

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources

Application – Application for Extension of Time

PFO – Proposed Final Order

cfs – cubic feet per second

POA – Point of Appropriation

POU – Place of Use

FOF – Findings of Fact

gpm – gallons per minute

GHVGAC – Greater Harney Valley Groundwater Area of Concern

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.

OAR 690-315-0050(6) requires the Department, for extensions exceeding five years, to establish checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between checkpoints will not exceed five year periods.

FINDINGS OF FACT

Background

1. On March 25, 1998, Permit G-13361 was issued by the Department. The permit authorizes the use of up to 2.0 cfs of water from a well in Little Rock Creek Basin for irrigation of 160.0 acres. The permit specified actual construction of the well was to begin by March 25, 1999, and complete application of water to the use was to be made on or before October 1, 2002.
2. On September 9, 2013, the Department issued a letter by certified mail to John Hull, the permit holder of record, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-13361 would begin. The letter was returned due to insufficient address, unable to forward.
3. On October 7, 2013, the Department issued a second letter by certified mail to John Hull, the permit holder of record at an alternate address, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-13361 would begin. The letter was returned due to vacant residence, unable to forward.
4. On September 9, 2013, the Department issued a letter by certified mail to Lura M. Koch, the land owner of record, to which Permit G-13361 is appurtenant to, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-13361 would begin. The letter was returned to the Department.
5. On October 7, 2013, the Department issued a second letter by certified mail to Lura M. Koch, the land owner of record at an alternate address, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-13361 would begin.
6. On February 10, 2014, the Department issued a third letter by certified mail to Lura M. Koch, the land owner of record, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-13361 would begin. The letter was returned due to insufficient address, unable to forward.
7. On April 7, 2014, the Department issued a fourth letter by certified mail to Lura M. Koch, the land owner of record, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-13361 would begin. The certified letter was received and signed by Lura M. Koch on April 9, 2014.
8. On June 20, 2014, the Department received the first Application for Extension of Time requesting the time to accomplish full beneficial use of the water be extended from October 1, 2002 to October 30, 2016.

9. On June 23, 2014, an assignment by proof from John Hull to Lura M. Koch was recorded in the records of the Water Resources Department.
10. On December 19, 2014, the Department issued a Final Order authorizing the time to apply water to full beneficial use to be extended from October 1, 2002 to October 30, 2016 under Permit G-13361.
11. On October 17, 2016, the permit holder, Lura M. Koch, submitted the second "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-13361 be extended from October 30, 2016 to October 1, 2022.
12. Notification of the Application for Extension of Time for Permit G-13361 was published in the Department's Public Notice dated October 25, 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)]

13. On October 17, 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)]

14. Actual construction of the well began prior to the March 25, 1999 deadline specified in the permit. According to the permit holder, construction of Well (HARN 1025) began December 30, 1974.

According to the well log received by the Department on January 27, 1975, construction of Well (HARN 1025) began December 30, 1974. The Department has determined that the prosecution of the construction of the well began prior to March 25, 1999.

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.

15. As of October 17, 2016, the Application states the remaining work to be completed consists of submitting and gaining approval for a Permit Amendment to change the Point of Appropriation (POA) and change the Place of Use (POU); constructing a new well at the newly approved location; meeting all permit conditions, including submitting annual water use reports; and applying water to full beneficial use on the remaining 30.0 acres.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2022, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-13361 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)]

16. Based on Findings of Fact (FOF) 5 and 7, work was accomplished under Permit G-13361 during the original development time frame, being March 25, 1998 to October 1, 2002.
17. Work was accomplished during the previous extension period, being October 1, 2002, to October 30, 2016 under Permit G-13361. The work consisted of installing power to the center pivot, installing a pump on Well (HARN 1025), and completing installation of the equipment needed to irrigate area under a new center pivot.

The Department has determined that work has been accomplished during the most recent extension period, 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)]

18. The Application states a maximum rate of 1000 gpm (2.23 cfs) of water has been appropriated from Well (HARN 1025) for irrigation of 130.0 acres. This exceeds the amount of water for irrigation use authorized under this permit. The authorized amount of water for irrigation use is 2.0 cfs.
19. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 30, 2016.

20. According to the Application, delay of full beneficial use of water under Permit G-13361 was due, in part, to:

“We pumped and irrigated 130.0 acres authorized in the permit for three months from the authorized well. The sand produced by the well destroyed the pump. We anticipate solving the sand problem by drilling a new well in a new location. This will require a permit amendment. With the amendment we will also relocate the 30.0 acres of water rights from the corners currently outside the center pivot.”

The Department has determined that this extension will allow the permit holder to submit and gain approval for a Permit Amendment to change the POA and POU, satisfy all permit conditions, and obtain the full rate of water allowed under the permit and to apply the water to full beneficial use on the remaining 30.0 acres.

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

21. The Application states a meter was installed on Well (HARN 1025) in March 2016.
22. The Department has considered the permit holder's compliance with conditions, and has identified the following concern: (1) annual reports of the amount of water used each month have not been received by the Department (A water use report was submitted for 2001 to 2002. No water was used).

The Department has determined that this extension will allow the submittal of annual water use reports after October 1, 2016, to satisfy compliance of the condition of “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-13361.

Beneficial use of water under this permit 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)]

23. The Application states the permit holder has invested about \$171,700, which is approximately 61 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$110,000 investment is needed for the completion of this project.

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

24. The Department has found good faith of the appropriator under Permit G-13361.

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)].

25. 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-13361; 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.
26. During a current review of Permit G-13361, the Department determined the following:
 - a. The point of appropriation for Permit G-13361, located within the Hot Springs Slough Basin, is within the Greater Harney Valley Groundwater Restricted Area. The Greater Harney Valley Groundwater Area of Concern (GHVGAC) is established to ensure that groundwater in the GHVGAC is appropriated within the capacity of the resource and that new appropriations of groundwater assure the maintenance of reasonably stable groundwater levels and prevent depletion of the groundwater resource. Current data, comprising substantial evidence, indicate that groundwater levels are declining in areas of the GHVGAC. Additional allocation of groundwater within the GHVGAC may exacerbate these declines. A comparison between estimated annual recharge and previously allocated groundwater volumes indicates that groundwater is fully allocated in some areas of the basin. 690-512-0020(1)
 - b. Hot Springs Slough is not located within or above any state or federal scenic waterway.
 - c. It is located within an area ranked "low" 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)].

27. 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)].

28. No other factors relevant to the determination of the market and present demand for water and power have been identified.
29. 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 Permit G-13361 with a "Permit Amendment Condition." This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary due to the permit holder needing to change the POA from Well (HARN 1025), and to general concerns regarding the long-term stability of the Greater Harney Valley groundwater. The Greater Harney Valley groundwater levels are declining as total discharge exceeds recharge, depleting the water that is being stored in the aquifer. (Gall, I. Memorandum to Water Resources Commission, Salem, OR. 18 June 2015). This condition requires the water user to apply for a permit amendment by August 1, 2017 to change the POA.
30. 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 2 of the "Conditions" section of this PFO, was determined to be necessary due to the lapse in time of developing Permit G-13361, being 18 years since permit issuance.
31. OAR 690-315-0050(6) requires a checkpoint condition on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. A "Checkpoint Condition" is specified under Item 3 of the "Conditions" section of this PFO to meet this condition.

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

32. 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)]

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

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

34. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit G-13361, in that Well (HARN 1025) began producing sand, which destroyed the pump, restricting their ability to complete development of the project in a timely manner.

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

35. 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 construction timeline requirements to begin actual 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 14 through 24, full application of water to beneficial use can be accomplished by October 1, 2022, 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).
6. As authorized in OAR 690-315-0050(5) and as described in Finding 29 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), a permit amendment condition in order to ensure future diligence and mitigate the effects of the subsequent development on competing demands on the resource.

7. As authorized in OAR 690-315-0050(5) and as described in Finding 30 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 2), a "Last Extension Condition" in order to ensure future diligence is exercised in the development and perfection of Permit G-13361.
8. As required by OAR 690-315-0050(6) and as described in Finding 31 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 3), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit G-13361.

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-13361 from October 30, 2016 to October 1, 2022.

Subject to the following conditions:

CONDITIONS

1. **Permit Amendment Condition**
The water user shall apply for a permit amendment to change the point of appropriation under Permit G-13361 by **August 1, 2017**.
2. **Last Extension Condition**
This is to be the last extension of time granted for Permit G-13361. Any future extensions of time requests will be denied.
3. **Checkpoint Condition**
The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2021**. ***A form will be enclosed with your Final Order.***
 - (a) At each checkpoint, the permit holder shall submit and the Department shall review evidence of the permit holder's diligence towards completion of the project and compliance with terms and conditions of the permit and extension. If, after this review, the Department determines the permit holder has not been diligent in developing and perfecting the water use permit, or complied with all terms and conditions, the Department shall modify or further condition the permit or extension to ensure future compliance, or begin cancellation proceedings on the undeveloped portion of the permit pursuant to ORS 537.260 or 537.410, or require submission of a final proof survey pursuant to ORS 537.250;

- (b) The Department shall provide notice of receipt of progress reports in its weekly notice and shall allow a 30 day comment period for each report. The Department shall provide notice of its determination to anyone who submitted comments.

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>

- If you have questions about statements contained in this document, please contact Corey A Courchane at (503)986-0825.
 - 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
Salem, OR 97301-1266
- Fax: 503-986-0901