

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-16700 was issued by the Department on May 6, 2010. The permit authorizes the use of up to 2.67 cfs of water from Well 1 and Well 2 in Ninemile Slough Basin for irrigation use on 160.0 acres. The permit specified completion of construction and application of water was to be made on or before May 6, 2015.
2. On April 23, 2012, an assignment from Tony D. Rutherford and Megan R. Rutherford to Tony D. Rutherford, Megan R. Rutherford and Northwest Farm Credit Services, FLCA was recorded in the records of the Water Resources Department.

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3. On January 6, 2014, an assignment from Tony D. Rutherford, Megan R. Rutherford and Northwest Farm Credit Services, FLCA to Tony D. Rutherford and Megan R. Rutherford was recorded in the records of the Water Resources Department.
4. On January 22, 2014, an assignment from Tony D. Rutherford and Megan R. Rutherford to Dean Nikkel was recorded in the records of the Water Resources Department.
5. On July 25, 2014, the Department approved Permit Amendment T-11725 (Special Order Volume 92, Page 1110). A superseding Permit G-17234 was issued to describe an amendment for an additional point of appropriation (Well 3) proposed under Permit Amendment Application T-11725. This permit supersedes Permit G-16700. Permit G-16700 specified a date of completion as May 5, 2015. The Permit G-17235 specified the date of completion as May 5, 2016.
6. On April 22, 2016, Dean and Jodi Nikkel, submitted an "Application for Extension of Time" to the Department, 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-17234 be extended from October 1, 2015, to October 1, 2021. This is the first permit extension requested for Permit G-17234.
7. Permit G-17234 states the "Completion of construction and application of the water shall be made within five years of the date of issuance of Permit G-16700, May 5, 2016." On April 22, 2016, the Department discovered a scrivener's error in the superseding permit. The original Permit G-16700 states that "Completion of construction and application of water shall be made within five years of the date of permit issuance. (May 6, 2015)" The Department finds it is reasonable that the current permit holder would be confident that the date for completion of construction and application of the water, as stated in superseding Permit G-17234 being May 5, 2016, is true and accurate. The Department finds May 5, 2016, to be the prescribed date of completion of construction and application of water under this permit.
8. Notification of the Application for Extension of Time for Permit G-17234 was published in the Department's Public Notice dated May 3, 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.

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)]

9. On April 22, 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)]

10. Construction of the well began prior to May 5, 2016, as specified in Permit G-17234 as being the date for completion of construction and application water to full beneficial use. The permit holder states, construction of the Well (HARN 52482) was completed March 18, 2016.

According to the well log received by the Department on April 22, 2016, (HARN 52482) construction began July 29, 2015, and was completed on March 18, 2016. The Department has determined that the prosecution of the construction of the well began prior to May 5, 2016, as required by superseding permit G-17234.

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 April 22, 2016, the application states the remaining work to be completed consists of:
- Completing construction of the water system, which includes construction of wells 1 & 2 and installation of additional irrigation equipment;
 - Meeting all permit conditions including installation of a totalizing flow meter, annual reporting of annual water use data, reporting initial and annual March static 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, 2021, 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-17234 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. Construction of the well was completed prior to May 5, 2016. Construction of Well 3 (HARN 52842) began on July 29, 2015, and was completed on March 18, 2016.
 - b. Work was completed during the development time frame stated under Permit G-17234. The work completed consisted of construction of Well 3 (HARN 52482) and installation of irrigation equipment (pivot).

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

13. The application states that no water has been appropriated from the Well 3 (HARN 52482) for irrigation.
14. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by May 5, 2016.
15. According to the permit holder, delay of full beneficial use of water under Permit G-17234 was due, in part, to recent purchase (October 17, 2013) of the property and there was not sufficient time to complete construction prior to the permit completion date, and the need to raise addition funding to complete the permit requirements.

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

16. 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 the permit holder to complete construction of Wells 1 and 2, comply with permit conditions: (1) before water use may begin under this permit, the permittee shall install a totalizing flow meter; (2) the permittee 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; (3) the permittee shall report an initial March static water-level measurement once well construction is complete and annual measurements thereafter, and obtain the full rate of water allowed under the permit and to apply the water to full beneficial use on the permitted 160.0 acres.

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)]

17. The application states the permit holder has invested about \$28,000, which is approximately 41 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$40,000 investment is needed for the completion of this project.

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

18. The Department has found good faith of the appropriator under Permit G-17234.

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)].

19. 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-17234; 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-17234, located within the Nine Mile Slough Basin, are not located within a limited or critical ground water area. Nine Mile Slough 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 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)].

20. 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)].

21. None have been identified.

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

22. 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)]

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

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

24. 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 10 through 26, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2021, 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).

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-17234 from May 5, 2016, to October 1, 2021.

Extend the time to apply water to beneficial use under Permit G-17234 from May 5, 2016, to October 1, 2021.

DATED: June 14, 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 29, 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.

- 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>

- 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
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