

**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-16858, Water Right Application G-16346, in) PROPOSED FINAL ORDER
the name of Foley Family Wines)

Permit Information

Application:	G-16346
Permit:	G-16858
Basin:	2 – Middle Willamette / Watermaster District 16
Date of Priority:	November 23, 2004
Source of Water:	Well 1 in Chehalem Creek Basin
Purpose of Use:	Irrigation use on 20.0 acres and domestic use for 36 households
Maximum Rate:	0.28 cubic foot per second (cfs); being 0.25 cfs for irrigation and 0.03 cfs for domestic use

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 July 13, 2016, to October 1, 2023¹.
- 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

gpm – gallons per minute

IR – Initial Review

bls – below land surface

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(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. On November 23, 2004, application G-16346 was submitted in the name of Black Family Vineyard, LLC requesting the use of 157 gpm from two wells for irrigation of 24.5 acres and domestic use in 49 homes.

2. On January 7, 2005, the application was amended to change the location of the wells.
3. On April 15, 2005, the department issued an Initial Review (IR) determining the use of 0.35 cfs, being 0.31 for irrigation use on 24.5 acres and 0.04 cfs for domestic use for 49 households, from well 1 in Chehalem Creek Basin and Well 2 in Harvey Creek Basin is allowable from March 1 through October 31 for irrigation and year round for domestic.
4. The IR identified conflicts with existing irrigation rights evidenced by groundwater Permit G-11457 and surface water permit S-51428.
5. The IR identified conditions to be placed on the permit, including the well construction condition requiring the “well to be continuously cased and sealed to a depth of 600 feet below land surface (bls). The well may not be completed in such a manner that it will allow ground water to be developed from upper aquifers in the basalts. If during well construction, it becomes apparent that the well can be constructed to eliminate interference with nearby shallow wells or hydraulically connected streams in a manner other than specified in this permit, the permittee can contact the Department Hydrologist for this permit or the Ground Water/Hydrology Section Manager to request approval of such construction. The request shall be in writing, and shall include a rough well log and a proposed construction design for approval by the Department. The request can be approved only if it is received and reviewed prior to placement of any permanent casing and sealing material.” and “After construction, a down-hole video of both wells shall be completed before pumps are installed to verify that the wells are not commingling aquifers. The video shall be submitted to the Water Resources Department Ground Water Section within 30 days of completion of the wells.”
6. On May 3, 2005, Lynne M. Paretchan, attorney for Black Family Vineyard LLC, requested that Application G-16346 be placed on administrative hold.
7. On November 1, 2005, Lynne M. Paretchan, attorney for Black Family Vineyard LLC, requested that Application G-16346 be placed on administrative hold.
8. On November 2, 2006, Lynne M. Paretchan, attorney for Black Family Vineyard LLC, submitted a report prepared by Northwest Geotech, Inc titled “Hydrologic Investigation Dundee Springs 38-Lot Subdivision Highway 99 and Fox farm Road Yamhill County, Oregon” prepared for the applicant.
9. On March 6, 2007, the Department issued a Proposed Final Order (PFO) proposing the issuance of a permit for irrigation use of 0.31 cfs on 24.5 acres and 0.04 cfs for domestic use for 49 households from well 1 in Chehalem Creek Basin and well 2 in Harvey Creek Basin. The PFO included similar conditions to those set forth in the IR.
10. On March 22, 2007, Melvin Olson submitted a protest of the Proposed Final Order and a Request for Standing.

11. On April 20, 2007, John H. Hammond, Jr., City of Dundee Attorney, submitted on behalf of the City of Dundee, a protest and request for Mediation and Contested Case Hearing. The protest was again submitted on April 24, 2007, indicating an error in the original.
12. On April 18, 2008, Lynne M. Paretchan, on behalf of Black Family Vineyard, LLC, submitted amendments to application G-16346 to change the domestic use rate to 15 gpm and to serve 36 household, to change the irrigation use rate to 112 gpm to serve 20 acres and to remove well 2 from the application.
13. On June 10, 2008, the Department issued a Superseding PFO reflecting the amendments to the application.
14. On June 19, 2008, Melvin Olson submitted a protest to the Superseding PFO.
15. On July 14, 2008, Arlon Bakanoff submitted a protest on the Superseding PFO.
16. On July 22, 2008, Jonathan Stout submitted a protest to the Superseding PFO.
17. On July 24, 2008, the City of Dundee submitted a protest to the Superseding PFO.
18. On September 18, 2008, Melvin Olson withdrew his protest to application G-16346.
19. On May 19, 2011, the Department issued a Final Order (FO) with draft permit approving application G-16346.
20. On June 21, 2011, upon the request of the applicant, Tim Wallin included in the file a memo stating that certain well construction conditions have been met.
21. Permit G-16858 was issued by the Department on July 13, 2011. The permit authorizes the use of up to 0.28 cfs of water from Well 1 in Chehalem Creek Basin for irrigation of 20.0 acres and domestic use for 36 households. The permit specified complete application of water was to be made on or before July 13, 2016.
22. On September 9, 2015, an assignment by proof from Black Family Vineyard, LLC to Foley Family Wines was recorded in the records of the Water Resources Department.
23. On behalf of the permit holder, Foley Family Wines, Paul Bergna submitted an "Application for Extension of Time" to the Department on April 6, 2016, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-16858 be extended from July 13, 2016 to October 1, 2023. This is the first permit extension requested for Permit G-16858.
24. Notification of the Application for Extension of Time for Permit G-16858 was published in the Department's Public Notice dated April 12, 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)]

25. On April 6, 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)]

26. Construction of the well began prior to permit issuance. The permit holder states, construction of Well 1 (YAMH 54479) began March 23, 2006.

According to the well log received by the Department on June 13, 2006, Well 1 (YAMH 54479) construction began March 23, 2006. The Department has determined that the prosecution of the construction of the well began prior to permit issuance.

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.

27. As of April 6, 2016, the application states the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions including installing a totalizing flow meter, submitting annual water usage reports and March water level measurements 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, 2023, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-16858 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).

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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.

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)]

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

- a. Construction of the well began prior to permit issuance. Construction of Well (YAMH 54479) began March 23, 2006, and was completed May 31, 2006.
- b. No other Work was completed during the original development time frame under Permit G-16858, as a majority of the work was completed prior to permit issuance.

The Department has determined that work has been accomplished prior to permit issuance and 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)]

29. The application states no water has been used under permit G-16858.

30. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions have been satisfied as of April 6, 2016.

31. According to the permit holder, delay of full beneficial use of water under Permit G-16858 was due, in part, to market conditions and available resources required the permit holder to modify development and water use on site.

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

32. 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. The Department recognizes that it is the intent of the permit holder to comply with all permit conditions at the time the conditions become applicable.

The Department has determined that this extension will allow installing a meter and submitting annual water usage reports and the required March static water level

measurements after July 13, 2016 to satisfy compliance of the condition of (1) "Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each point of appropriation." (2) "The permittee shall keep a complete record of the amount of water used each month, and shall submit an annual report which includes the recorded water use measurements to the Department by December 1 of each year." (3) "Use of water from a new well shall not begin until an initial static water level has been measured and reported to the Department." (4) "a water level measurement shall be made each year during the period of March 1 through March 31." in an effort to make proof of beneficial use of the water as required by Permit G-16858. The Department has determined that this extension will allow the permit holder to complete construction and to apply the water to full beneficial use on the remaining 20.0 acres and domestic use for 36 households.

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)]

33. The application states the permit holder has invested about \$70,400, which is approximately 46 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$83,000 investment is needed for the completion of this project.

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

34. The Department has found good faith of the appropriator under Permit G-16858.

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)].

35. 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-16858;

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-16858, 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 "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)].

36. 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)].

37. None have been identified.

38. 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 1 of the "Conditions" section of this PFO to meet this condition.

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

39. 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)]

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

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

41. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit G-16858, in that market conditions and available resources required the permit holder to modify development and water usage plans on the site.

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 28 through 35, full application of water to beneficial use can be accomplished by October 1, 2023, 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 required by OAR 690-315-0050(6) and as described in Finding 39 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit G-16858.

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-16858 from July 13, 2016, to October 1, 2023.

Extend the time to apply water to beneficial use under Permit G-16858 from July 13, 2016, to October 1, 2023.

Subject to the following conditions:

CONDITIONS

1. **Checkpoint Condition**
The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2021**. ***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: June 7, 2016



Dwight 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;

