

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

Application for Extension of Time

In the Matter of the Application for an Extension of Time)	
for Permit G-16196, Water Right Application G-16663,)	
in the name of Barnett Estate Partnership)	PROPOSED FINAL ORDER TO DENY

Permit Information

Application:	G-16663
Permit:	G-16196
Basin:	5 – Deschutes / Watermaster District 3
Date of Priority:	April 19, 2006
Source of Water:	A well (SHER 50175) in Spanish Hollow Basin
Purpose or Use:	Irrigation use on 606.0 acres, storage of ground water in Pond 1 for multiple purpose, and pond maintenance of Pond 1 and Pond 2 (Permit R-14396)
Maximum Rate:	3.0 cubic feet per second (cfs), further limited to 0.042 cfs for pond maintenance
Maximum Volume:	2.5 Acre Feet (AF) of storage in Pond 1

In Summary, the Department proposes to:

- Deny an extension of time to complete construction of the water system from October 1, 2013, to October 1, 2020.
- Deny an extension of time to apply water to full beneficial use from October 1, 2013, to October 1, 2020.

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.

ACRONYM QUICK REFERENCE

Agent – Larry Toll, Tennison Engineering
Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
Well – SHER 50175
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 (Department) for good cause shown shall order and allow an extension of time within which irrigation or other works 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) 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 therefor; and the income or use that may be required to provide fair and reasonable returns upon the investment.

OAR 690-315-0040 provides that in order to approve an application for an extension of time to complete construction or apply water to full beneficial use, the Department shall make the findings in OAR 690-315-0040(1) including a finding that there is “good cause” to approve the extension. OARS 690-315-0040(2)-(4) contain the factors that the Department must consider to make findings that support a “good cause” determination.

FINDINGS OF FACT

1. On June 21, 2007, Permit G-16196 was issued by the Department. The permit authorizes the use of up to 3.0 cfs of water, further limited to 0.042 cfs for pond maintenance, from a Well (SHER 50175), in Spanish Hollow Basin for irrigation use on 606.0 acres, storage of ground water in Pond 1 for multiple purpose, and pond maintenance of Pond 1 and Pond 2 (Permit R-14396). The permit specified completion of construction and complete application of water was to be made on or before October 1, 2011.
2. One prior permit extension has been granted for Permit G-16196. The extension request resulted in the completion dates for full application of water being extended from October 1, 2011, to October 1, 2013.

3. On December 27, 2016, Gena D. Arthur, manager for Barnett Estate Partnership, submitted an "Application for Extension of Time" (Application) 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-16196 be extended from October 1, 2013, to October 1, 2020.
4. On January 5, 19 and 26, 2017, Larry Toll (Agent), agent for the permit holder, submitted additional information to supplement the Application. The additional information answered questions necessary to establish findings on the market and present demand of the water.
5. On January 10, 2017, notification of the Application of Time for Permit G-16196 was published in the Department's Public Notice. No public comments were received regarding the extension application.

Review Criteria [OAR 690-315-0040]

In order to approve an Application for Extension of Time to complete construction and/or apply water to full beneficial use pursuant to ORS 537.230 or 537.630, or to begin construction, pursuant to ORS 537.248, the Department must make the findings in OAR 690-315-0040(1)(a) – (d).

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

6. On December 27, 2016, the Department received a completed Application 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. The permit holder states, construction of the Well began June 30, 2005.
8. According to the well log received by the Department on November 8, 2005, construction of the Well began June 30, 2005.

The Department has determined based on Finding of Fact (FOF) 7 and 8 that the prosecution of the construction of the well began prior to October 1, 2011.

Good Cause [OAR 690-315-0040(1)(d)]

The Department must find that there is "good cause" to approve the extension. In making a "good cause" finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).

Reasonable Diligence of the Appropriator [OAR 690-315-0040(2)(a)]

In order to make a finding of "good cause" to approve the extension, the Department shall consider whether the applicant has demonstrated "reasonable diligence" in previous

performance under the permit. OAR 690-315-0040(2)(a). In determining "reasonable diligence", the Department shall consider, but is not limited to, the following factors: a) The amount of construction completed within the time allowed in the permit or previous extension; b) The amount of beneficial use made of the water during the permit or previous extension time limits; c) Water right holder conformance with the permit or previous extension conditions; and d) Financial investments made toward developing the beneficial use of water.

Amount of Construction [OAR 690-315-0040(3)(a)] (The amount of construction completed within the time allowed in the previous extension.¹)

9. The Application states that no construction occurred within the time allowed in the previous extension period for Permit G-16196, being October 1, 2011, to October 1, 2013.
10. The Application states that no construction occurred after the time allowed in the previous extension, being from October 1, 2013, to December 27, 2016.

The Department has determined, based on FOF 9 and 10 the Application does not provide evidence of work being accomplished within the time allowed during the previous extension period, which provides evidence of lack of good cause and lack of diligence toward the complete application of water to a beneficial use under Permit G-16196.

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

The water right permit holder's conformance with the previous extension conditions.

11. The Application states that a totalizing flow meter has been installed and water use reports have been submitted.

The Department has determined, based on FOF 11, that the permit holder has demonstrated compliance with the conditions requiring installation of a totalizing flow meter and submittal of annual water use reports.

12. The Application states that the condition requiring annual March static water level measurements has been complied with.
13. The Department records show annual March static water level measurements have been submitted to the Department for the years 2009, 2013, 2015 and 2016. According to the record, the measurements were performed by Don Hilderbrand, manager of Barnett Estate Partnership.

¹ "Actual Construction" is defined in OAR 690-315-0020(3)(d)(A) and (B) as physical work performed toward completion of the water system which demonstrates the water right permit holder's good faith and intention to complete the project with reasonable diligence. Actual construction does not include planning a diversion system, formulating a business plan, securing financing, letting contracts, purchasing but not installing equipment, surveying, clearing land or planting crops.

14. Permit G-16196 specifies that "All measurements shall be made by a certified water rights examiner (CWRE), registered professional geologist (RPG), registered professional engineer (PE), licensed well constructor (WC) or pump installer licensed by the Construction Contractors Board." The information provided in the Application and in the Permit Condition Water-Level Reporting Forms does not identify Don Hilderbrand as satisfying these requirements.

The Department has determined based on FOF 13 and 14, that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-16196:

- "The permittee shall submit an initial March static water-level measurement once well construction is complete and annual measurements thereafter. Annual measurements are required whether or not the well is used. All measurements shall be made by a certified water rights examiner (CWRE), registered professional geologist (RPG), registered professional engineer (PE), licensed well constructor (WC) or pump installer licensed by the Construction Contractors Board."

The Application provides minimal evidence of compliance with the terms and conditions of the permit during the previous Extension of Time period.

Beneficial Use of Water OAR 690-315-0040(3)(b): *the amount of beneficial use made of the water during the permit or previous extension conditions.*

15. The Application states that 60 gpm (0.13 cfs) of water has been appropriated from the Well for maintenance of Pond 1. This exceeds the rate authorized for pond maintenance. The maximum rate authorized for pond maintenance is 0.042 cfs.
16. The annual water use report for water year 2015 shows monthly water use of 7.9 AF, totaling 94.8 AF appropriated for storage in Pond 1, which exceeds the authorized volume of 2.5 AF of storage in Pond 1.
17. The Application states that no water has been appropriated from the Well for maintenance of Pond 2 (Permit R-14396).
18. The Application states that no water has been appropriated from the Well for irrigation.
19. According to the permit holder, delay of full beneficial use of water under Permit G-16196 was due, in part, to control of the water right permit development being held by a family partnership, and until recently a number of the members were uncertain about the cost of expanding the use. The managers of the Barnett Estate Partnership were not interested in spending the money for irrigation without more support.

The Department finds, based on FOF 13 and 14, there has been no beneficial use of water since permit issuance.

The Department finds, based on FOF 16, Pond 1 is storing significantly more groundwater than is authorized under Permit G-16196. The storage of any volume of groundwater in Pond 1 beyond the 2.5 AF authorized under this permit constitutes an illegal use of water.

The Department finds there is no evidence of progress made towards completion of the water development and application to full beneficial use as allowed in the time period specified in the most recent Extension of Time period being October 1, 2011, to October 1, 2013.

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

20. The Applicant states that there has been no financial investment made toward developing the beneficial water use during the most recent extension of time period. The permit holder anticipates an additional \$40,000 investment is needed for the completion of this project.

Based on FOF 20, the Department finds there is no evidence of financial investment to appropriate and apply water to its beneficial use under the terms and conditions of the permit during the most recent Extension of Time period, being from October 1, 2011, to October 1, 2013.

Reasonable Diligence of the Appropriator [OAR 690-315-0040(2)(a)]

The Application provides evidence that no work has been accomplished towards completion of the water system during the most recent Extension of Time period; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use of water has not been demonstrated. Based on FOF 9, 10, and 12 through 20, the Department has determined the applicant has not demonstrated reasonable diligence in previous performance under Permit G-16196, therefore the Department cannot find good cause to approve an Extension of Time.

The Market and Present Demands for Water [OAR 690-315-0040(4)(a-f)]

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:

- *(a) The amount of water available to satisfy other affected water rights and scenic waterway flows;*
- *(b) 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);*
- *(c) The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife;*

- (d) *Economic investment in the project to date;*
- (e) *Other economic interests dependent on completion of the project; and*
- (f) *Other factors relevant to the determination of the market and present demands for water and power.*

The amount of water available to satisfy other affected water rights and scenic waterway flows OAR 690-315-0040(4)(a)

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-16196; 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.

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) OAR 690-315-0040(4)(b)

22. The point of appropriation for Permit G-16196, located within the Spanish Hollow Basin, is not located within a limited or critical groundwater area.
23. Spanish Hollow Creek is not located within or above any state or federal scenic waterway.
24. The point of appropriation is in an area listed by the Department of Environmental Quality as a water quality limited stream. Spanish Hollow Creek, River Mile 0 to 15.7, is listed for flow modification and habitat modification.

The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife OAR 690-315-0040(4)(c)

25. It 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.

Economic interests dependent on completion of the project OAR 690-315-0040(4)(d)

26. The Application states a total of \$40,000 has been invested in the project between 2005 and 2007. The Application states that no investment has been made towards the completion of the project during the most recent Extension of Time period.

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

27. The Application states that the land is leased out for farming and the use of irrigation will increase the variation and value of crops grown. This additional value may provide an opportunity for the farmer to employ additional labor to assist with the farm operation.

Other factors relevant to the determination of the market and present demand for water and power OAR 690-315-0040(4)(f)

28. The Application states there are no other viable water sources available.

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

29. The Application identifies that other local farms in the area have used irrigation to boost income and that the fair return on the investment is the objective.

Other Governmental Requirements OAR 690-315-0040(2)(g)

30. The Application states that the location of the well falls on the service area border between Wasco Electric Coop (WEC) and Pacific Power and Light (PP&L) which made it difficult to determine which provider is authorized to serve their well.

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

31. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit G-16196, in that family resistance towards the project took as much as six years to resolve.

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

32. The Application states a denial of the extension would result in undue hardship in that it will deprive the landlord of the ability to provide for a variety of crops that could be grown. This would effectively reduce the amount of gross sales.

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

33. Based on Findings of Fact 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 26 and 31 above, the Department finds that the applicant has not demonstrated good faith.

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.

34. As of December 27, 2016, the Application states the remaining work to be accomplished consists of connecting to electrical service, installing a pump and installing a wheel line.

The Department cannot find that the applicant can complete the project or apply water to full beneficial use within the time requested for the extension because the applicant did not demonstrate reasonable diligence in development of the water use during the most recent Extension of Time period.

Good Cause [OAR 690-315-0040(1)(d)]

The Department must find that there is "good cause" to approve the extension. In making a "good cause" finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).

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 not 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).

CONCLUSIONS OF LAW

1. The permit holder has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The permit holder has not complied with the time allowed for construction work under the permit pursuant to ORS 537.630 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. The Application established that there has been no construction, no financial investment or reasonable diligence toward developing the project during the most recent extension of Time period. The permit holder has not 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).

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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:

Deny the time to complete construction of the water system under Permit G-16196 from October 1, 2013, to October 1, 2020.

Deny the time to apply water to beneficial use under Permit G-16196 from October 1, 2013, to October 1, 2020.

DATED: February 28, 2017


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 **April 14, 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.

- 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
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Salem, OR 97301-1266
- Fax: 503-986-0901