

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-16845, Water Right Application G-16364, in) PROPOSED FINAL ORDER
the name of Joe Frazier)

Permit Information

Application: G-16364
Permit: G-16845
Basin: 7 – Umatilla / Watermaster District 5
Date of Priority: January 10, 2005
Source of Water: A well in Walla Walla River Basin
Purpose of Use: Irrigation of 236.6 acres
Maximum Rate: 2.96 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 April 22, 2016 to October 1, 2026.
- Grant an extension of time to apply water to full beneficial use from April 22, 2016 to October 1, 2026¹.
- 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

RM – River Mile

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.

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 January 10, 2005, Joe Frazier submitted an Application for a Permit to Use Ground Water to the Department.
2. On February 11, 2005, the Department submitted a notice to the applicant of the Department's Initial Review, determining that, "The use of 2.96 cfs from a well in Walla Walla River Basin for irrigation use on 236.6 acres is allowable from March 1 through October 31 of each year." The Initial Review also stated:
 - The well requested under the groundwater application is located within a five mile radius around the City of Milton-Freewater's municipal wells. Groundwater use from the basalt reservoir within a five mile radius around any municipal well of the City of Milton-Freewater could be limited to only municipal uses, group domestic uses, or statutorily exempt groundwater uses, if the city has an approved water management and conservation plan in effect, pursuant to OAR 690-507-0070(3)(a)(B); and
 - The conclusions were subject to change if a Water Management and Conservation Plan were approved by OWRD for the City of Milton-Freewater before the Proposed Final Order protest deadline passed.
3. On March 24, 2005, the Department issued a Final Order approving a Water Management and Conservation Plan for the City of Milton-Freewater.
4. On May 20, 2005, the Department's Groundwater Section determined there was not a documented barrier to ground water movement separating the proposed well from the City of Milton-Freewater's municipal wells, and there would be interference with the City's wells.
5. On May 31, 2005, the Department issued a Proposed Final Order denying the application. The Umatilla Basin Program does not allow irrigation use under OAR 690-507-0030(3)(a)(B).
6. On July 15, 2005, the applicant filed a timely protest and Request for Hearing.
7. On April 15, 2011, the protest was withdrawn by the permit holder.
8. A Settlement Agreement was signed by Joe Frazier and the Department as of April 15, 2011.
9. Permit G-16845 was issued by the Department on April 22, 2011. The permit authorizes the use of up to 2.96 cfs of water from a well in Walla Walla River Basin for irrigation of

236.6 acres. The permit specified construction of the water system was to be completed by April 22, 2016, and complete application of water was to be made on or before April 22, 2016.

10. On June 30, 2011, a second Settlement Agreement was signed by Joe Frazier, Les Peterson, Seven Hills Properties, LLC, the City of Milton-Freewater, and the Department G-16364, and the Milton-Freewater Water Management and Conservation Plan was signed and agreed upon by the applicant and the Department.
11. On June 30, 2011, Final Order approving a WMCP for the City of Milton-Freewater, Special Order Volume 84, Page 676, was issued by the Department.
12. On June 30, 2011, a Superseding Final Order Incorporating Settlement Agreement was issued by the Department.
13. The permit holder, Joe Frazier, submitted an "Application for Extension of Time" to the Department on April 19, 2016, requesting both the time to complete construction of the water system be extended from April 22, 2016 to October 1, 2020, and the time to apply water to full beneficial use under the terms and conditions of Permit G-16845 be extended from April 22, 2016 to October 1, 2026. This is the first permit extension requested for Permit G-16845.
14. Notification of the Application for Extension of Time for Permit G-16845 was published in the Department's Public Notice dated April 26, 2016. No public comments were received regarding the extension application.
15. On April 27, 2015, the permit holder submitted additional information to supplement their Application for Extension of Time. The amendment requested the extended time to complete construction of the water system be changed from October 1, 2020 to October 1, 2026.

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)]

16. On April 19, 2016, the Department received a completed Application for Extension 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.

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)]

17. Construction of the well began prior to April 22, 2016, as specified in the permit as being the date to apply water to full beneficial use. The permit holder states, construction of Well Frazier Bluff (UMAT 57672) began November 9, 2015.

According to the well log received by the Department on March 18, 2016, Well (UMAT 57672) construction began November 9, 2015. The Department has determined that the prosecution of the construction of the well began prior to April 22, 2016.

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.

18. As of April 19, 2016, the application states the remaining work to be completed consists of finalizing construction of discharge to begin irrigation of 160 acres; mainline construction to the remaining 76.6 acres; meeting all permit conditions; completing construction of the water system; and applying water to full beneficial use on 236.6 acres.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2026, 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-16845 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)]

19. 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 April 22, 2016.

- b. Work was completed during the original development time frame under Permit G-16845. Construction of Well Frazier Bluff (UMAT 57672) began November 9, 2015 and was completed March 3, 2016. The permit holder installed a temporary drive, flow meter, and discharge.

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)]

20. The application states no water has been appropriated from Well Frazier Bluff (UMAT 57672) for irrigation.
21. Beneficial use of water has not yet been demonstrated under this permit because no water has been appropriated, and not all permit conditions were satisfied by April 22, 2016.
22. According to the permit holder, delay of full beneficial use of water under Permit G-16845 was due, in part, to the length of time to arrange financing; selecting and scheduling drilling contractor; and preparing the site for construction. Continuous delays in construction have prevented any possible irrigating until late April 2016. The permit holder needs more time in which to obtain the full quantity of water allowed under the permit.

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

23. The Department has considered the permit holder's compliance with conditions, and has identified the following concern: (1) 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 application states a flow meter was installed on April 12, 2016.

Department records show a March static water level measurement (initial) was submitted to the Department on March 3, 2016.

The Department has determined that this extension will allow the annual water use reports submitted after April 22, 2016 to satisfy compliance of the condition of "The permittee shall keep a complete record of the amount of water diverted each month, and shall submit a report which includes the recorded report water-use measurements to the Department annually or more frequently as may be required by the Director," in an effort to make proof of beneficial use of the water as required by Permit G-16845.

The Department has also determined that this extension will allow the permit holder to complete construction, obtain the full rate of water allowed under the permit and to apply the water to full beneficial use on the authorized 236.6 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)]

24. The application states the permit holder has invested about \$260,153, which is approximately 65 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$140,000 investment is needed for the completion of this project.

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

25. The Department has found good faith of the appropriator under Permit G-16845.

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)].

26. 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-16845; 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-16845, located within the Walla Walla River Basin, is within the Walla Walla River Withdrawn Authority. Walla Walla River and West Little Walla Walla River are not located within or above any state or federal scenic waterway, however, they 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 point of appropriation is in an area listed by the Department of Environmental Quality as a water quality limited stream for the West Little Walla Walla River, being Dissolved Oxygen (RM 4.6 to 11.5), Parathion (RM 4.6 to 11.5), Chlorpyrifos (RM 4.6 to 11.5), and Guthion (RM 4.6 to 11.5); and the Walla Walla River, being Dissolved Oxygen (RM 40.6 to 46.1).

Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].

27. 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)].

28. None have been identified.

29. 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)]

30. 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)]

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

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

32. 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 17 through 25, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2026, 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 26 above, the Department has established, as specified in the “Conditions” section of this PFO (Item 2), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit G-16845.

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-16845 from April 22, 2016 to October 1, 2026.

Extend the time to apply water to beneficial use under Permit G-16845 from April 22, 2016 to October 1, 2026.

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, 2020 and 2025. 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 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.
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 Corey A Courchane at (503)986-0825.
 - 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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