

**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-15474, Water Right Application G-15787, in)
the name of John G. McBee) **PROPOSED FINAL ORDER**

Permit Information

Application: G-15787
Permit: G-15474
Basin: 7 – Umatilla / Watermaster District 5
Date of Priority: June 28, 2002
Source of Water: A well in McKay Creek Basin
Maximum Rate /
Purpose or Use 0.15 cubic foot per second (cfs), being 0.11 cfs for Irrigation of
 8.9 acres and 0.04 cfs for maintenance of two reservoirs for wildlife and
 aquatic life, constructed under (Application R-85165, Permit R-13435);
 and (Application R-85166, Permit R-13436)

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, 2007 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

Application – Application for Extension of Time

PFO – Proposed Final Order

cfs – cubic foot 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.

FINDINGS OF FACT

Background

1. On August 14, 2003, Permit G-15474 was issued by the Department. The permit authorizes the use of up to 0.15 cfs of water, being 0.11 cfs for irrigation of 8.9 acres and 0.04 cfs for maintenance of two reservoirs for wildlife and aquatic life, constructed under Permits R-13435 (Application R-85165) and R-13436 (Application R-85166) from a well in McKay Creek Basin. The permit specified complete application of water was to be made on or before October 1, 2007.
2. On July 6, 2015, 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-15474 would begin.

3. On May 10, 2016, the Department issued (Special Order Volume 100, Page 393) an Order for Cancellation of Certain Permit(s) to Appropriate Water under the provisions of ORS 537.260 for Permit G-15474, for failure to make proof of appropriation of water under the terms and conditions of the permit.
4. On June 20, 2015, the Department received a petition for reconsideration of the cancellation of Permit G-15474.
5. On June 24, 2016, the Department issued (Special Order Volume 101, Page 251) an Order In the Matter of Reinstatement of Permit G-15474, Reinstating Permit G-15474.
6. On August 31, 2016, the permit holder, John G. McBee, 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-15474 be extended from October 1, 2007 to October 1, 2018. This is the first permit extension requested for Permit G-15474.
7. Notification of the Application for Extension of Time for Permit G-15474 was published in the Department's Public Notice dated September 6, 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)]

8. On August 31, 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)]

9. Construction of the well began prior to permit issuance. The permit holder states, construction of the well began on September 7, 2001.

According to the well log received by the Department on October 17, 2001, construction of Well (UMAT 54398) began on August 28, 2001. The Department has determined that the prosecution of the construction of the well began prior to October 1, 2007.

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.

10. As of August 31, 2016, the Application states the remaining work to be completed consists of completing construction of the water system including developing additional irrigation infrastructure and installing a more powerful (well) pump if needed, meeting all permit conditions 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-15474 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)]

11. 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 (UMAT 54398) began on August 28, 2001 and was completed on September 7, 2001. Ponds 1 and 2 were constructed; and a pump and irrigation pipes were installed.
 - b. No other work was completed during the original development time frame under Permit G-15474, being August 14, 2003 through October 1, 2007, as a majority of the work was completed prior to permit issuance.
 - c. Since October 1, 2007, the permit holder has installed 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)]

12. The Application states a maximum estimated rate of 60-65 gpm (0.14 cfs) of water has been appropriated from the well for irrigation of 8.9 acres and the maintenance of (two) ponds. The Application does not indicate the rate used for each purpose. The authorized amount of water for irrigation use is 0.11 cfs, for pond maintenance is 0.04 cfs for a maximum combined rate of 0.15 cfs. The permit holder is responsible for maintaining the allowable rate for each use as authorized under the permit.
13. Beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2007.
14. According to the permit holder, delay of full beneficial use of water under Permit G-15474 was due, in part, to inconsistent output from the well and the need to incorporate more efficient measures to allow for more uniform application of the water.

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

15. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns.
16. The Permit Holder submitted documentation from Mike Ladd, North Central Region Watermaster, stating that the permit holder is in compliance with the condition of "Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director." The documentation states that a "dedicated electric meter meets this condition".
17. The Application states that the permit holder installed a flow meter on July 22, 2016, and the permit holder intends to monitor the maximum rate and water usage, to determine installation of a bigger pump is necessary.

The Department has determined that this extension will allow the permit holder to obtain the full rate of water allowed under the permit and or 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)]

18. The Application states the permit holder has invested about \$18,757, which is approximately 73 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$7,000 investment is needed for the completion of this project.

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

19. The Department has found good faith of the appropriator under Permit G-15474.

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)].

20. 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-15474; 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.
21. During a current review of Permit G-15474, the Department determined the following:
 - a. The point of appropriation for Permit G-15474, located within the McKay Creek Basin, is not located within a limited or critical groundwater area.
 - b. McKay Creek is not located within or above any state or federal 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 not in an area listed by the Department of Environmental Quality as a water quality limited stream.
 - e. The point of appropriation is located within the McKay Creek sub-basin within the Umatilla basin. The Umatilla Basin Program rules states, "McKay Creeks and tributaries are withdrawn from further appropriation of unappropriated waters during the period June 1 through October 31 each year. The withdrawal does not apply to domestic, livestock, fish and wildlife uses or water released from storage. This action was taken by the Commission on December 2, 1985", pursuant OAR 690-507-0060(2)(a).

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.

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

24. 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)]

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

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

26. No unforeseen events have been identified.

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

27. 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 9 through 19, 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 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-15474 from October 1, 2007 to October 1, 2018.

DATED: October 11, 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 25, 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>

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- 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
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