

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
Well – YAMH 53282
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. OAR 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 March 23, 2006, Permit G-16034 was issued by the Department. The permit authorizes the use of up to 0.178 cfs of water from a well in Hawn Creek Basin for nursery uses on 15.0 acres. The permit specified completion of construction and complete application of water was to be made on or before October 1, 2010.
2. On March 8, 2017, an assignment from Petal Pushers Flowers to Queen Angels, LLC was recorded in the records of the Water Resources Department.
3. On April 14, 2017, Kim Jameson, owner of Queen Angels, LLC, 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-16034 be extended from October 1, 2010, to October 1, 2023. This is the first permit extension requested for Permit G-16034.

4. On April 18, 2017, notification of the Application for Permit G-16034 was published in the Department's Public Notice. No public comments were received regarding the Application.

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)]

5. On April 14, 2017, 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)]

6. Construction of the well began prior to permit issuance. The permit holder states, construction began February 26, 2003.
7. According to the well log received by the Department on February 28, 2003, construction of YAMH 53282 (Well) began February 26, 2003.

Based on Finding of Fact (FOF) 6 and 7, the Department has determined that the prosecution of the construction of the well began prior to October 1, 2010.

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 permit.²)

8. Construction of the Well began prior to permit issuance.
9. Work was accomplished during the original development time frame under Permit G-16034 is as follows:
 - installed irrigation equipment;
 - installed a water meter; and
 - constructed greenhouses.

Based on FOF 6 through 9, the Department has determined that work has been accomplished prior to permit issuance and within the time allowed in the permit, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

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

10. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns.

Based on FOF 10, the Department has determined, that the permit holder has demonstrated compliance with permit conditions as required by Permit G16034.

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.*

11. The Application states a maximum rate of 86 gpm (0.191 cfs) of water has been appropriated from the Well for nursery uses on 5.0 acres. This exceeds the amount of water for nursery uses authorized under this permit. The authorized amount of water for irrigation use is 0.178 cfs.

Based on FOF 10 and 11, the Department has determined that beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2010.

Financial Investments to Appropriate and Apply Water to a Beneficial Purpose OAR 690-315-

² "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.

0040(2)(b),(3)(d),(4)(d)

12. The Application states an approximate total of \$150,210 has been invested. The Application included costs associated with repair and maintenance costs of a system 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 \$99,365 which is about 68 percent of the total projected cost for complete development of this project. The Application states an additional \$47,185 investment is needed to complete this project, which includes constructing additional greenhouses, pit green houses and hoop houses.

Based on FOF 12, the Department has determined that the permit holder had made an investment, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

The Application provides evidence that work has been accomplished towards completion of the water system; the permit holder has demonstrated compliance with permit conditions, a financial investment has been made, and; beneficial use of water has been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit G-16034.

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)

13. 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-16034; 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)

14. The point of appropriation for Permit G-16034, located within the Hawn Creek Basin, is not located within a limited or critical groundwater area.
15. Hawn Creek is not located within or above any state or federal scenic waterway.
16. The point of appropriation is not in an area listed by the Department of Environmental Quality as a water quality limited stream.

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)

17. Hawn Creek 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.

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

18. The Application states an approximate total of \$99,365 has been invested in the project.

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

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

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. 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.

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

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

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

23. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit G-16034, in that the permit holders were faced with serious health issues in 2007 that restricted their ability to complete development of the project in a timely manner. Additionally, winter storms of 2016 destroyed much of the developed infrastructure which now needs to be redeveloped.

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.

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

25. The Application provides evidence of good faith of the appropriator under Permit G-16034.

Based on FOF 6 through 12 and 18, the Department has determined that the applicant has shown good faith and reasonable diligence.

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.

26. As of April 14, 2017, the Application states the remaining work to be completed consists of completing construction of the water system, which includes constructing additional greenhouses and extending irrigation to them; meeting all permit conditions, which include continued water use reporting; and applying water to full beneficial use on the remaining 10.0 acres.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2023, 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-16034 is both reasonable and necessary.

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 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 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).
2. The applicant has 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).
3. Based on Finding of Facts 6 through 25, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2023, as required by OAR 690-315-0040(1)(c).
4. The applicant can complete the project within the time period requested for the extension on the project.
5. The applicant has demonstrated good cause for the extension.

continued on following page

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-16034 from October 1, 2010, to October 1, 2023.

Extend the time to apply water to beneficial use under Permit G-16034 from October 1, 2010, to October 1, 2023.

DATED: May 30, 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 **July 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;

