

**Oregon Water Resources Department
Water Right Services Division**

Water Right Application
Number G-17282

In the Matter of the Application for an Extension of Time)	FINAL ORDER
for Permit G-16779, Water Right Application G-17282,)	INCORPORATING
in the name of the McNulty Water People's Utility District)	SETTLEMENT AGREEMENT

Permit Information

Application File G-17282/ Permit G-16779

Basin 2 – Columbia Basin / Watermaster District 18

Date of Priority: November 4, 2009

Authorized Use of Water

Source of Water:	Well McGilvra #2 in Milton Creek Basin
Purpose or Use:	Municipal use
Maximum Rate:	1.0 cubic foot per second (cfs)

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

Appeal Rights

This final order is subject to judicial review by the Court of Appeals under ORS 183.482. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.482(1). Pursuant to ORS 536.075 and OAR 137-003-0675, you may petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

Application History

Permit G-16779 was issued by the Department on August 23, 2010. The permit called for completion of construction by August 23, 2015, and complete application of water to beneficial use by August 23, 2015. On August 19, 2015, Jeff Anderson, General Manager of McNulty Water PUD submitted an application to the Department for an extension of time for Permit G-16779. In accordance with OAR 690-315-0050(2), on April 19, 2016, the Department issued a Proposed Final Order proposing to deny the time to complete construction from August 23, 2015 to October 1, 2027 and the time to fully apply water to beneficial use from August 23, 2015 to October 1, 2027. The protest period closed June 3, 2016, in accordance with OAR 690-315-0060(1). McNulty Water PUD filed a timely protest with the Department on June 3, 2016.

The McNulty Water PUD protested the Proposed Final Order to Deny the extension for, among others, the following reason:

- Actual construction began by the deadline required by Permit G-16779, being August 23, 2015.

FINDINGS OF FACT

Except as expressly stated herein, The Department adopts and incorporates by reference the findings of fact in the Proposed Final Order dated April 19, 2016.

Start of Construction [OAR 690-315-0080(1)(b)]

Finding of Fact 7, as shown in the Proposed Final Order is stricken and replaced with the following:

7. Actual construction began prior to August 23, 2015, the original time period specified in the permit, as evidenced by supplemental information submitted to the Department on June 3, 2016. In or around July or August 2010, McNulty Water PUD installed over 100 feet of water line from the District's main line at Hankey Road to the existing well at the project site, being Well McGilvra #2 (COLU 1225).

The Department has determined that the prosecution of the construction of the project began prior to August 23, 2015.

Duration of Extension [OAR 690-315-0080(1)(c) and (1)(d)]

Under OAR 690-315-0080(1)(c),(d), in order to approve an extension of time for municipal and quasi-municipal water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

Finding of Fact 10, as shown in the Proposed Final Order is corrected as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

10. The Department finds that the work accomplished does ~~not~~ fall under the definition of actual construction to demonstrate that actual construction began.

Finding of Fact 11, as shown in the Proposed Final Order is corrected as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

11. As of August 24, 2015, the McNulty Water PUD has not diverted any water authorized under Permit G-16779 for municipal purposes. There has been no beneficial use of water.

~~As required by OAR 690-315-0080(1)(b), the permit holder was not able to demonstrate that actual construction of the project began (commenced) within the time period~~

~~required by ORS 537.630(2), being no later than August 23, 2015, in order to be within the five year time period as specified in the permit. ORS 537.630(2) provides that the Department may only allow an extension of time to complete construction and/or to perfect a water right permit beyond the specified permit under certain conditions. The time to begin construction may not be extended.~~

The Department ~~cannot~~ finds that the applicant can complete the project or apply water to full beneficial use within the time requested for the extension.

Good Cause [OAR 690-315-0080(1)(e) and (3)(a-g) and (4)]

The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0080(3) and OAR 690-315-0080(4).

Finding of Fact 12, as shown in the Proposed Final Order is stricken and replaced with the following:

12. Prior to the issuance of Permit G-16779 on August 23, 2010, McNulty Water PUD installed over 100 feet of water line from the District's main line at Hankey Road to the existing well at the project site, being Well McGilvra #2 (COLU 1225).

Finding of Fact 13, as shown in the Proposed Final Order is stricken and replaced with the following:

13. As of August 24, 2015, McNulty Water PUD has invested \$50,000 for development of this project. McNulty Water PUD estimates an additional \$660,000 investment is needed for the completion of this project. The Department recognizes that while some of these investment costs are unique to construction and development solely under G-16779, other costs included in this accounting are not partitioned out for G-16779 because (1) they are incurred under the development of a water supply system jointly utilized under other rights held by the City of St. Helens and McNulty Water PUD, and (2) they are generated from individual activities counted towards reasonable diligence and good faith as listed in ORS 690-315-0080(4) which are not associated with just this permit, but with the development and exercise of all of McNulty Water PUD's water rights.

Finding of Fact 14, as shown in the Proposed Final Order is corrected as follows (additions are shown in "underline" text, deletions are shown in "~~striketrough~~" text):

14. According to McNulty Water PUD no water has been appropriated for municipal purposes. Beneficial use of water has not yet been demonstrated under this permit because none of the permit conditions were satisfied by August 23, 2015.

Based on Findings of Fact 7 through 14, above, the Department finds that the applicant has demonstrated ~~a lack of~~ good faith.

Cost to Appropriate and Apply Water to a Beneficial Purpose [OAR 690-315-0080(3)(b)]

Finding of Fact 15, as shown in the Proposed Final Order is stricken and replaced with the following:

15. As of August 24, 2015, McNulty Water PUD has invested \$50,000 for development of this project. McNulty Water PUD estimates an additional \$660,000 investment is needed for the completion of this project.

Economic investment in the project to date [OAR 690-315-0080(5)(d)]

Finding of Fact 17, as shown in the Proposed Final Order is stricken and replaced with the following:

17. According to McNulty Water PUD, as of August 24, 2015, they have invested \$50,000 for complete development of this project. McNulty Water PUD estimates an additional \$660,000 investment is needed for the completion of this project.

Fair Return Upon Investment [OAR 690-315-0080(3)(e)]

Finding of Fact 18, as shown in the Proposed Final Order is stricken and replaced with the following:

18. McNulty Water PUD expects to obtain a fair and reasonable return on investment by continuing development of Permit G-16779.

ADDITIONAL FINDING OF FACT

Duration of Extension [OAR 690-315-0080(1)(c) and (1)(d)]

Under OAR 690-315-0080(1)(c),(d), in order to approve an extension of time for municipal and quasi-municipal water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

21. As of August 24, 2015, McNulty Water PUD had appropriated no water authorized under Permit G-16779 for municipal purposes. There is an undeveloped portion of 1.0 cfs of water under Permit G-16779.
22. In addition to the 1.0 cfs of water authorized under Permit G-16779 (Well McGilvra #2), McNulty Water PUD holds the following water right certificates:
 - Certificate 57888 for 0.04 cfs of water from Deshazer Well in the Columbia River Basin, for domestic and commercial use;
 - Certificate 58654 for 0.04 cfs of water from Deshazer Well in the Columbia River Basin, for quasi-municipal uses during the non-irrigation season of each year;

- Certificate 58655 for 1.0 cfs of water from Deshazer Well in the Columbia River Basin, for quasi-municipal uses;
- Certificate 61176 for 1.0 cfs of water from Millard Road Well in the Columbia River Basin, for quasi-municipal uses;
- Certificate 65072 for 0.6 cfs of water from Well #1 in the Columbia River Basin, for quasi-municipal uses;
- Certificate 87258 for 0.56 cfs of water from a Well in McNulty Creek Basin, for quasi-municipal use; and
- Certificate 87259 for 0.78 cfs of water from Robinette Well in the Willamette Basin, for quasi-municipal use.
- ASR Permit #002 for 0.89 cfs of water from Stone Road Well 1 and 2, Millard Well, and Blaha Well 1 and 2, for Aquifer Storage and Recovery.

These water rights and permits total 4.91 cfs of water, being 4.91 cfs of ground water. McNulty Water PUD has not yet made use of 1.0 cfs of water under Permit G-16779.

23. According to McNulty Water PUD, its peak water demand within its service area boundaries was 1.7 cfs in 2014.
24. According to McNulty Water PUD, in 2013, the population within the service boundary was 2,451. McNulty Water PUD estimates the population will increase at growth rate of 2.5 percent per year, reaching an estimated population of 3,463 by the year 2027. McNulty Water PUD states that as of 2014 it had 917 service connections. Growth projections from the 2007 Master Water Plan were adjusted to align with actual growth realized through 2014. McNulty Water PUD has seen a positive increase in service requests thus far through 2015 and is optimistic of future growth with the district.
25. According to McNulty Water PUD, its peak day demand is projected to be approximately 2.06 cfs of water by the year 2027. According to McNulty Water PUD, the service area is generally comprised of Rural Residential 2 (RR2), Rural Residential 5 (RR5), Forest Agricultural (FA-80), Primary Agricultural (PA-80), and Primary Forest (PF-80). The RR2 and RR5 zones are centrally located within McNulty Water PUD's current service area. Many of the RR2 and RR5 properties remain underdeveloped and are anticipated to experience in-fill development. Development in the RR2 and RR5 zones will bring new residential customers and increase system demands.
26. Full development of Permit G-16779 is needed to address the present and future water demand of McNulty Water PUD, including system redundancy and emergency use.

27. Given the amount of development left to occur, the Department has determined that McNulty Water PUD's request for an extension of time until October 1, 2027, to complete construction and to apply water to full beneficial use under the terms and conditions of Permit G-16779 is both reasonable and necessary.

Reasonable Diligence and Good Faith of the Appropriator [OAR 690-315-0080(3)(a),(3)(c) and (4)]

Reasonable diligence and good faith of the appropriator must be demonstrated during the permit period or prior extension period as a part of evaluating good cause in determining whether or not to grant an extension. In determining the reasonable diligence and good faith of a municipal or quasi-municipal water use permit holder, the Department shall consider activities associated with the development of the right including, but not limited to, the items set forth under OAR 690-315-0080(4) and shall evaluate how well the applicant met the conditions of the permit or conditions of a prior extension period.

28. The Department has considered McNulty Water PUD's compliance with conditions, and has identified the following concerns: (1) the record does not show that a totalizing flow meter or other suitable measuring device has been installed, (2) the required March static water level measurements have not been received by the Department, and (3) 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 McNulty Water PUD to comply with all permit conditions at the time the conditions become applicable.

The Department has determined that this extension will allow the totalizing flow meter to be installed, and the annual water use reports and March static water level measurements submitted after August 23, 2015 to satisfy compliance of the conditions of, "Before water use may begin under this permit, the permittee shall install a totalizing flow meter or other suitable measuring device as approved by the Director at each point of appropriation", "The permittee shall keep a complete record of the amount of water used each month, and shall submit an annual report which includes the recorded water use measurements to the Department by December 1 of each year," and "In addition to the measurement required in subsection (a) of this section, a water level measurement shall be made each year during the period March 1 through March 31," in an effort to make proof of beneficial use of the water as required by Permit G-16779.

The 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.

29. According to the Application, from 2008 through 2014 customer growth was curtailed in large part due to the global economic recession and decline in the local housing market. The limited growth lead to decreased income from system development charges which support capital improvements such as the development of the well pursuant to Permit G-16779. Given the financial stress of the time, McNulty Water PUD's Board of Directors did not see that it was prudent to direct funds to capital improvements.

The Market and Present Demands for Water [OAR 690-315-0080(3)(d) and (5)(a-f)]

For municipal or quasi-municipal water use permits issued after November 2, 1998, in making a determination of good cause pursuant to 690-315-0080(3)(d), the Department shall also consider, but is not limited to, the factors in 690-315-0080(5)(a-f).

30. As described in Findings 7 through 26 McNulty Water PUD has indicated, and the Department finds that, McNulty Water PUD must rely on full development of Permit G- 16779 to meet its present and future water demands.
31. McNulty Water PUD projects a population increase of 2.5 percent per year over a 14 year period, from 2014 to 2027, and also expects residential growth.
32. Given the current water supply situation of McNulty Water PUD as well as current and expected demands, there is a market and present demand for the water to be supplied under Permit G-16779.
33. According to the application, it has recently come to the attention of McNulty Water PUD that existing well and associated easement purchased by McNulty Water PUD to support Permit G-16779 was subject to a private water system agreement between the original owner and two adjacent properties. This agreement was not disclosed by the property owner at the time of the purchase and agreement with McNulty Water PUD. McNulty Water PUD is currently working with the two other parties who have interest in the well to establish an agreement for water service. The Department was notified of this matter as documented in a letter submitted to E. Timothy Wallin, dated May 27, 2015.
34. OAR 690-315-0090(3) requires a condition on this extension of time to ensure that appropriation of any water up to 1.0 cfs under Permit G-16779 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan(s) (WMCP) under OAR Chapter 690, Division 86 which grants access to a greater appropriation of water under the permit consistent with OAR 690-086-0130(7). A "Development Limitation" condition is specified under Item 1 of the "Conditions" section of this PFO to meet this requirement.
35. 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 2 of the "Conditions" section of this PFO to meet this condition.

Fair Return Upon Investment [OAR 690-315-0080(3)(e)]

36. McNulty Water PUD expects to obtain a fair and reasonable return on investment by continuing development of Permit G-16779.

Other Governmental Requirements [OAR 690-315-0080(3)(f)]

37. According to the application, McNulty Water PUD and the City of St. Helens have been working collaboratively for years to establish responsibility of providing water service where McNulty Water PUD's service area overlaps the City of St. Helens Urban Growth Boundary (UGB). On September 23, 2013, the *Urban Service Agreement Relating to Provision of Water Service* was signed between McNulty Water PUD and the City of St. Helens. Preparing the agreement included a detailed review of McNulty Water PUD's system including; I. Quantity and Quality of Service, II. Financial Capacity, III. Customer Financial Impact, Rates, Equity and Bills, IV. Operation Capacity, V. Management Capacity, VI. Customer Accountability, and VII. Demographics and Sociological Trends. Generating and assembling this data was a great effort of both personnel and financial resources. This agreement is essential to understanding McNulty Water PUD's long term service area, water needs, and customer growth projections.

Events which Delayed Development under the Permit [OAR 690-315-0080(3)(g)]

38. Delay of development under Permit G-16779 was due, in part, to the McNulty Water PUD completing the Urban Services Agreement with the City of St. Helens, and the approval of the Application for Aquifer and Storage Removal, which constitute two major components of the framework for a water system master plan update.

CONDITIONS

1. Development Limitations

Appropriation of any water up to 1.0 cfs under Permit G-16779 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan (WMCP) under OAR Chapter 690, Division 86 that authorizes access to a greater rate of appropriation of water under the permit consistent with OAR 690-086-0130(7). The required WMCP shall be submitted to the Department within 3 years of this Final Order. The amount of water used under Permit G-16779 must be consistent with this and subsequent WMCP's approved under OAR Chapter 690, Division 86 on file with the Department.

The deadline established herein for the submittal of a Water Management and Conservation Plan (consistent with OAR Chapter 690, Division 086) shall not relieve a Permit Holder from any existing or future requirement(s) for submittal of a Water Management and Conservation Plan at an earlier date as established through other final orders of the Department.

2. Checkpoint Condition

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2021 and 2026. 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.

The Department and McNulty Water People's Utility District signed a Settlement Agreement on October 20, 2016. The Settlement Agreement is attached hereto and incorporated by reference as if fully set out in the Final Order Incorporating Settlement Agreement.

CONCLUSION OF LAW

Conclusion of Law #3, on page 7 of the Proposed Final Order, is herein modified to read as follows:

As required by OAR 690-315-0080(1)(b), the permit holder was able to demonstrate that actual construction of the project began (commenced) within the time period required by ORS 537.630(2), being no later than August 23, 2015, in order to be within the five year time period as specified in the permit.

Conclusion of Law #4, on page 7 of the Proposed Final Order, is herein modified to read as follows:

Full application of water to beneficial use can be completed by October 1, 2027¹ pursuant to OAR 690-315-0080(1)(d).

¹ For permits applied for or received on or before July 9, 1987, upon complete development of the permit, you must notify the Department that the work has been completed and either: (1) hire a water right examiner certified under ORS 537.798 to conduct a survey, the original to be submitted as required by the Department, for issuance of a water right certificate; or (2) continue to appropriate water under the water right permit until the Department conducts a survey and issues a water right certificate under ORS 537.625.

ULTIMATE CONCLUSION OF LAW

Good cause exists to approve an extension of time to complete construction and apply water to full beneficial use from August 23, 2015 to October 1, 2027, pursuant to ORS 537.630, ORS 539.010(5) and OAR 690-315-0080(3).

ORDER

The extension of time for Application G-17282, Permit G-16779, therefore, is approved subject to conditions contained herein. The deadline for completing construction is extended from August 23, 2015 to October 1, 2027. The deadline for applying water to full beneficial use within the terms and conditions of the permit is extended from August 23, 2015 to October 1, 2027.

DATED: November 1, 2016

A handwritten signature in black ink, appearing to read 'Dwight French', is written over a horizontal line.

Dwight French
Water Right Services Division Administrator, for
Thomas M. Byler, Director
Oregon Water Resources Department

If you have any questions about statements contained in this document, please contact Corey A Courchane at (503) 986-0825.

If you have other questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at (503) 986-0900.

**BEFORE THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON**

IN THE MATTER OF APPLICATION FOR	)	SETTLEMENT AGREEMENT
EXTENSION OF TIME FOR PERMIT G-16779,	)	
IN THE NAME OF MCNULTY WATER	)	
PEOPLE'S UTILITY DISTRICT,	)	
<i>Applicant, Protestant</i>	)	

The Oregon Water Resources Department ("Department") and McNulty Water People's Utility District ("McNulty") (collectively "the Parties") do hereby stipulate and agree in this Settlement Agreement as follows:

A. Background

1. On August 19, 2015, McNulty Water People's Utility District filed an Application for Extension of Time for Permit-16779.
2. On April 19, 2016, the Department issued a Proposed Final Order recommending denial of the extension request.
3. On June 3, 2016, McNulty filed a timely protest.
4. The Parties agree that the protest is resolved solely on the terms set forth in this Agreement.

B. Consent

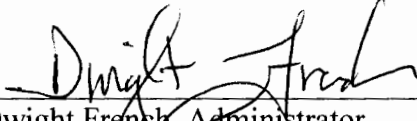
1. Each Party to this Agreement certifies that it has read the entire Settlement Agreement, including the draft Final Order Incorporating Settlement Agreement, and understands and agrees with the contents thereof.
2. Each Party to this Agreement understands and agrees that this Agreement and all documents incorporated by reference set forth the entire agreement of the parties.
3. Each Party to this Agreement understands and agrees that this Agreement and the Final Order Incorporating Settlement Agreement issued pursuant to this Agreement constitute the complete and final resolution of the protest.
4. Effective upon the signing of this Agreement by the Parties, McNulty Water People's Utility District waives any and all rights to petition for judicial review of this Agreement, and waives any and all rights to request reconsideration, petition for judicial review, or appeal the Final Order Incorporating Settlement Agreement.

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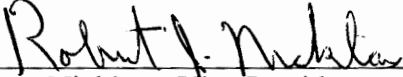
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C. Terms of the Agreement

1. Once each Party has signed this Agreement, the Department will issue a Final Order Incorporating Settlement Agreement consistent with the attached draft Final Order Incorporating Settlement Agreement.
2. Each Party to this Agreement represents, warrants, and agrees that the person who executes this Agreement on its behalf has the full right and authority to enter into this Agreement on behalf of that Party and bind that Party to the terms of this Agreement.
3. Each Party to this Agreement certifies that it has had a reasonable opportunity to review and request changes to the Agreement, and that it has signed this Agreement of its own free will and accord.
4. The Parties agree that nothing in this Agreement or the Final Order Incorporating Settlement Agreement establishes factual, legal, or policy precedent.
5. This Agreement may be signed in counterparts.


Dwight French, Administrator,
Water Right Services Division
for Thomas M. Byler, Director
Oregon Water Resources Department

10/20/16
Date


Robert Nicklaus, Vice President
McNulty Water People's Utility District

September 23, 2016

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