



## **ACRONYM QUICK REFERENCE**

Department – Oregon Department of Water Resources

MP – Mitigation Project

Application – Application for Extension of Time

CWRE – Certified Water Right Examiner

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 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(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.

## **FINDINGS OF FACT**

### *Background*

1. On April 9, 1999, Marvin May submitted an Application for a water use permit.

2. On May 17, 2004, the applicant submitted a revised map indicating the actual number of acres proposed to be irrigated under this application.
3. On June 4, 2004, the Department received a Deschutes Basin Mitigation Credit Documentary Evidence Form for Mitigation Banks, requesting to assign 42.3 mitigation credits in the Indian Ford Creek Zone of Impact, from Mitigation Project (MP)-17 account held by the Deschutes Water Exchange Mitigation Bank, to ground water application G-14967.
4. On July 1, 2004, the Department received an amended Deschutes Basin Mitigation Credit Documentary Evidence Form for Mitigation Banks, requesting to assign 36 mitigation credits in the Indian Ford Creek Zone of Impact, from MP-17 account held by the Deschutes Water Exchange Mitigation Bank, to ground water application G-14967.
5. On August 6, 2004, Permit G-15703 was issued by the Department. The permit authorizes the use of up to 0.25 cfs of water from a well in Indian Ford Creek Basin for irrigation of 20.0 acres. The permit specified actual construction of the well to begin by October 1, 2005, and complete application of water was to be made on or before October 1, 2008.
6. On June 14, 2016, 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-15703 would begin.
7. One prior permit extension has been granted for Permit G-15703. The most recent extension request resulted in the completion date for full application of water being extended from October 1, 2008 to October 1, 2014.
8. On August 12, 2016, Michelle Sims, Certified Water Right Examiner (CWRE) on behalf of the permit holder Marvin May, 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-15703 be extended from October 1, 2014 to October 1, 2018.
9. Notification of the Application for Extension of Time for Permit G-15703 was published in the Department's Public Notice dated August 16, 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*

537.230<sup>2</sup>, 537.248<sup>3</sup>, 537.630<sup>4</sup> and/or 539.010(5)<sup>5</sup>.

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

10. On August 12, 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)]**

11. Actual construction of the well began prior to the October 1, 2005 deadline specified in the permit. According to the permit holder, construction of Well 1 (DESC 53232) began August 4, 2000.

According to the well log received by the Department on August 14, 2000, Well 1 (DESC 53232) construction began August 1, 2000. The Department has determined that the prosecution of the construction of the well began prior to October 1, 2005.

**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.*

12. As of August 12, 2016, the Application states the remaining work to be completed consists of running 3-phase power to the existing well; installing a 10 HP pump (3-phase option); upgrading to 4" mainline and installing sprinklers; 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, 2018, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15703 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*

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<sup>2</sup>ORS 537.230 applies to surface water permits only.

<sup>3</sup>ORS 537.248 applies to reservoir permits only.

<sup>4</sup>ORS 537.630 applies to groundwater permits only.

<sup>5</sup>ORS 539.010(5) applies to surface water and groundwater permits.

*the permit:*

**Amount of Construction [OAR 690-315-0040(3)(a)]**

13. The Application states, work was accomplished within the time allowed in the permit or previous extension as follows:
  - a. Actual construction of the well began prior to the October 1, 2005 deadline specified in the permit. Construction of Well 1 (DESC 53232) began August 1, 2000 and was completed August 4, 2000. The permit holder began work on the irrigation system.
  - b. Work was completed during the original development time frame under Permit G-15703. Mainlines were extended to the area of use, and a meter, sprinklers, and irrigation guns were installed.
  - c. No work was accomplished during the last extension period, being October 1, 2008 to October 1, 2014.
  - d. Since October 1, 2014, no work has been accomplished.

The Application provides evidence of progress of physical work made towards completion of the water system, enough to qualify as the minimum necessary for the Department to find good cause and reasonable diligence towards complete application of water to a beneficial use.

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

14. The Application states a maximum rate of 45 gpm (0.10) cfs of water has been appropriated from Well 1 (DESC 53232) for irrigation of 20.0 acres.
15. Beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2014
16. According to the Application, delay of full beneficial use of water under Permit G-15703 was due, in part, to Well 1 (DESC 53232) not consistently producing the volume of water desired. The plan was to bring in 3-phase power for a larger well pump, but the cost was high due to the location of Well 1 (DESC 53232). 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)]**

17. The Department has considered the permit holder's compliance with conditions, including mitigation requirements, and did not identify any concerns.
18. On September 1, 2008, the permit holder installed a water meter.

19. Department records show annual water use reports were submitted for irrigation years 2008 and 2010-2015.
20. Department records show Marvin May is in good standing with mitigation requirements through 2016. Marvin May has obtained mitigation credits annually from the Deschutes River Conservancy mitigation bank, and has already obtained the necessary credits for 2016.

The Department has determined that this extension will allow the permit holder to obtain the full rate of water allowed under the permit, and to apply the water to full beneficial use.

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

21. The Application states the permit holder has made no investment during the last extension period. The permit holder anticipates an additional \$69,4000 investment is needed for the completion of this project.

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

22. The Department has found marginal good faith of the appropriator under Permit G-15703.

**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)].*

23. 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-15703; 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.

24. During a current review of Permit G-15703, the Department determined the following:

- a. The point of appropriation for Permit G-15703, located within the Indian Ford Creek Basin, is not located within a limited or critical groundwater area.
- b. Indian Ford Creek is located above the Deschutes Scenic Waterway.
- c. 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.
- d. The point of appropriation is in an area listed by the Department of Environmental Quality as a water quality limited stream for Temperature (River Mile 0 to 12.3).

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

25. 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)].**

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

27. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to ensure future diligence, and/or mitigate the effects of the subsequent development on competing demands on the resource. The Department determined the need to place a “Last Extension Condition” on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. This condition, specified under Item 1 of the “Conditions” section of this PFO, was determined to be necessary due to no additional work having been accomplished since September 1, 2008.

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

28. 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)]**

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

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

30. No unforeseen events have been identified.

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

31. 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 actual 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 10 through 22, 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 marginal 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 authorized in OAR 690-315-0050(5) and as described in Finding 27 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), a "Last Extension Condition" in order to ensure future diligence is exercised in the development and perfection of Permit G-15703.

**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-15703 from October 1, 2014 to October 1, 2018.

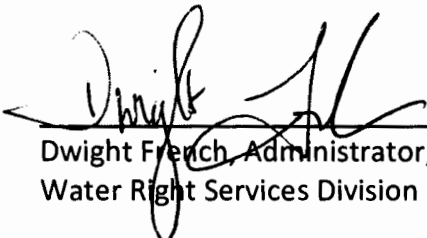
Subject to the following conditions:

### CONDITIONS

1. **Last Extension Condition**

This is to be the last extension of time granted for Permit G-15703. Any future extensions of time requests will be denied.

DATED: September 20, 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 **November 4, 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;

