

**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-17294, Water Right Application G-16359, ) PROPOSED FINAL ORDER  
in the name of Les Peterson ) TO DENY

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Permit Information

Application:	G-16359
Permit:	G-17294
Basin:	7 – Umatilla / Watermaster District 5
Date of Priority:	December 30, 2004
Source of Water:	Three wells in Birch Creek Basin
Purpose or Use:	Irrigation of 350.0 acres
Maximum Rate:	4.38 cubic feet per second (cfs)

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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.

*In Summary, the Department proposes to:*

- Deny an extension of time to complete construction of the water system from April 22, 2016, to October 1, 2026.
  
- Deny an extension of time to apply water to full beneficial use from April 22, 2016, to October 1, 2026.

## **ACRONYM QUICK REFERENCE**

Application – Application for Extension of Time  
Department – Oregon Department of Water Resources  
FOF – Finding of Fact  
PFO – Proposed Final Order  
cfs – cubic feet per second  
Agent – David E. Filippi, Stoel Rives LLP  
Well 2 – POA 2 (Startcard #1029943)  
POA – point of appropriation

## **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. OAR 690-315-0040(2)-(4) contains the factors that the Department must consider to make findings that support a “good cause” determination.

## **FINDINGS OF FACT**

1. On April 22, 2011, Permit G-16846 was issued by the Department. The permit authorizes the use of up to 4.38 cfs of water from a well in Birch Creek Basin for irrigation of 350.0 acres. The permit specified completion of construction and complete application of water was to be made on or before April 22, 2016.
2. On August 15, 2014, the Department approved Permit Amendment T-11630 (Special Order Volume 93, Page 108) authorizing additional points of appropriation, and a change in the place of use under Permit G-16846. A superseding Permit G-17266 was issued by the Department on August 25, 2014, to reflect the changes.

3. On August 25, 2014, a correcting superseding Permit G-17294 was issued by the Department, to correct an error in a change in place of use and describe additional points of appropriation proposed under Permit Amendment T-11630. The permit authorizes the use of up to 4.38 cfs of water from three wells in Birch Creek Basin for irrigation of 350.0 acres. The permit specified completion of construction and complete application of water was to be made on or before April 22, 2016.
4. On October 17, 2016, on behalf of the permit holder, David E. Filippi, (Agent) for Les Peterson, 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-17294 be extended from April 22, 2016, to October 1, 2026. This is the first permit extension requested for G-17294.
5. On October 25, 2016, notification of the Application for Extension of Time for G-17294 was published in the Department's Public Notice. On October 26, 2016, Walla Walla River Irrigation District submitted comments on the Application.
6. In summary, the commenter stated the basalt aquifer in Milton Freewater is over appropriated, landowners are facing potential groundwater curtailment for the first time, and that granting an extension of time for Permit G-17294 to further perfect a basalt groundwater right would be detrimental to other basalt groundwater rights.

**Review Criteria [OAR 690-315-0040]**

*In order to approve an Application for an 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)]**

7. On October 17, 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)]**

8. Construction of the well began prior to April 22, 2016, as specified in the permit as being the date to apply water to full beneficial use. The permit holder states, construction of POA 2, Startcard #1029943 (Well 2) began March 31, 2016.
9. According to correspondence received by the Department on October 17, 2016, from Zollman's Larry Burd Well Drilling, LLC, construction of Well 2 began March 31, 2016.

The Department has determined based on Finding of Fact (FOF) 8 and 9 that the permit holder has satisfied the condition requiring beginning of construction of the well.

**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.*

**OAR 690-315-0040(3)(a)**

**Amount of Construction** (The amount of construction completed within the time allowed in the permit.<sup>1</sup>)

10. The Application states that on March 31, 2016, construction of Well 2 began.
11. Since April 22, 2016, the permit holder has continued construction of Well 2 to a depth of 950 feet below ground surface.

The Application provides minimal evidence of progress of physical work made towards completion of the water system. The Department has determined based on FOF 10 and 11, the permit holder has demonstrated minimal progress towards the development of Permit G-17294.

**OAR 690-315-0040(3)(c)**

**Compliance with Conditions**

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

12. The Application states that none of the conditions in the permit have been complied with, as construction of the well has not been completed.

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<sup>1</sup> "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.

The Department has determined based on FOF 12, that the permit holder has not demonstrated compliance with the terms and conditions as required by Permit G-17294. The Application does not provide evidence of compliance with the terms and conditions of the permit. Therefore, the Department has determined the permit holder has not complied with any of the terms and conditions specified in Permit G-17294.

**OAR 690-315-0040(3)(b)**

**Beneficial Use of Water:** *the amount of beneficial use made of the water during the permit or previous extension conditions.*

13. The Application states that no water has been appropriated under this permit.
14. The Application does not identify beneficial use of water under this permit.

Based on FOF 12, 13, and 14, the Department has determined that beneficial use of water has not been demonstrated, as no water has been appropriated and the permit holder has demonstrated non-compliance with the terms and conditions under Permit G-17294.

**OAR 690-315-0040(2)(b),(3)(d),(4)(d)**

**Financial Investments to Appropriate and Apply Water to a Beneficial Purpose**

15. The Application states an approximate total of \$366,390 has been invested. The Application included costs associated with surveying, and construction of an access road and pad for construction of Well 2 which are not "actual construction" under this permit, and therefore are not counted towards development. After deducting these costs, the approximate total investment for "actual construction" of the water system to date is approximately \$355,933 which is about 22 percent of the total projected cost for complete development of this project. The Application states an additional \$1,250,000 investment is needed to complete this project, which includes completing construction of Well 2, construction of POA 1 and POA 3 if necessary, installing pumps, electrical, and the water delivery system.

The Department has determined based on FOF 15, that the permit holder had made an investment towards the development of the water system.

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

Based on FOF 10 through 15, the Application provides evidence that minimal work has been accomplished towards completion of the water system; the permit holder has demonstrated noncompliance with the terms and conditions of the permit, and; beneficial use of water has not been demonstrated. The Department has determined the applicant has demonstrated marginal diligence in development of the water under Permit G-17294.

**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.*

**OAR 690-315-0040(4)(a)**

**The amount of water available to satisfy other affected water rights and scenic waterway flows.**

16. A review of the amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit G-17294; furthermore, water availability for other affected water rights and scenic waterway flows after the permit was issued is determined when an Application for a new water right is submitted.
17. On April 13, 2017, the undeveloped portion of water under Permit G-17294, being 4.38 cfs, was reviewed by the Department's Groundwater Section for evaluation of current water availability. Based on available information, the Groundwater Section states that water levels in the vicinity of Permit G-17294 show water level declines on the order of 100 feet since the 1970s, and declines of 3 to 4 feet per year over the past 5 years. The Groundwater Section determined that the resource cannot support the complete development of the authorized rate.

**OAR 690-315-0040(4)(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).**

18. The points of appropriation for Permit G-17294, are located within the Birch Creek Basin, and are located in the Walla Walla Sub Basin.

19. Birch Creek is not located within or above any state or federal scenic waterway.
20. The points of appropriation are not in an area listed by the Department of Environmental Quality as a water quality limited stream.
21. The points of appropriation are located in a proposed serious water management problem area, currently new groundwater applications are being denied.

**OAR 690-315-0040(4)(c)**

The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife.

22. Birch Creek is located within an area ranked "high" 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.

**OAR 690-315-0040(4)(d)**

Economic interests dependent on completion of the project.

23. The Application states an approximate total of \$355,933 has been invested in the project.

**OAR 690-315-0040(4)(e)**

Other economic interests dependent on completion of the project.

24. The Application did not identify economic interests other than those of the applicant's that may be dependent on completion of the project.

**OAR 690-315-0040(4)(f)**

Other factors relevant to the determination of the market and present demand for water and power.

25. Other factors relevant to the determination of the market and present demand for water and power have been identified, in that demand on the resource has resulted in significant declines of water levels in the aquifer, resulting in injury to senior water right holders.
26. On October 26, 2016, comments were received by the Department from the Walla Walla River Irrigation District. The commenter stated the basalt aquifer in Milton Freewater is over appropriated, and the Department's Field Services Division recently proposed designating the area a Critical Groundwater Area. Landowners are facing potential groundwater curtailment for the first time, and granting an extension of time for Permit G-17294 to further perfect a basalt groundwater right would be detrimental to existing

basalt groundwater rights.

The Department has determined based on FOF 17, 18, 21, 25, and 26, that there is a significant present demand for water in the Walla Walla Sub Basin, and that current data, comprising of substantial evidence, indicate groundwater levels are declining, and additional appropriation of groundwater may exacerbate these declines.

***OAR 690-315-0040(2)(f)***

**Fair Return Upon Investment**

27. The Application did not identify that the use and income from the permitted water development will likely result in reasonable returns upon the investment made to date.

***OAR 690-315-0040(2)(g)***

**Other Governmental Requirements**

28. The Application states delay in the development of this project was due in part to the length of time involved in gaining approval of a Permit Amendment to change the place of use.

***OAR 690-315-0040(2)(h)***

**Unforeseen Events**

29. The Application did not identify unforeseen events.

***OAR 690-315-0040(2)(i)***

**Denial of the Extension Will Result in Undue Hardship**

30. The Application did not state if a denial of the extension would result in undue hardship.
31. The Application did not identify whether there are other reasonable alternatives for meeting water use needs.

***OAR 690-315-0040(2)(c)***

**Good Faith of the Appropriator**

32. Based on Findings of Fact 12, 13, and 14, 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.*

33. As of October 17, 2016, the Application states the remaining work to be completed consists of completing construction of the water system, which includes completing construction of Well 2, construction of POA 1, construction of POA 3, with continuous casing and sealing to a depth of at least 950 feet below land surface, installing pumps, electrical, and water delivery infrastructure to all authorized places of use; meeting all permit conditions, which includes installing a totalizing flow meter at each POA, submitting annual water use reports, and annual March static water level measurements for each authorized POA; and applying water to full beneficial use on 350.0 acres.

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 demand on the resource cannot support the development of the undeveloped portion of water under Permit G-17294.

**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 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 marginal diligence toward developing the project. 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).

4. Based on Market and Present Demand of water, pursuant to 690-315-0040(4), water is not available to support additional development.

### 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-17294 from April 22, 2016, to October 1, 2026.

Deny the time to apply water to beneficial use under Permit G-17294 from April 22, 2016, to October 1, 2026.

DATED: May 2, 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 **June 16, 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.

