

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources
Application – Application for Extension of Time
PFO – Proposed Final Order
cfs – cubic feet per second
COBU – Claim of Beneficial Use

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 groundwater 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(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 April 15, 2004, Permit G-15591 was issued by the Department. The permit authorizes the use of up to 4.0 cfs of water from a well in South Fork Malheur River Basin for irrigation use on 320.0 acres. The permit specified complete application of water was to be made on or before October 1, 2008.

2. On July 8, 2009, a Claim of Beneficial Use (COBU) was submitted to the Department for review. The COBU identified the permit holder had developed 251.6 acres.
3. On July 21, 2016, a Request to Withdraw the COBU was submitted to the Department. The permit holder sold the property to their daughter and son-in-law, who intend to develop the full amount of acres authorized under Permit G-15591, being 320.0 acres.
4. On July 21, 2016, an assignment from Kenneth and Paula Thomas to Mathieu J. Zander and Dally M. Zander was recorded in the records of the Water Resources Department.
5. On July 21, 2016, the permit holder, Mathieu J. Zander and Dally M. Zander, submitted an "Application for Extension of Time" to the Department, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-15591 be extended from October 1, 2008 to October 1, 2021. This is the first permit extension requested for Permit G-15591.
6. Notification of the Application for Extension of Time for Permit G-15591 was published in the Department's Public Notice dated August 2, 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.

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

7. On July 21, 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)]

8. Construction of the well began prior to permit issuance. The permit holder states, construction began June 30, 2003.

According to the well log received by the Department on July 17, 2003, Well (HARN 50957) construction began June 30, 2003. The Department has determined that the prosecution of the construction of the well began prior to October 1, 2008.

²ORS 537.230 applies to surface water permits only.

³ORS 537.248 applies to reservoir permits only.

⁴ORS 537.630 applies to groundwater permits only.

⁵ORS 539.010(5) applies to surface water and groundwater 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.

9. As of July 21, 2016, the Application states the remaining work to be completed consists of installing a system to irrigate about 70.0 more acres of pivot corners, 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 accomplish the application of water to beneficial use under the terms and conditions of Permit G-15591 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)]

10. As stated in the Application, 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 (HARN 50957) began June 30, 2003, and was completed July 2, 2003.
 - b. Work was completed during the original development time frame under Permit G-15591. The previous permit holder installed two pivots, a pump, and a flow meter.

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)]

11. The Application states a maximum rate of 4.0 cfs of water has been appropriated from Well (HARN 50957) for irrigation of 250.0 acres.

12. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2008.

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

13. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns.
14. Since October 1, 2008 the permit holder has submitted the static water level measurements required under Permit G-15591.
15. As stated in the Application, a flow meter was installed May 2008.
16. Department records show annual water use reports were submitted for years 2004, 2005, and 2008-2015.
17. Department records show an initial water level measurement in the month of March once well construction was completed was not received.
18. Department records show a March static water level measurement (reference) was submitted March 31, 2010.

The Department has determined that this extension will allow the March static water level measurement submitted after October 1, 2008, to satisfy permit condition, "Following the first year of water use, the user shall submit one static water level measurement in the month specified (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-15591.

The Department has also determined that this extension will allow the permit holder to apply the water to full beneficial use on the remaining 70.0 acres.

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

19. The Application states the permit holder has invested about \$145,000, which is approximately 83 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$30,000 investment is needed for the completion of this project.

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

20. The Department has found good faith of the appropriator under Permit G-15591.

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)].

21. A review of 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-15591; 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.
 - a. The point of appropriation for Permit G-15591, located within the Malheur River Basin, is not located within a limited or critical groundwater area.
 - b. Malheur Gap is not located within or above any state or federal scenic waterway.
 - c. 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.
 - d. 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)].

22. No other economic interests 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)].

23. No other factors relevant to the determination of the market and present demand for water and power have been identified.
24. 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)]

25. 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)]

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

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

27. No unforeseen events have been identified.

Denial of the Extension Will Result in Undue Hardship [OAR 690-315-0040(2)(i)]

28. The application did not state if a denial of the extension would result in undue hardship.

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 8 through 19, 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 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 23 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit G-15591.

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-15591 from October 1, 2008 to October 1, 2021.

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**. ***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: September 6, 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 **October 21, 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>

