

**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-11812, Water Right Application G-12836, in) PROPOSED FINAL ORDER
the name of Matt Mountanos)

Permit Information

Application:	G-12836
Permit:	G-11812
Basin:	14 – Klamath / Watermaster District 17
Date of Priority:	March 24, 1992
Source of Water:	A well in the Sycan River Basin
Purpose or Use:	Irrigation of 174.10 acres
Maximum Rate:	2.18 cubic feet per second (cfs)

***Please read this Proposed Final Order in its entirety as it contains
additional conditions not included in the original permit.***

In Summary, the Department proposes to:

- Grant an extension of time to complete construction of the water system from October 1, 1996 to October 1, 2021.

- Grant an extension of time to apply water to full beneficial use from October 1, 1997 to October 1, 2021¹.

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

COBU – Claim of Beneficial Use

Application – Application for Extension of Time

PFO – Proposed Final Order

cfs – cubic feet per second

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.

FINDINGS OF FACT

Background

1. On September 8, 1994, Permit G-11812 was issued by the Department. The permit authorizes the use of up to 2.18 cfs of water from a well in the Sycan River Basin for irrigation use on 174.10 acres. The permit specified actual construction of the well was to begin by September 8, 1995, construction of the water system was to be completed by October 1, 1996, and complete application of water was to be made on or before October 1, 1997.
2. On August 23, 1995, a Notice of Beginning of Construction (Form-A) was submitted to the Department, identifying construction began on April 23, 1991.

3. On August 23, 1995, a Notice of Completion of Construction (Form-B) was submitted to the Department, identifying construction was completed on May 20, 1992.
4. On September 2, 1997, a Claim of Beneficial Use (COBU) and site report was submitted to the Department for review.
5. On March 12, 2002, an assignment from John Mills to Steve and Christina Hubacker was recorded in the records of the Water Resources Department.
6. On May 30, 2012, the Department issued a Proposed Order of Certification in the Matter of Cancellation of Permit G-11812, for failure to comply with conditions of the permit by not submitting annual water use reports prior to the complete application of water date, being October 1, 1997, and static water level measurements were made in the month of March rather than April, as required by Permit G-11812.
7. On June 11, 2012, a Request for Reconsideration in the matter of cancelling Permit G-11812 was submitted to the Department.
8. On March 5, 2013, an assignment by proof from Steve and Christina Hubacker to Matt Mountanos was recorded in the records of the Water Resources Department.
9. On October 2, 2015, the Department began review of the COBU for issuance of a water right certificate.
10. On November 23, 2015, the Department issued a Proposed Order of Certification in the Matter of Cancellation of Permit G-11812 by certified mail, for failure to comply with conditions of the permit by not submitting annual water use reports prior to the complete application of water date, being October 1, 1997, and static water level measurements were made in the month of March rather than April, as required by Permit G-11812.
11. On March 7, 2016, the Department issued a second Proposed Order of Certification in the Matter of Cancellation of Permit G-11812, as verification of delivery of Certified Mail was not received by the Department.
12. On June 15, 2016, the Department issued a Final Order; Order of Certification in the Matter of Cancellation of Permit G-11812 (Special Order Volume 101, Page 84), because "satisfactory proof of beneficial use has not been made."
13. On August 12, 2016, the Department received a request and the associated fee for reinstatement of Permit G-11812.
14. On August 18, 2016, the Department issued an Order Granting Reconsideration, Reversing Cancellation Order, and Reinstating Permit G-11812 (Special Order Volume

101, Page 686).

15. On August 12, 2016, the permit holder, Matt Mountanos, submitted an "Application for Extension of Time" to the Department, requesting the time to complete construction of the water system from October 1, 1996 to October 1, 2021, and the time to apply water to full beneficial use under the terms and conditions of Permit G-11812 be extended from October 1, 1997 to October 1, 2021. This is the first permit extension requested for Permit G-11812.
16. Notification of the Application for Extension of Time for Permit G-11812 was published in the Department's Public Notice dated August 23, 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)]

17. 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)]

18. Actual construction of the well began prior to the September 8, 1995 deadline specified in the permit. According to the permit holder, construction of the well began April 23, 1991.

According to the Notice of Beginning of Construction (Form-A) received by the Department on August 23, 1995, construction began April 23, 1991. The Department has determined that the prosecution of the construction of the well began prior to September 8, 1995.

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.

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.

19. As of August 12, 2016, the Application states the remaining work to be completed consists of completing construction of the water system; meeting all permit conditions, including submitting an April static water level measurement; 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 complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit G-11812 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)]

20. 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 September 8, 1995 deadline specified in the permit. Construction of Well (KLAM 10188) began April 23, 1991 and was completed May 7, 1991.
- b. Work was completed during the original development time frame under Permit G-11812. In the Application, it states that the existing Artesian well was capped, being Well (KLAM 10188), excavation of ditches for flood irrigation, and installation of a flowmeter, pump and motor, 2640 feet of 8" PVC, and (6) 8" valves to flood the ditches took place.

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)]

21. The Application states a maximum rate of 2.1 cfs of water has been appropriated from Well (KLAM 10188) for irrigation of 168.31 acres.

22. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 1997.

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

23. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) 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 flowmeter was installed August 7, 1997.

Department records show the only April static water level measurement was received April 27, 2009. The Department has not received any April static water level measurements since.

The Department has determined that this extension will allow the annual water use reports submitted after October 1, 1997, to satisfy compliance of the condition, "The permittee shall maintain the meter or measuring device in good working order, 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," in an effort to make proof of beneficial use of the water as required by Permit G-11812.

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)]

24. The Application states the permit holder has invested about \$44,456, which is the total projected cost for complete development of this project.

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

25. The Department has found good faith of the appropriator under Permit G-11812.

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)].

26. 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-11812; 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.
27. During a current review of Permit G-11812, the Department determined the following:
 - a. The point of appropriation for Permit G-11812, located within the Sycan River Basin, is not located within a limited or critical groundwater area.
 - b. Sycan River is located above the Klamath Scenic Water Way.
 - c. Sycan River 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 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)].

28. 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)].

29. 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)]

30. 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)]

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

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

32. No unforeseen events have been identified.

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

33. 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 18 through 25, completion of construction and 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 complete construction and 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 complete construction of the water system under Permit G-11812 from October 1, 1996 to October 1, 2021.

Extend the time to apply water to beneficial use under Permit G-11812 from October 1, 1997 to October 1, 2021.

DATED: September 27, 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 11, 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.

