

Application for Extension of Time

In the Matter of the Application for an Extension of Time)
for Permit G-16174, Water Right Application G-16620, in) PROPOSED FINAL ORDER
the name of Kim and Gloria Bowman)

Application:	G-16620
Permit:	G-16174
Basin:	8 – Grande Ronde / Watermaster District 6
Date of Priority:	February 6, 2006
Source of Water:	A well in Conley Creek Basin
Purpose or Use:	Irrigation use on 16.0 acres
Maximum Rate:	0.20 cubic foot per second (cfs)

In Summary, the Department proposes to:

- Grant an extension of time to complete construction of the water system from October 1, 2011 to October 1, 2021.
- Grant an extension of time to apply water to full beneficial use from October 1, 2011 to October 1, 2021¹.
- Make the extension subject to certain conditions set forth below.

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

BLS – Below Land Surface

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 5, 2007, Permit G-16174 was issued by the Department. The permit authorizes the use of up to 0.20 cfs of water from a well in Conley Creek Basin for irrigation use on 16.0 acres. The permit specified completion construction and complete application of the water to the use completed by October 1, 2011.

2. On August 2, 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-16174 would begin.
3. On September 23, 2016 the permit holders, Kim and Gloria Bowman, submitted an "Application for Extension of Time" to the Department, requesting both the time to complete construction of the water system and the time to apply water to full beneficial use under the terms and conditions of Permit G-16174 be extended from October 1, 2011 to October 1, 2021. This is the first permit extension requested for Permit G-16174.
4. Notification of the Application for Extension of Time for Permit G-16174 was published in the Department's Public Notice dated October 4, 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)]

5. On September 23, 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)]

6. Construction of the well began prior to October 1, 2011, as specified in the permit as being the date to complete construction and apply water to full beneficial use. The permit holder states, construction of Well (UNIO 51878) began July 7, 2007.

According to the well log received by the Department on August 3, 2007, Well (UNIO 51878) construction began July 7, 2007. The Department has determined that the prosecution of the construction of the well began prior to October 1, 2011.

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.

7. As of September 23, 2016, the Application states the remaining work to be completed consists of completing construction of the water system which includes resealing of Well (UNIO 51878) or re-drilling a well to permit specifications; 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, 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-16174 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)]

8. The Application states, work was accomplished within the time allowed in the permit or previous extension as follows:
 - a. Work was completed during the original development time frame under Permit G-16174. According to the Application, work completed towards the development of the water system includes construction of Well (UNIO 51878), installation of a McCrometer flow meter, mainlines, and wheel lines for irrigation.
 - b. The Application does not identify any work accomplished after October 1, 2011.

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)]

9. The Application states a maximum rate of 0.20 cfs of water has been appropriated from Well (UNIO 51878) for irrigation of 16.0 acres.
10. The Application states that Well (UNIO 51878) was completed, but not to the specifications contained in Permit G-16174.
11. Beneficial use of water has not yet been demonstrated under this permit because not all

permit conditions were satisfied by October 1, 2011.

12. According to the permit holder, delay of full beneficial use of water under Permit G-16174 was due to the contractor hired to complete the well failed to construct the well in accordance with the condition of "The well shall be continuously cased and continuously sealed a minimum of 20 feet into competent basalt." as required under this permit.

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

13. The Department has considered the permit holder's compliance with well construction conditions, and has identified Well (UNIO 51878) was not constructed in accordance with the permit conditions.

According to the well log submitted to the Department on August 3, 2007, Well (UNIO 51878) is cased to a depth of 631 feet BLS and is sealed from 0 to 40 feet BLS with bentonite clay and from 40 to 55 feet BLS with cement. A basalt layer, described as "Fractured Black Basalt" was first encountered at a depth of 620 feet BLS.

14. The Department has considered the permit holder's compliance with water level measurement conditions and recognizes the permit holder's intent to comply with the static water level measurement conditions.
15. The Departments record shows an initial March static water level measurement taken on March 5, 2008 was submitted to the Department. The static water level measurement was taken on Well (UNIO 51878).
16. The Departments record shows annual March static water level measurements were submitted to the Department for the years 2009, 2010, 2012 and 2014. Additional static water level measurements taken outside of the required month on February 28, 2011 and April 10, 2013 were submitted to the Department. The static water level measurements were taken on Well (UNIO 51878).
17. The static water level measurements that have been submitted show intent of the permit holder to comply with conditions required under Permit G-16174. Well (UNIO 51878) was not completed to the specifications prescribed in the permit. Compliance with the static water level conditions cannot be satisfied until the well is completed to the specifications authorized under this permit. 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.
18. Permit G-16174 contains a condition that states the use of water from the well shall be controlled or shut off if the well displays an average water level decline of three or more feet per year for five consecutive years; or a water level decline of 15 or more feet in fewer than five consecutive years; or a water level decline of 25.0 or more feet; or hydraulic interference leads to a decline of 25 or more feet in any neighboring well with

senior priority. A reference level cannot be determined under this permit as Well (UNIO 51878) has not been constructed to meet the conditions of the permit. The permit holder will need to continue to measure the static water level in Well (UNIO 51878) once it is resealed; or will need to measure a new well if it is authorized by permit amendment and constructed under this permit.

The Department has determined that this extension will allow alteration of Well (UNIO 51878) or construction of a new well that is authorized by the Department and is constructed to the specifications under Permit G-16174 after 2011 to satisfy compliance of the condition of "The well shall be continuously cased and continually sealed a minimum of 20 feet into competent basalt"; and submittal of an initial static water level measurement and seven consecutive annual static water level measurements in an effort to make proof of beneficial use of the water as required by Permit G-16174.

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)]

19. The Application states the permit holder has invested about \$41,500, which is approximately 37 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$70,000 investment is needed for the completion of this project to complete a well to permit specifications.

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

20. The Department has found good faith of the appropriator under Permit G-16174.

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-16174; 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.
22. During a current review of Permit G-16174, the Department determined the following:
 - a. The point of appropriation for Permit G-16174, located within the Conley Creek Basin, is not located within a limited or critical groundwater area.
 - b. Conley Creek is located above The Wallowa - Grande Ronde 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.

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

23. 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)].

24. No other factors relevant to the determination of the market and present demand for water and power have been identified.
25. 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 a need to condition any use of water under Permit G-16174 from Well (UNIO 51878). The Department determined the need to place a "Well Construction 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, limits no water is to be appropriated from Well (UNIO 51878) under this permit until the well is resealed to the specifications set forth in Permit G-16174.
26. 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 "Permit Amendment 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 2 of the "Conditions" section of this PFO, was determined to be necessary due to the condition of "If the number, location, source, or construction of any well deviates from that proposed in the permit application or required by the permit conditions, this permit may not be valid, unless the Department authorizes the change in writing" contained in the original permit. If the permit holder chooses to drill a new well, the use of water from a new well shall not begin until a Permit Amendment is filed and a Final Order Approving the new well is issued.

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

27. 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)]

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

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

29. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit G-16174, in that the permit holders believed the well driller constructed the well according to the permit conditions.

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

30. 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 timeline requirements to begin construction as required by ORS 537.630, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. Based on Finding of Facts 6 through 20, 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).

6. As authorized in OAR 690-315-0050(5) and as described in Finding 25 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), a well construction condition that applies to any use of water from Well (UNIO 51878) under Permit G-16174 in order to ensure future diligence.
7. As authorized in OAR 690-315-0050(5) and as described in Finding 26 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 2), a permit amendment condition that applies to any use of water from Well (UNIO 51878) under Permit G-16174 in order to ensure future diligence and to mitigate the effects of the subsequent development on competing demands on the resource.

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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-16174 from October 1, 2011 to October 1, 2021.

Extend the time to apply water to beneficial use under Permit G-16174 from October 1, 2011 to October 1, 2021.

Subject to the following conditions:

CONDITIONS

1. Well Construction Condition

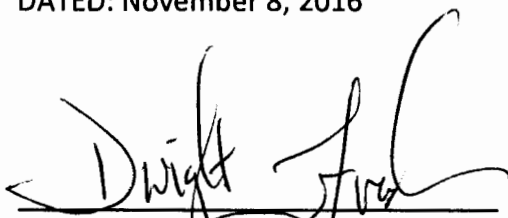
The use of any water from Well (UNIO 51878) under Permit G-16174 is subject to this Groundwater Condition.

No water shall be appropriated from Well (UNIO 51878) under Permit G-16174 until it has been reconstructed to meet the conditions contained in Permit G-16174. The permit holder must submit proof of compliance that the well authorized under this permit or by permit amendment is in compliance with the conditions of; "The well shall produce ground water only from the basalt ground water reservoir"; and "The well shall be continuously cased and continuously sealed a minimum of 20 feet into competent basalt."

2. Permit Amendment Condition

If the permit holder chooses to construct a new well to meet the specifications contained in Permit G-16174, the permit holder shall file a Permit Amendment requesting authorization of the use of water from the new well under this permit. **Use of water from the new well shall not begin until the Permit Amendment is approved by the Department.**

DATED: November 8, 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 **December 23, 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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