

**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-15896, Water Right Application G-16261, in) **PROPOSED FINAL ORDER**
the name of Robert K. Gressley)

Permit Information

Application:	G-16261
Permit:	G-15896
Basin:	10 – Malheur / Watermaster District 9
Date of Priority:	June 10, 2004
Source of Water:	Well 5 and Well 6 in Malheur River Basin
Purpose of Use:	Supplemental irrigation use on 141.5 acres
Maximum Rate:	1.49 cubic feet per second (cfs), being 0.83 cfs from Well 5 for supplemental irrigation on 88.5 acres; and 0.66 cfs from Well 6 for supplemental irrigation on 53.0 acres

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, 2018¹.

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. Permit G-15896 was issued by the Department on April 21, 2005. The permit authorizes the use of up to 1.49 cfs of water, being 0.83 cfs from Well 5 for supplemental irrigation on 88.5 acres; and 0.66 cfs from Well 6 for supplemental irrigation on 53.0 acres in Malheur River Basin. The permit specified complete application of water was to be made on or before October 1, 2009.
2. On May 3, 2012, an assignment from Keith Gressley to Robert K. Gressley was recorded in the records of the Water Resources Department.
3. The permit holder, Robert K. Gressley, submitted an "Application for Extension of Time" to the Department on May 19, 2016, requesting the time to apply water to full

beneficial use under the terms and conditions of Permit G-15896 be extended from October 1, 2009 to October 1, 2017. This is the first permit extension requested for Permit G-15896.

4. Notification of the Application for Extension of Time for Permit G-15896 was published in the Department's Public Notice dated May 24, 2016. No public comments were received regarding the extension application.
5. On June 6, 2016, the permit holder submitted an amendment to their Application for Extension of Time. The amendment requested the extended time to apply water to full beneficial use of the water system be changed from October 1, 2017 to October 1, 2018.

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)]

6. On May 19, 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)]

7. Construction of the well began prior to permit issuance. The permit holder states, construction of the well began in May 1991.

According to the well log received by the Department on May 8, 2003, Well 5 (MALH 52032) construction began April 3, 2003. 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.

8. As of May 19, 2016, the application states the remaining work to be completed consists of submitting and gaining approval for a Permit Amendment to add an additional point of appropriation; meeting all permit conditions, including submitting a March static water level measurement on each point of appropriation; and applying water to full

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.

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, 2018, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15896 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)]

9. 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 5 (MALH 52032) began April 3, 2003 and was completed April 7, 2003. Construction of Well 6 (MALH 52034) began April 7, 2003 and was completed April 12, 2003. Well 6 (MALH 52034) was reconditioned on November 4, 2004, to comply with minimum well construction standards. Well 6 (MALH 52034/52542) was re-identified, and here forward will be referred to simply as Well 6 (MALH 52545).
 - b. Work was completed during the original development time frame under Permit G-15896. Flow meters were installed in 2006 on Well 5 (MALH 52032) and Well 6 (MALH 52545).
 - c. Since October 1, 2009 the permit holder has accomplished the following:
 - Constructed unauthorized Well 7 (MALH 54124); and
 - Installed underground piping.

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)]

10. The application states a maximum cumulative total rate of 950 gpm (2.12 cfs) of water has been appropriated, being 350 gpm (0.78 cfs) from Well 5 (MALH 52032) for supplemental irrigation of 88.5 acres, 300 gpm (0.67 cfs) from Well 6 (MALH 52545), and 300 gpm (0.67 cfs) from unauthorized Well 7 (MALH 54124) for supplemental irrigation of 53.0 acres from both wells. This exceeds the amount of water for supplemental irrigation use authorized under this permit. The authorized amount of water for irrigation use is 1.49 cfs.
11. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2009.

The Department has determined that water use from Well 7 (MALH 54124) has been an illegal use of water, as this well is an unauthorized well under Permit G-15896.

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

12. Since October 1, 2009 the permit holder has submitted the annual water use records, required under Permit G-15896.
13. 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 on unauthorized Well 7 (MALH 54124), (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, (4) Well 7 (MALH 54124) is an unauthorized well being used for supplemental irrigation under Permit G-15896.
14. The application states flow meters were installed on Well 5 (MALH 52032) and Well 6 (MALH 52545) on May 1, 2006.
15. Department records show annual water use reports were submitted for Wells 5 and 6 from 2013-2015.
16. Department records also show a March static water level measurement (initial) was not submitted for either well, however a March static water level measurement (reference) was submitted March 31, 2006 for Well 5 (MALH 52032) and Well 6 (MALH 52545).

The Department has determined that this extension will allow the permit holder to apply for a Permit Amendment to add Well 7 (MALH 54124); install a meter on Well 7 (MALH 54124); submit annual water use reports and March static water level measurements after 2009, to satisfy compliance of the condition of the permit

conditions in an effort to make proof of beneficial use of the water as required by Permit G-15896.

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)]

17. The application states the permit holder has invested about \$67,500, which is the total projected cost for complete development 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-15896.

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-15896; 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-15896, located within the Malheur River Basin, are not located within a limited or critical ground water area. Malheur 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 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 7 through 15, full application of water to beneficial use can be accomplished by October 1, 2018, 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).

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-15896 from October 1, 2009 to October 1, 2018.

DATED: June 28, 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 **August 12, 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.

