

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-16352, Water Right Application G-16936, in) PROPOSED FINAL ORDER
the name of 4-DSD, LLC.)

Permit Information

Application: G-16936
Permit: G-16352
Basin: 6 – John Day / Watermaster District 4
Date of Priority: October 1, 2007
Source of Water: Well 1 (WHEE 50331), Well 2 (WHEE 50335), and Well 6 (WHEE 50334) in Willow Creek Basin; Well 3 (WHEE 50328) in Tubb Creek Basin; and Well 4 (WHEE 50337) and Well 5 (WHEE 50330) in Indian Creek Basin

Purpose of Use: Irrigation use on 800.0 acres
Maximum Rate: 10.0 cubic feet 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 complete construction of the water system from October 1, 2012 to October 1, 2019.
- Grant an extension of time to apply water to full beneficial use from October 1, 2012 to October 1, 2019¹.
- 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.

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

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.

FINDINGS OF FACT

Background

1. Permit G-16352 was issued by the Department on July 10, 2008. The permit authorizes the use of up to 10.0 cfs of water from Well 1 (WHEE 50331), Well 2 (WHEE 50335), and Well 6 (WHEE 50334) in Willow Creek basin; Well 3 (WHEE 50328) in Tub Creek basin; and Well 4 (WHEE 50337) and Well 5 (WHEE 50330) in Indian Creek basin for irrigation use on 800.00 acres. The permit specified construction of the water system was to be completed by October 1, 2012, and complete application of water was to be made on or before October 1, 2012.

2. On behalf of the permit holder, Jim Newton, submitted an "Application for Extension of Time" to the Department on March 3, 2016, 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-16352 be extended from October 1, 2012 to October 1, 2019. This is the first permit extension requested for Permit G-16352.
3. Notification of the Application for Extension of Time for Permit G-16352 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 537.230², 537.248³, 537.630⁴ and/or 539.010(5)⁵.

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

4. On March 3, 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)]

5. Construction of the wells occurred prior to permit issuance. The application states, construction began on July 27, 2007.

According to the well log received by the Department on July 24, 2007, Well 1 (WHEE 50331) construction began July 10, 2007. The Department has determined that the prosecution of the construction of the well began prior to October 1, 2012.

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.

6. As of March 3, 2016, the application states the remaining work to be completed consists of completing construction of the water system, such as installing pivots, hand lines, and pumps; 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, 2019, to complete construction of

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.

the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit G-16352 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. The application states, work was accomplished within the time allowed in the permit as follows:

- a. Construction of six wells was completed prior to October 1, 2012.
Well 1 (WHEE 50331) was completed on July 11, 2007, and then altered (WHEE 50371) which deepened the well and added casing to 403 feet below land surface;
Well 3 (WHEE 50328) was completed on July 18, 2007;
Well 5 (WHEE 50330) was completed on July 19, 2007;
Well 6 (WHEE 50334) was completed on August 8, 2007;
Well 4 (WHEE 50337) was completed on August 14, 2007; and
Well 2 (WHEE 50335) was completed on August 14, 2007.
- b. Work was completed during the original development time frame under Permit G-16352. The application states 3 pivots were purchased and installed; power was installed, and pumps and irrigation systems installed.
- c. Since October 1, 2012, the application states no additional development has occurred.

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 500.0 gpm (1.11 cfs) of water has been appropriated from Well 1 (WHEE 50371) and Well 3 (WHEE 50328) for irrigation of 250.0 acres.

9. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2012.

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

10. From July 10, 2008 to October 1, 2012 the permit holder has:
- Installed a totalizing flow meter on Well 1 (WHEE 50371) and Well 3 (WHEE 50328).
 - Submitted March static water level measurements for Well 1 (WHEE 50371) and Well 3 (WHEE 50328) in 2011.
11. Since October 1, 2012 the permit holder has:
- Submitted March static water level measurements for Well 1 (WHEE 50371) and Well 3 (WHEE 50328) in 2013.
 - Submitted annual water usage from Well 1 (WHEE 50371) and Well 3 (WHEE 50328) in 2015.
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 totalizing flow meter has been installed on Well 2 (WHEE 50335), Well 4 (WHEE 50337) Well 5 (WHEE 50330) or Well 6 (WHEE 50334);
 - (2) the required initial March static water level measurements have not been received by the Department, for Well 2 (WHEE 50335), Well 4 (WHEE 50337) Well 5 (WHEE 50330) or Well 6 (WHEE 50334);
 - (3) Seven consecutive March static water level measurements have not been received by the Department, for Well 1 (WHEE 50371), Well 2 (WHEE 50335), Well 3 (WHEE 50328), Well 4 (WHEE 50337), Well 5 (WHEE 50330) or Well 6 (WHEE 50334),
 - (4) Annual reports of the amount of water used each month have not been received by the Department. for Well 1 (WHEE 50371), Well 2 (WHEE 50335), Well 3 (WHEE 50328), Well 4 (WHEE 50337), Well 5 (WHEE 50330), or Well 6 (WHEE 50334), and
 - (5) The required well construction condition has not been satisfied that requires all six wells shall be continuously cased and continuously sealed to a minimum depth of 350 feet below ground surface.

The Department has determined that this extension will allow the permit holder to be in compliance with all permit conditions to be satisfied after 2012 to satisfy compliance of conditions in Finding of Fact 12 in an effort to make proof of beneficial use of the water as required by Permit G-16352.

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)]

13. The application states the permit holder has invested about \$774,000, which is approximately 69 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$340,000 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 good faith of the appropriator under Permit G-16352.

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-16352; 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-16352, located within the Willow Creek, Tubb, and Indian Creek Basin, is not located within a limited or critical ground water area. Willow Creek, Tubb Creek, and Indian Creek Basin are located above The John Day Scenic Waterway, and, are 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 are 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)].

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 eliminate interference with hydraulically connected to streams or springs. The department determined on January 18, 2008 a need to condition any use of water from wells authorized under Permit G-16352 with a "Well Condition." This condition, specified under Item 1 of the "Well Conditions" section of this PFO, was determined to be necessary to eliminate interference with hydraulically connected streams or springs. This condition requires the permit holder to provide documentation that all six well are continuously cased and continuously sealed to a minimum of 350 feet below ground surface before any water is appropriated.

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

19. 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)]

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

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

21. 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 7 through 14, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2019, 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 18 above, the Department has established, as specified in the "Well Construction Condition" section of this PFO (Item 1), a condition that requires the permit holder to provide documentation that all six well are continuously cased and continuously sealed to a minimum of 350 feet below ground surface before any water is appropriated under Permit G-16352 in order to eliminate interference with hydraulically connected streams or springs.

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-16352 from October 1, 2012 to October 1, 2019.

Extend the time to apply water to beneficial use under Permit G-16352 from October 1, 2012 to October 1, 2019.

Subject to the following conditions:

CONDITIONS

1. **Well Construction Condition**

The use of any water under Permit G-16352 is subject to this Well Construction Condition.

The permit holder shall provide documentation that all the wells authorized under Permit G-16352 are continuously cased and continuously sealed to a minimum of 350 feet below ground surface **before any water is appropriated** under Permit G-16352.

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>

