

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources

Application – Application for Extension of Time

PFO – Proposed Final Order

cfs – cubic feet per second

gpm – gallons per minute

Well 1 - CLAC 56813

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

1. On November 3, 2005, Permit G-15980 was issued by the Department. The permit authorizes the use of up to 0.356 cfs of water from Well 1 in Beaver Creek Basin for nursery use on 21.4 acres and maintenance of four ponds for nursery uses, to be constructed under Applications R-86195, R-86196, R-86197, and R-86198. The permit specified completion of construction and complete application of water to the proposed use was to be made on or before October 1, 2010.
2. On May 9, 2006, an assignment from Beaverlake Nursery, LLC to Raymond (Troy) Martin was recorded in the records of the Water Resources Department.

3. On June 29, 2006, an assignment from Raymond (Troy) Martin to Ray C. Martin III and Northwest Farm Credit Services, FLCA was recorded in the records of the Water Resources Department.
4. On September 30, 2016, the permit holder, Ray C. Martin III, 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-15980 be extended from October 1, 2010, to September 6, 2017. This is the first permit extension requested for Permit G-15980.
5. On October 11, 2016, notification of the Application for Extension of Time for Permit G-15980 was published in the Department's Public Notice. Comments were received regarding the extension application.
6. On October 31, 2016, the Agent submitted an amendment to the Application. The amendment was to request the date the permit be extended to be changed from September 6, 2017, to October 1, 2018. (A. Cardenas, personal communication, October 31, 2016) A hard copy of the letter was received by the Department on November 3, 2016.
7. On November 10, 2016, Brian Posewitz, Attorney, on behalf of Deborah Noble, submitted comments on the Application for Extension of Time under this permit and five other related permits. In summary, the comments requested the Department to review the permit holder's compliance with permit conditions contained within the permit.

Review Criteria [OAR 690-315-0040]

The time limits to complete construction and/or apply water to full beneficial use may be extended if the Department finds that the permit holder has met the requirements set forth under OAR 690-315-0040. This determination shall consider the applicable requirements of ORS 537.230², 537.248³, 537.630⁴ and/or 539.010(5)⁵.

Complete Extension of Time Application [OAR 690-315-0040(1)(a)]

8. On September 30, 2016, the Department received a completed Application for Extension of Time and the fee specified in ORS 536.050 from the permit holder.

Start of Construction [OAR 690-315-0040(1)(b) and 690-315-0040(5)]

9. Construction of the well began prior to permit issuance. The permit holder states, construction of Well 1 (CLAC 56813) began June 2, 2001.

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.

10. According to the well log received by the Department on June 8, 2001, construction of Well 1 began May 30, 2001, and was completed on June 2, 2001.

The Department has determined that the prosecution of the construction of the well began prior to October 1, 2010.

Amount of Construction [OAR 690-315-0040(3)(a)]

11. The Application states, work was accomplished within the time allowed in the permit:
- a. Construction of the well began prior to permit issuance. Construction of Well 1 was completed on June 2, 2001.
 - b. Work was completed during the original development time frame under Permit G-15980 including connecting Well 1 to Pond 1 and installation of a new pump in the well.
 - c. Since October 1, 2010, the permit holder has installed additional irrigation system components, expanded the reservoirs and installed a totalizing flow meter.

The Department has determined that work has been accomplished within the time allowed in the permit, which provides evidence of good cause and reasonable diligence from the appropriator towards the complete application of water to a beneficial use.

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.

12. As of September 30, 2016, the Application states the remaining work to be completed consists of completing construction of the water system, which includes rehabilitating the well by pulling and replacing the pump, resetting the bowls, increasing the size of the outlet pipe, upgrading existing pipeline to Pond 1 and installing a new pipeline to Pond 3; meeting all permit conditions, which includes submitting annual water use reports; and applying water to full beneficial use on the remaining 6.4 acres.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2018, to complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15980 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:

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 that a meter or other suitable measuring device has been installed prior to October 1, 2010; (2) annual water use reports have not been received by the Department.

Failure to comply with permit conditions constitutes illegal use of water. 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.

The Department has determined, based on FOF 13, the permit holder has not demonstrated compliance with the following condition:

- Before water use may begin under this permit, the water user shall install a meter or other suitable measuring device as approved by the Director. The water user 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.

Beneficial Use of Water [OAR 690-315-0040(3)(b)]

14. The Application states a maximum rate of 30 gpm (0.067 cfs) of water has been appropriated from Well 1 for nursery use on 15.0 acres and pond maintenance.

The Department has determined, based on FOF 13, beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2010.

Financial Investments to Appropriately and Apply Water to a Beneficial Purpose [OAR 690-315-0040(2)(b),(3)(d),(4)(d)]

15. The Application states the permit holder has invested about \$154,054, which is approximately 95 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$8,000 investment is needed for the completion of this project.

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

16. Based on Finding of Fact 11, the Application provides evidence of good faith of the appropriator under Permit G-15980.

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)].

17. 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-15980; 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.
18. During a current review of Permit G-15980, the Department determined the following:
 - a. The point of appropriation for Permit G-15980, located within the Beaver Creek Basin, is not located within a limited or critical groundwater area.
 - b. Beaver Creek 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)].

19. The Application does not identify 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)].

20. 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)]

21. 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)]

22. The Application does not identify that a delay in the development of this project was caused by any other governmental requirements.

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

23. The Application does not identify any unforeseen events.

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

24. 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 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 9 through 16, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2018, as required by OAR 690-315-0040(1)(c).
5. The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and fair and reasonable return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the permit holder had no control, whether denial of the extension will result in undue hardship to the applicant and whether there are no other reasonable alternatives for meeting water use needs, any other factors relevant to a determination of good cause, and has determined that the applicant has shown that good cause exists for an extension of time to complete construction and 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 complete construction of the water system under Permit G-15980 from October 1, 2010, to October 1, 2018.

Extend the time to apply water to beneficial use under Permit G-15980 from October 1, 2010, to October 1, 2018.

DATED: December 20, 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 **February 3, 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;

- 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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