

Application for Extension of Time

Permit Information

Please read this Proposed Final Order in its entirety.

Page 1 of 8

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
PFO – Proposed Final Order
Reservoir – Grizzly Mountain Farm Pond
AF – acre feet
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.

FINDINGS OF FACT

Background

1. On January 5, 2006, Permit G-15999 was issued by the Department. The permit authorizes the use of up to 0.04 cubic foot per second (cfs) of water from Well L67139 and storage of 9.0 acre-feet (AF) of water in Grizzly Mountain Farm Pond (Reservoir) for irrigation use on 6.0 acres. The permit specified complete application of water was to be made on or before October 1, 2010.
2. On August 16, 2016, the Department issued a letter by certified mail, requesting either a Claim of Beneficial Use or an Application for Extension of Time be submitted, or cancellation proceedings for Permit G-15999 would begin.

3. On October 18, 2016 the permit holder, Alfred and Lisa Sennhauser, 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-15999 be extended from October 1, 2010 to October 1, 2021. This is the first extension request for Permit G-15999.
4. Notification of the Application for Extension of Time for Permit G-15999 was published in the Department's Public Notice dated October 25, 2016. No public comments were received regarding the extension application.
5. On November 4, 2016, the permit holder submitted additional information to supplement their Application for Extension of Time. The additional information provided was the volume of water stored in Grizzly Mountain Farm Pond.

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)]

6. On October 18, 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)]

7. Construction of the well began prior to permit issuance. The permit holder states, construction of Well (JACK 56626) began October 1, 2005.

According to the well log received by the Department on March 15, 2004, construction of Well (Jack 56626) began February 6, 2004. The Department has determined that the prosecution of the construction of the well began prior to October 1, 2010.

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.

8. As of October 18, 2016, the Application states the remaining work to be completed consists of: completing construction of a water system which includes installing irrigation system and a totalizing flow meter; meeting all permit conditions which includes submitting an initial March static water level measurement and seven

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.

consecutive March static water level measurements; 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-15999 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)]

9. 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 (JACK 56626) began February 6, 2004 and was completed on February 7, 2004.
 - b. Work was completed during the original development time frame under Permit G-15999. The Application states that a storage tank, two pumps, approximately one mile of 2" pipe were installed and Grizzly Mountain Farm Pond (Reservoir) was constructed.

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)]

10. The Application states a maximum rate of 25 gpm (0.06 cfs) of water has been appropriated from Well (JACK 56626). This exceeds the maximum rate of water authorized under this permit. The authorized rate of water use is 0.04 cfs (17 gpm).
11. The permit holder states that a maximum volume of 5,000 AF have been stored in the Reservoir. No water has been appropriated from Well (JACK 56626) or from Grizzly Mountain Farm Pond for irrigation.
12. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2010.

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

13. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the record does not show totalizing flow meter has been installed, (2) the initial March static water level measurement was taken March 3, 2014, which is outside of the development time frame authorized under Permit G-15999, and (3) the required seven consecutive March static water level measurements have not been received by the Department.

The Department has determined that this extension will allow the permit holder to complete construction of the water system including installation of a totalizing flow meter, obtain the full rate for irrigation and the full storage volume of water allowed under the permit, submit annual March static water level measurements and to apply the water to full beneficial use on the remaining 6.0 acres.

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)]

14. The Application states the permit holder has invested about \$42,500, which is approximately 63 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$25,000 investment is needed for the completion of this project.

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

15. The Department has found good faith of the appropriator under Permit G-15999.

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)].

16. 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-15999; 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.
17. During a current review of Permit G-15999, the Department determined the following:
- a. The point of appropriation for Permit G-15999, located within the Kitchen Creek Basin, is not located within a limited or critical groundwater area.
 - b. Kitchen Creek is above the Rogue Scenic Waterway located within or above any state or federal scenic waterway.
 - c. Kitchen Creek is located within an area ranked "moderate" 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)].

18. 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)].

19. 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)]

20. 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)]

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

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

22. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit G-15999, in that the great recession of 2008 and 2009 and the slow recovery facilitated a need to change farm operations. "The last few years have been challenging from a financial perspective. To overcome these challenges, I have decided to change the use of my farm to a vineyard."

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

23. 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 the 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 7 through 15, 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).

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-15999 from October 1, 2010 to October 1, 2021.

DATED: November 29, 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 **January 13, 2017**, 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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