity of water allowed under the permit.

The Department has determined that this extension will allow the permit holder additional time to make full beneficial use of the water under the terms and conditions of the permit.

The Department has determined that this extension will allow all permit conditions to be completed after 2009, to satisfy compliance of the conditions of the permit in an effort to make proof of beneficial use of the water as required by Permit G-15734.

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

12. 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, and (3) annual reports of the amount of water used each month have not been received by the Department.

Therefore, the Department has determined the permit holder did not comply with conditions of the permit, by not installing a meter or other suitable measuring device, or submitting annual water use reports and March static water level measurements, as required by Permit G-15734.

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)]***

13. The application states the permit holder has invested about \$13,270, which is approximately 35 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)]***

14. The Department has found marginal good faith of the appropriator under Permit G-15734, as no work has been accomplished since permit issuance, being October 14, 2004.

***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)].

15. 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-15734; 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-15734, located within the Malheur River Basin, is not located within a limited or critical ground water area. Malheur River 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)].***

16. 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)].***

17. None have been identified.
18. 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 1 of the “Conditions” section of this PFO, was determined to be necessary due to no additional work having been accomplished since October 14, 2004.
19. 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 2 of the “Conditions” section of this PFO to meet this condition.

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

20. 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)]***

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

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

22. 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 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 6 through 14, full application of water to beneficial use can be accomplished by October 1, 2025, 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 marginal 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 required by OAR 690-315-0050(6) and as described in Finding 19 above, the Department has established, as specified in the “Conditions” section of this PFO (Item 2), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit G-15734.
7. As authorized in OAR 690-315-0050(5) and as described in Finding 18 above, the Department has established, as specified in the “Conditions” section of this PFO (Item 1), a “Last Extension Condition” in order to ensure future diligence is exercised in the development and perfection of Permit G-15734.

**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-15734 from October 1, 2009 to October 1, 2025.

Subject to the following conditions:

### CONDITIONS

**1. Last Extension Condition**

This is to be the last extension of time granted for Permit G-15734. Any future extensions of time requests will be denied.

**2. Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2020 and 2024. 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.

**3. Before water use may begin under this permit;**

A. The water user shall install a meter or other suitable measuring device as approved by the Director. The water user shall maintain the meter or other suitable measuring device as approved by the Director in good working order, shall keep a complete record of the amount of water used each month, and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as may be required by the Director.

Further, the Director may require the water user to report general water-use information, including the place and nature of use of water under the permit.

- B. The water user shall allow the watermaster access to the meter or measuring device; provided however, where the meter or measuring device is located within a private structure, the watermaster shall request access upon reasonable notice.

To monitor the effect of water use from the well(s) authorized under this right, the Department requires the water user to make and report annual static water level measurements. The static water level shall be measured in the month of March. Reports shall be submitted to the Department within 30 days of measurement.

Measurement must be made according to the following schedule:

**Before Use of Water Takes Place**

**Initial and Annual Measurements**

The Department requires the water user to submit an initial water level measurement in the month specified above once well construction is complete and annually thereafter until use of water begins; and

**After Use of Water has Begun**

**Reference Water Level Determination**

Following the first year of water use, the user shall submit one static water level measurement in the month specified above which will establish the reference level against which future annual measurements will be compared. The water user is not required to measure additional water levels after the reference level has been determined unless required by the Director. The additional measurements may be required in a different month. If the measurement requirement is stopped, the Director may restart it at any time.

All measurements shall be made by a certified water rights examiner, registered professional geologist, registered professional engineer, licensed well constructor or pump installer licensed by the Construction Contractors Board and be submitted to the Department on forms provided by the Department. The Department requires the individual performing the measurement to:

- (a) Identify each well with its associated measurement; and
- (b) Measure and report water levels to the nearest tenth of a foot as depth-to-water below ground surface; and
- (c) Specify the method used to obtain each well measurement; and
- (d) Certify the accuracy of all measurements and calculations submitted to the Department.

The water user shall discontinue use of, or reduce the rate or volume of withdrawal from, the well(s) if annual water level measurements reveal any of the following events:

- (a) An average water level decline of three or more feet per year for five consecutive years; or
- (b) A water level decline of 15 or more feet in fewer than five consecutive years; or
- (c) A water level decline of 25 or more feet; or
- (d) Hydraulic interference leading to a decline of 25 or more feet in any neighboring well with senior priority.

DATED: May 17, 2016

  
Dwight W. Erench, 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 **July 1, 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.

