

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-15223, Water Right Application G-15705, in) PROPOSED FINAL ORDER
the name of Bear Mountain Cherries, LLC and RABO)
AgriFinance Inc

Permit Information

Application:	G-15705
Permit:	G-15223
Basin:	4 – Hood River / Watermaster District 3
Date of Priority:	February 12, 2002
Source of Water:	A well in Neal Creek Basin
Purpose of Use:	Irrigation of 210.9 acres
Maximum Rate:	0.998 cubic foot per second (cfs)

Please read this Proposed Final Order in its entirety.

In Summary, the Department proposes to:

- Grant an extension of time to apply water to full beneficial use from October 1, 2007 to October 1, 2020¹.

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.

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.

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-15223 was issued by the Department on October 1, 2002. The permit authorizes the use of up to 0.998 cfs of water from a well in Neal Creek Basin for irrigation of 210.9 acres. The permit specified complete application of water was to be made on or before October 1, 2007.
2. On November 5, 2004, an assignment from Cascade Orchards, Inc; George B. Wertgen to Cascade Orchards, Inc; George B. Wertgen and Northwest Farm Credit Services, FLCA was recorded in the records of the Water Resources Department.

3. On September 29, 2011, an assignment from Cascade Orchards, Inc; George B. Wertgen and Northwest Farm Credit Services, FLCA to Cascade Orchards, Inc; Mary Thomas, First Successor Trustee, George Wertgen Estate, President Cascade Orchards was recorded in the records of the Water Resources Department.
4. On April 6, 2012, an assignment from Cascade Orchards, Inc; Mary Thomas, First Successor Trustee, George Wertgen Estate, President Cascade Orchards to Bear Mountain Cherries LLC was recorded in the records of the Water Resources Department.
5. On July 27, 2012, the permit was partially assigned to Rabo AgriFinance, Inc. was recorded in the records of the Water Resources Department.
6. On July 6, 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-15223 would begin.
7. On March 31, 2016, Brad Fowler, President of Bear Mountain Cherries, LLC submitted an "Application for Extension of Time" to the Department requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-15223 be extended from October 1, 2007 to October 1, 2018. This is the first permit extension requested for Permit G-15223.
8. Notification of the Application for Extension of Time for Permit G-15223 was published in the Department's Public Notice dated April 5, 2016. No public comments were received regarding the extension application.
9. On April 13, 2016, the permit holder submitted additional information to supplement their Application for Extension of Time. The amendment requested the extended time to apply water to full beneficial use of the water system be changed from October 1, 2018, to October 1, 2020.

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.

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.

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

10. On March 31, 2016, 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)]

11. Construction of the well began prior to permit issuance, being October 1, 2002. The permit holder states, construction began May 30, 2001.

According to the well log received by the Department on October 29, 2001, Well (HOOD 50299) construction began May 30, 2001. The Department has determined that the prosecution of the construction of the well began prior to October 1, 2007.

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.

12. As of March 31, 2016, the permit holder states the remaining work to be completed consists of applying water to full beneficial use on the remaining 40.9 acres.

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 accomplish the application of water to beneficial use under the terms and conditions of Permit G-15223 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)]

13. The application states, work was accomplished within the time allowed in the permit:
 - a. Construction of the well was completed prior to October 1, 2007. Construction of Well (HOOD 50299) began on May 30, 2001, and was completed on August 31, 2001.

- b. Work was completed during the original development time frame under Permit G-15223. The permit holder installed pumps, mainline, lateral lines and a flow meter.
- c. Since October 1, 2007 the permit holder has developed two additional acre of irrigation land.

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

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

14. The application states a maximum rate of 225 gpm (0.501 cfs) of water has been appropriated from the well for irrigation of 172.0 acres (170.0 acres prior to October 1, 2007; 2 acres in 2015).
15. Beneficial use of water has been demonstrated under this permit because all permit conditions were satisfied by October 1, 2007.

The Department has determined that this extension will allow time to make complete beneficial use of the water on the remaining 40.9 acres; and will allow the submission of the remaining five years of the March static water level measurements to complete the seven consecutive March static water level measurement required under permit G-15223.

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

16. According to the Departments records the annual March static water level measurement were received for years; 2009, 2010, 2012, 2014 and 2015.
17. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns: The department recognizes that the permit holder has several additional March static water level measurements which will need to be submitted.
 - The required seven consecutive March static water level measurements have not been received by the Department. The department recognizes it is the intent of the permit holder to comply with the condition to submit the required March static water level measurements.

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

18. The application states the permit holder has invested about \$307,600, which is approximately 85 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$54,000 investment is needed for the completion of this project.

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

19. The Department has found good faith of the appropriator under Permit G-15223.

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)].

20. 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-15223; 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-15223, located within the Neal Creek Basin, is not located within a limited or critical ground water area. Neal Creek 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)].

21. 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)].

22. None have been identified.

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

23. 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)]

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

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

25. 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 beginning 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 13 through 19, full application of water to beneficial use can be accomplished by October 1, 2020, 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).

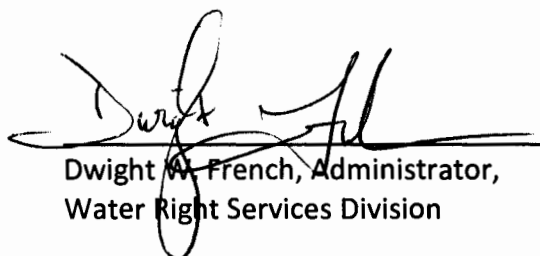
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PROPOSED ORDER

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-15223 from October 1, 2007 to October 1, 2020.

DATED: June 7, 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 **July 22, 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 Jeffrey D. Pierceall 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
Fax: 503-986-0901 Salem, OR 97301-1266
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