

**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-12493, Water Right Application G-12927,) **PROPOSED FINAL ORDER**
in the name of Linda J. Neale) **TO DENY**

Permit Information

Application:	G-12927
Permit:	G-12493
Basin:	10 – Malheur / Watermaster District 10
Date of Priority:	May 21, 1992
Source of Water:	Two wells in South Fork Malheur River Basin
Purpose of Use:	Irrigation of 179.4 Acres
Maximum Rate:	2.24 cubic feet per second (cfs)

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.

In Summary, the Department proposes to:

- Deny an extension of time to complete construction of the water system from October 1, 2006, to October 1, 2021; and
- Deny an extension of time to apply water to full beneficial use from October 1, 2006, to October 1, 2021.

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 May 21, 1992, Fred Briggs submitted an application to the Department for a water use permit.
2. On November 22, 1994, application G-12927 was assigned to Fred H. and Betty R. Briggs.
3. Permit G-12493 was issued by the Department on June 12, 1996. The permit authorizes the use of up to 2.24 cfs of water from two wells in South Fork Malheur River Basin for irrigation of 179.4 acres. The permit specified actual construction of the well was to begin within one year of permit issuance, construction of the water system was to be

completed by October 1, 1998, and complete application of water was to be made on or before October 1, 1999.

4. On September 9, 2002, the Department issued a letter by certified mail, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-12493 would begin.
5. Fred Briggs submitted an "Application for Extension of Time" to the Department on December 13, 2002, requesting the time to complete construction of the water system be extended from October 1, 1998, to October 1, 2006, and the time to apply water to full beneficial use under the terms and conditions of Permit G-12493 be extended from October 1, 1999, to October 1, 2006.
6. On May 4, 2006, the Department issued a Final Order granting an extension of time to complete construction from October 1, 1998, to October 1, 2006, and apply water to full beneficial use from October 1, 1999, to October 1, 2006.
7. The Departments records shows on May 22, 2008, Linda J. Neale and Rodney McAfee took ownership of a portion of the property listed in Permit G-12927.
8. On July 13, 2010, the Department issued a letter by certified mail, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-12493 would begin.
9. On November 19, 2010, the Department issued a letter by certified mail, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-12493 would begin.
10. On December 10, 2010, the Department issued a letter by certified mail, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-12493 would begin.
11. On May 13, 2011, the Department issued a letter by certified mail, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-12493 would begin.
12. On June 2, 2011, Linda Neale contacted the Department regarding the letter. Neale stated that she would request an assignment.
13. On June 7, 2011, the Department notified Linda Neale and Rod McAfee the request for assignment could not be performed as the request was not signed by Fred and Betty Briggs.
14. On May 20, 2016, an assignment by proof from Fred H. and Betty R. Briggs to Linda J. Neale was recorded in the records of the Water Resources Department.

15. The permit holder, Linda J. Neale submitted an "Application for Extension of Time" to the Department on May 18, 2016, requesting the time to complete construction of the water system be extended from October 1, 1998, to October 1, 2020, and the time to apply water to full beneficial use under the terms and conditions of Permit G-12493 be extended from October 1, 1999, to October 1, 2021. This is the second permit extension requested for Permit G-12493.
16. On May 25, 2016, the Department issued a letter to the Applicant requesting clarification of the application and additional information be submitted to the Department by June 24, 2016.
17. Notification of the Application for Extension of Time for Permit G-12493 was published in the Department's Public Notice dated May 31, 2016. No public comments were received regarding the extension application.
18. On June 24, 2016, an assignment by proof from Fred H. and Betty R. Briggs to Linda J. Neale was corrected to a partial assignment and recorded in the records of the Water Resources Department.

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 537.230¹, 537.248², 537.630³ and/or 539.010(5)⁴.

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

19. On May 18, 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)]

20. Actual construction of the wells began prior to the June 12, 1997, deadline specified in the permit. The Application indicates construction of Well #1 (HARN 1504) and Well #2 (HARN 1506) began June 14, 1977.

According to the well logs received by the Department on July 26, 1977, Well #1 (HARN 1504) construction began June 14, 1977, and Well #2 (HARN 1506) construction began June 15, 1977. The Department has determined that the prosecution of the construction of the well began prior to June 12, 1997.

¹ORS 537.230 applies to surface water permits only.

²ORS 537.248 applies to reservoir permits only.

³ORS 537.630 applies to ground water permits only.

⁴ORS 539.010(5) applies to surface water and ground water permits.

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.

21. As of May 18, 2016, the permit holder states the remaining work to be completed consists reinstalling the pivot and remaining sprinkler system, installing a meter on Well #1 and Well #2; and applying water to full beneficial use.
22. Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2025, 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-12493 is both unreasonable and unnecessary, because the Application provides no evidence of good faith and diligence in the development of the water during the most recent extension period from October 1, 1999, to October 1, 2006.

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:
 - a. Construction of the well began prior to the June 12, 1997 deadline specified in the permit.
 - b. Work was completed during the original development time frame under Permit G-12493, the permit holder installed pumps, and an irrigation system.
 - c. During the most recent extension period, being from October 1, 1999, to October 1, 2006, no work was accomplished.
 - d. Since October 1, 2006, the applicant states no work has been accomplished.

The Application does not provide evidence of progress made towards completion of the water development and application of water to full beneficial use as allowed in the time period specified in the permit and the recent extension period ending on October 1, 2006. The Department has determined that no physical work was performed towards completion of the water system authorized under this permit during the most recent extension of time. Therefore the department cannot find good cause and or reasonable diligence towards the complete application of water to a beneficial use under Permit G-12493.

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

24. The Application states that the maximum instantaneous rate used to date from Well #1 (HARN 1504) is 2.24 cfs to irrigate 179.4 acres and from Well #2 (HARN 1506) is 2.24 cfs to irrigate 179.4 acres
25. The Department received on February 4, 2002, an annual report for 2000 to 2001, showing not water use. No other reports were received by the Department.
26. The Previous Application for an extension of time submitted on December 13, 2002, states that "The system that I installed would not function, they have been taken out, and in the progress of putting new ones in." and "I have test run the [irrigation] system several times trying to get it to work. The pivot has been taken out."
27. According to the permit holder, delay of full beneficial use of water under Permit G-12493 was due, in part, to the previous permit holder removed the sprinkler system prior to the sale. The permit holder requests more time in which to reinstall a pivot and sprinkler system to obtain the full quantity of water allowed under the permit.

The Application does not provide evidence that any water has been appropriated under Permit G-12493.

The Application does not provide evidence of beneficial use of the water under Permit G-12493 during the most recent extension period ending on October 1, 2006. Therefore the department cannot find good cause and or reasonable diligence towards the complete application of water to a beneficial use under Permit G-12493.

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

28. 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, and (2) the Department received on February 4, 2002, an annual report for 2000 to 2001, showing not water use. No additional water use reports have been received by the department.
29. The Application states that compliance with 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.” has been complied with.

The Department has determined the permit holder has not complied with the condition “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.”

The Applications states the condition of “Before water use may begin under this permit, the permittee shall install a meter of other suitable measuring device as approved by the Director” has not been complied with.

The Application does not provide evidence of progress made towards completion of the water development and application of water to full beneficial use as allowed in the time period specified in the permit and the recent extension period ending on October 1, 2006. The Department has determined that no physical work was performed towards completion of the water system authorized under this permit during the most recent extension of time. Therefore the department cannot find good cause and or reasonable diligence towards the complete application of water to a beneficial use under Permit G-12493.

Financial Investments to Appropriate and Apply Water to a Beneficial Purpose [OAR 690-315-0040(2)(b),(3)(d),(4)(d)]

30. The Application states the permit holder has invested about \$200,000, which is approximately 50 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$200,000 investment is needed for the completion of this project. The Application specifies the cost to construct Well #1 (HARN 1504) was \$25,000 and Well #2 (HARN 1506) was \$25,000 in 1977. The Applications specifies the cost of installation of buried mainlines to the two wells and irrigation equipment (pivot, hand lines and wheel lines) was \$150,000 in 1999.

The Application does not identify any financial investment made during the previous extension time period, being from October 1, 1999, to October 1, 2006, nor does the application identify any financial investment made since October 1, 2006

31. The Previous Application for an extension of time submitted on December 13, 2002, states that the total investment made in the project as of December 13, 2002, was \$25,000.

The Application does not provide evidence towards perfecting the water right under the terms and conditions of the previous extension of time under Permit G-12493.

Therefore the department cannot find good cause and or reasonable diligence towards the complete application of water to a beneficial use under Permit G-12493.

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

32. Based on Findings of Fact 20 through 31 above, the Department finds that the applicant has not demonstrated good faith.

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)].

33. The amount of water available to satisfy other affected water rights was determined at the time of issuance of Permit G-12493; furthermore, water availability for other affected water rights after the permit was issued is determined when an application for a new water right is submitted. Under a current review of water availability to the extent to which water is available, the Department found no new groundwater limited area or groundwater critical area has been designated in the area of the proposed point of appropriation. The points of appropriation for Permit G-12493, are located within the South Fork Malheur River Basin, are not located within a limited or critical ground water area. South Fork 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)].

34. No other economic interests dependent on completion of the project 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)].

35. No other factors relevant to the determination of the market and present demand for water and power have been identified.

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

36. According to the current permit holder, they have not made any financial investment in development of this project.

Other Governmental Requirements [OAR 690-315-0040(2)(g)]

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

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

38. No unforeseen have been identified.

CONCLUSIONS OF LAW

1. The permit holder 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 permit holder 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 permit holder has not complied with the time allowed for construction work under the permit pursuant to ORS 537.630 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. The Application established that there has been no construction, no financial investment or reasonable diligence toward developing the project during the most recent extension. The permit holder has not 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).

continued on following page

PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department proposes to issue an order to:

Deny the time to complete construction of the water system under Permit G-12493 from October 1, 2006, to October 1, 2021.

Deny the time to apply water to beneficial use under Permit G-12493 from October 1, 2006 to October 1, 2021.

DATED: July 19, 2016



Dwight W. 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 **September 2, 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 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
725 Summer St NE, Suite A
Fax: 503-986-0901 Salem, OR 97301-1266