

**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-15810 (modified by Permit Amendment	)	PROPOSED FINAL ORDER
T-9869), Water Right Application G-15566, in the name of	)	
Les Hottovy; and Marrienne Woods	)	

Permit Information

Application:	G-15566
Permit:	G-15180 (modified by Permit Amendment T-9869)
Basin:	2 – Clackamas / Watermaster District 20
Date of Priority:	July 24, 2001
Source of Water:	A well in Molalla River Basin
Purpose of Use:	Nursery use on 15.04 acres
Maximum Rate:	0.188 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, 2009 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. On July 24, 2001, Ed Hunter, owner of Whisky Hill Nursery, submitted an Application for a Permit to Use Ground Water to the Department. The application proposed the use of up to 0.188 cfs of water from two old domestic wells, for nursery use on 15.04 acres. According to well logs received with the application, the wells to be used for nursery use were identified as Well (CLAC 2341) and Well (CLAC 2363).
2. On March 29, 2002, a determination of the application based on the Initial Review by the Department was submitted by Certified Mail. The Department had determined that;
 - Well 1 (CLAC 2363) and Well 2 (CLAC 2341) allow comingling of water from more than one groundwater reservoir and permits the loss of artesian head, a

permit cannot be issued until the wells have been properly constructed per current well construction standards.

- Well 1 shall be sealed to 125 feet below ground level to be properly constructed. Well 2 shall be sealed to 65 feet below ground level to be properly constructed.
3. On June 13, 2002, a letter was submitted to the Department correctly identifying the wells to be used for nursery use as Well 1 (CLAC 2331) and Well 2 (CLAC 2341).
 4. On November 12, 2002, the Department issued a Proposed Final Order recommending that the application be denied, based on the proposed use did not comply with rules of the Water Resources Commission.
 5. On December 27, 2002, a letter of clarification of the applicant's groundwater application, and revised application map were submitted on behalf of the applicant to the Department, amending the application. The amendment stated the applicant proposed to abandon the two wells (Wells 1 and 2 of the original application) and construct a new well in accordance with the well construction standards.
 6. Permit G-15810 was issued by the Department on December 23, 2004. The permit authorizes the use of up to 0.188 cfs of water from a well in Molalla River Basin for nursery use on 15.04 acres. The permit specified complete application of water was to be made on or before October 1, 2009.
 7. On March 28, 2005 a partial assignment from Edmund D. Hunter to Marrienne Woods was recorded in the records of the Water Resources Department.
 8. On December 19, 2005, the Department approved Permit Amendment T-9869 (Special Order Volume 67, Page 580) authorizing a change in the point of appropriation for 9.85 acres under Permit G-15810 (modified by Permit Amendment T-9869) which is hereafter referred to simply as Permit G-15810.
 9. On April 23, 2007, a partial assignment by deed from Whisky Hill Nursery (Edward Hunter) to Beyond Green, LLC was recorded in the records of the Water Resources Department.
 10. On December 13, 2010, the Department issued Correcting Final Order, Special Order Volume 83, Page 202, correcting a scrivener's error in the original order. The correcting final order was issued to correctly describe the authorized place of use and the proposed point of appropriation.
 11. On April 23, 2013, a partial assignment from Beyond Green, LLC to Les Hottovy was recorded in the records of the Water Resources Department.

12. On March 2, 2015, the Department issued a letter by certified mail to Beyond Green LLC, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-15810 would begin. The letter was returned to the Department March 11, 2015 as undeliverable.
13. On June 8, 2015, the Department issued a letter by certified mail to Marrienne Woods, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-15810 would begin. The letter was returned to the Department June 15, 2015 as undeliverable.
14. On June 8, 2015, the Department issued a letter by certified mail to Les Hottovy, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-15810 would begin.
15. On October 22, 2015, the Department issued (Special Order Volume 98, Page 124) a Final Order for Cancellation of Certain Permit(s) to Appropriate Water under the provisions of ORS 537.260 for G-15810, for failure to make proof of appropriation of water under the terms and conditions of the permit.
16. On behalf of the permit holder, Kate L. Moore, agent for Les Hottovy, submitted a request for reinstatement to the Department on December 22, 2015.
17. On January 8, 2016, the Department issued (Special Order Volume 98, Page 553) an Order Granting Reconsideration, Reversing Cancellation Order, and Reinstating Permit G-15810.
18. On behalf of the permit holder, Kate L. Moore, agent for Les Hottovy, submitted an "Application for Extension of Time" to the Department on May 5, 2016, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-15810 be extended from October 1, 2009 to October 1, 2020. This is the first permit extension requested for Permit G-15810.
19. Notification of the Application for Extension of Time for Permit G-15810 was published in the Department's Public Notice dated May 10, 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.

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

20. On May 5, 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)]

21. Construction of the well began prior to October 1, 2009, as specified in the permit as being the date to apply water to full beneficial use. The application states, an original well was used for irrigation prior to the water rights transfer process, being December 19, 2005.

According to the well log received by the Department on July 9, 1976, unauthorized Well 2 (CLAC 2341) construction began June 30, 1976. The Department has determined that the prosecution of the construction of the well began prior to October 1, 2009.

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.

22. As of May 5, 2016, the application states the remaining work to be completed consists of 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, 2020, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15810 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)]

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

⁴ORS 537.630 applies to ground water permits only.

⁵ORS 539.010(5) applies to surface water and ground water permits.

- a. Construction of the well was completed prior to October 1, 2009. Construction of unauthorized Well 2 (CLAC 2341) began June 30, 1976 and was completed July 1, 1976. Construction of unauthorized Well 1 (CLAC 2331) began October 6, 1978 and was completed October 7, 1978.
- b. Work that was completed during the original development time frame under Permit G-15810 is unknown. However, it has been indicated that water was put to beneficial use pursuant to the permit as early as 2005, as identified by Affidavit Attesting to the Use of Water submitted to the Department on May 5, 2016.
- c. Since October 1, 2009 the permit holder, Les Hottovy, had constructed authorized Well (CLAC 67528), beginning on December 15, 2010, and completed on January 14, 2011.

The Department has determined that work has been accomplished, 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)]

24. The application states an unknown amount of water has been appropriated from Well (CLAC 67528) for nursery use on 9.85 acres, owned by Les Hottovy. An unknown amount of water has been appropriated on the 5.19 acres under permit holder Marianne Woods.
25. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2009.

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

26. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the required March static water level measurements have not been received by the Department, and (2) 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 meter has been installed.

The Department has determined that this extension will allow the annual water use reports and March static water level measurement submitted after 2009 to satisfy compliance of the condition of, "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 or more frequently as may be required by

the Director,” and “Following the first year of water use, the user shall submit one static water level measurement in the month specified above (March) which will establish the reference level against which future annual measurements will be compared,” in an effort to make proof of beneficial use of the water as required by Permit G-15810.

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)]

27. The amount invested in the development of the project prior to October 1, 2009, is unknown due to limited information obtained from the previous permit holder. The application states the current permit holder has invested about \$23,019, which is approximately 85 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$4,000 investment is needed for the completion of this project.

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

28. The Department has found good faith of the appropriator under Permit G-15810.

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)].

29. 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-15810; 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-15810, located within the Molalla River Basin, is within the Rock Creek Withdrawal Authority Area. Pudding River 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)].

30. 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)].

31. None have been identified.

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

32. 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)]

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

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

34. According to the application, unforeseen events extended the length of time needed to fully develop and perfect Permit G-15810, in that the permit holder was faced with a difficult family matter. As of November 30, 2005, the 9.85 acres appurtenant to Permit G-15810 (Hottovy Property) were owned in common by Les Hottovy, a resident of Nashville, Tennessee, and his brother Steven Hottovy. The remaining 5.19 acres is located on an adjacent property, owned by permit holder Marrianne Woods. Since 2008, Les Hottovy has been the sole owner of the Hottovy Property. During his ownership, Mr. Steven Hottovy operated a nursery on the property under the business name Beyond Green, LLC, and Beyond Green continued to lease the property after ownership transferred in full to Les Hottovy.

In December 2005, the Department issued an order approving Permit Amendment T-9869, which changed the point of appropriation for Permit G-15810 onto the Hottovy Property. The Permit Amendment was submitted by both permit holders; Beyond Green LLC, and Marrianne Woods. Upon completion of construction of the new point of appropriation in 2011, Steve Hottovy informed Les Hottovy that all paperwork related to the well construction and documenting completion of the appropriation of the water right had been provided to the Department. Shortly thereafter, Steve Hottovy unexpectedly became unavailable due to a serious health condition. Steve Hottovy had entered into a diabetic coma, and was unable to be located by Les Hottovy. After several months, Les Hottovy located his brother Steve, who was then very much in need of medical attention and other assistance.

To assist in handling his brother's business affairs that arose during his health related absence, Les Hottovy set up a PO Box in Nashville for Beyond Green. It was at that address that the notices related to the water right were sent earlier in 2015. After several failed delivery attempts, Les Hottovy finally received the Department's correspondence and it was not until November 2015 that he was able to obtain from his brother other limited information regarding the water right permit. Mr. Les Hottovy is currently unaware of his brother's whereabouts and has been unable to gather any additional information regarding the water right, which has restricted the permit holder's ability to complete development of the project in a timely manner.

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 21 through 28, 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).

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 apply water to beneficial use under Permit G-15810 from October 1, 2009 to October 1, 2020.

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.

- 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
Salem, OR 97301-1266
- Fax: 503-986-0901