



## **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.

## **FINDINGS OF FACT**

### *Background*

1. Permit G-12301 was issued by the Department on February 29, 1996. The permit authorizes the use of up to 3.19 cfs of water from a well within Malheur Lake Basin for irrigation of 255.0 acres. The permit specified actual construction of the well was to begin by February 29, 1997, construction of the water system was to be completed by October 1, 1998, and complete application of water was to be made on or before October 1, 1999.
2. On February 4, 2002, a Claim of Beneficial Use was submitted to the Department for review.
3. On April 11, 2008, the Department notified the permit holder after the review of the

Claim of Beneficial Use that a pump test which is required has not been received by the Department.

4. On February 22, 2010 an assignment from Joe Eckley to Gordon Bloomquist was recorded in the records of the Water Resources Department.
5. On August 8, 2013, an assignment from Gordon Bloomquist to Sunnyside Dairy, LLC was recorded in the records of the Water Resources Department.
6. Two prior permit extensions have been granted for Permit G-12301. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2005 to October 1, 2014.
7. On behalf of the permit holder, Rosalio Brambila, Manager of Sunnyside Dairy, LLC, submitted an "Application for Extension of Time" to the Department on February 17, 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-12301 be extended from October 1, 2014 to October 1, 2025.
8. Notification of the Application for Extension of Time for Permit G-12301 was published in the Department's Public Notice dated March 29, 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)]**

9. On February 17, 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 well began prior to the February 29, 1997 deadline specified in the permit. According to the previous Application for Extension of Time received by the Department on September 27, 1999, construction of the well began in 1997.

According to the well log received by the Department on April 9, 1997, Well (HARN

---

<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.

50149) construction began February 27, 1997. The Department has determined that the prosecution of the construction of the well began prior to February 29, 1997.

**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 February 17, 2015, the permit holder states the remaining work to be completed consists of submitting and gaining approval for a Permit Amendment to change the place of use, add additional points of appropriation, and correctly identify the location of the existing wells; completing construction of the water system; meeting all permit conditions, including installing meters, and submitting annual water use reports; 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-12301 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. Actual construction of the well began prior to the February 29, 1997 deadline specified in the permit. Construction of unauthorized Well 2 (HARN 50149) began February 27, 1997 and was completed March 29, 1997.
  - b. Work was completed during the original development time frame under Permit G-12301. The original permit holder installed a 100 HP pump, switch equipment, pipeline, pivot, and a meter. Construction of the Well 1 (HARN 50516) began September 23, 1998 and was completed on April 20, 2000.

- c. During the most recent extension period, being from October 1, 2005, to October 1, 2014, two pivots were installed and Well 1 (HARN 50516/51788) was deepened in June 2011.
- d. Since October 1, 2014, the applicant states the following was accomplished:
  - Constructed an unauthorized well; and
  - Installed pump, piping, and electrical.

The Department has determined that work has been accomplished within the time allowed in the most recent extension, 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)]***

- 13. The application states a maximum rate of 3.3 cfs of water, being 2.1 cfs from unauthorized Well (HARN 50149), and 1.2 cfs from the unauthorized Well (HARN 50516/51788) has been appropriated from the wells for irrigation of 255.0 acres.
- 14. Beneficial use of water not has been demonstrated under this permit, as the wells are not authorized under Permit G-12301.
- 15. According to the application, delay of full beneficial use of water under Permit G-12301 was due, in part, to the property going in to foreclosure in 2013, and was sold to Sunnyside Dairy, LLC. The permit holder needs more time in which to gain approval for the change in place of use, additional points of appropriation and correctly identify the location of the existing wells

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

- 16. From October 1, 1999, to October 1, 2004 and then October 1, 2014 to 2015 the permit holder installed a meter on Well 1 (HARN 1318) and submitting the annual water use records under Well 1(HARN 1318) as required under Permit G-12301.
- 17. The unauthorized Well (HARN 50149) and Well (HARN 51788) have meters that were installed in 2014.
- 18. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the record does not show that the current wells being utilized are authorized under permit G-12301; and (2) annual reports of the amount of water used each month have not been received by the Department for the unauthorized wells.
- 19. The Department has determined that this extension will allow the permit holder to seek approval of a Permit Amendment to change the location of a portion of the acres, add

additional points of appropriation, correctly identify well locations, and submit the annual reports of the amount of water used after October 1, 2014 to satisfy compliance of the conditions in an effort to make proof of beneficial use of the water as required by Permit G-12301

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)]***

20. The application states the permit holder has invested about \$604,250, which is approximately 98 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$10,000 investment is needed for the completion of this project.

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

21. The Department has found good faith of the appropriator under Permit G-12301.

***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)].

22. 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-12301; 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-12301, located within the Malheur Lake Basin, is not located within a limited or critical ground water area. Malheur Lake 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)].***

23. 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)].***

24. None have been identified.

25. 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 illegal use of water from unauthorized wells and the length of time of development being 20 years.

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

26. 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)]***

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

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

28. 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 10 through 21, 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).

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).
6. As authorized in OAR 690-315-0050(5) and as described in Finding 25 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-12301.

**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 complete construction of the water system under Permit G-12301 from October 1, 2014 to October 1, 2025.

Extend the time to apply water to beneficial use under Permit G-12301 from October 1, 2014 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-12301. Any future extensions of time requests will be denied.

DATED: May 31, 2016



Dwight M. 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 **July 15, 2016**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.

