

**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-17749, Water Right Application G-11640, in            )     PROPOSED FINAL ORDER  
the name of Thomas A. MacDonald                                        )

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Permit Information

Application:                G-11640  
Permit:                     G-17749  
Basin:                     13 – Goose and Summer Lakes / Watermaster District 12  
Date of Priority:         April 7, 1987 for 10.0 cubic feet per second (cfs) for fish culture and  
                                  7.73 cfs for irrigation; and June 14, 1989 for 7.8 cfs for fish culture  
Source of Water:         Nine wells in the Ana River Basin  
Purpose or Use:         Fish culture, irrigation use of 50.1 acres and supplemental irrigation of  
                                  569.6 acres  
Maximum Rate:         17.80 cfs, being 7.73 cfs for irrigation and 17.80 cfs for fish culture

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***Please read this Proposed Final Order in its entirety.***

*In Summary, the Department proposes to:*

- Grant an extension of time to complete construction of the water system from October 1, 2016, to October 1, 2020.
- Grant an extension of time to apply water to full beneficial use from October 1, 2016, to October 1, 2020<sup>1</sup>.
- Make the extension subject to certain conditions set forth below.

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.

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<sup>1</sup>Pursuant to ORS 537.630(4), upon the completion of beneficial use of water allowed under the permit, the permittee shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permittee shall submit a map of the survey and a new or revised claim of beneficial use as deemed appropriate by the Department.

**ACRONYM QUICK REFERENCE**

Application – Application for Extension of Time  
Department – Oregon Department of Water Resources  
POA – Point of Appropriation  
cfs – cubic feet per second

FOF – Finding of Fact  
PFO – Proposed Final Order  
Agent – Bruce Estes

**Points of Appropriation**

Well 1 – LAKE 52367	Well 2 – LAKE 1507	Well 3 – LAKE 4444
Well 4 – LAKE 3029	Well 5 – Not Constructed	Well 6 – LAKE 52368
Well 7 – LAKE 52369	Well 8 – LAKE 52487	Well 9 – Not Constructed

**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.

**OAR 690-315-0050(5)** states that extension orders may include, but are not limited to, any condition or provision needed to: ensure future diligence; mitigate the effects of the subsequent development on competing demands on the resource; and periodically document the continued need for the permit.

**FINDINGS OF FACT**

1. On April 30, 1990, Permit G-11024 was issued by the Department. The permit authorizes the use of up to 17.80 cfs of water, being 7.73 cfs for irrigation of 50.1 acres and supplemental irrigation of 569.6 acres, and 17.80 cfs for fish culture from a well in the Ana River Basin. The permit specified actual construction of the well to begin by April 30, 1991, construction of the water system was to be completed by October 1, 1992, and complete application of water was to be made on or before October 1, 1993.

2. On December 10, 2008, the Department approved Permit Amendment T-10716 (Special Order Volume 76, Page 833) authorizing four additional points of appropriation (POA) under Permit G-11024 (modified by Permit Amendment T-10716) which is hereafter referred to simply as Permit G-11024.
3. On September 20, 2010, an assignment from Northwest Farm Credit Services FLCA/PCA and Thomas A. MacDonald to Thomas A. MacDonald was recorded in the records of the Water Resources Department.
4. On October 24, 2016, the Department approved Permit Amendment T-11749 (Special Order Volume 103, Page 268) authorizing a change in the location of one POA and to add an additional POA under Permit G-11024 (modified by Permit Amendment T-10716). A superseding Permit G-17282 was issued by the Department on October 24, 2016, to reflect the changes.
5. Four prior permit extensions have been granted for this permit. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2014, to October 1, 2016.
6. On December 14, 2016, the permit holder, Thomas A. MacDonald, submitted an "Application for Extension of Time" (Application) to the Department, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-17282 be extended from October 1, 2016, to October 1, 2020.
7. On December 20, 2016, notification of the Application for Permit G-11024 was published in the Department's Public Notice. No public comments were received regarding the Application.
8. On January 18, 2017, the permit holder submitted additional information to supplement their Application. The additional information was to clarify information describing the work accomplished during the most recent extension of time period, being from October 1, 2014 to October 1, 2016.
9. On February 15, 2017, Bruce Estes (Agent), agent for the permit holder submitted additional information to supplement the Application. The additional information was to clarify information about permit condition compliance, irrigated lands under the permit, and the rate of use from each well.
10. On March 17, 2017, the Department issued a superseding final order for Permit Amendment T-11749 (Special Order Volume 104, page 165), approving a change in POA, adding an additional POA and correcting a scrivener's error in a previous order. Permit G-17749 was issued to reflect these changes.
11. Permit G-17749 authorizes the use of up to 17.80 cfs of water, being 7.73 cfs for irrigation of 50.1 acres and supplemental irrigation of 569.6 acres, and 17.80 cfs for fish culture from nine wells in the Ana River Basin.

12. On May 18, 2017, the Agent submitted additional information further clarifying the development of the water project.

**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)]**

13. On December 14, 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)]**

14. Actual construction of the well began prior to the April 30, 1991 deadline specified in the permit. According to the permit holder, construction of LAKE 1507 (Well 2) began April 15, 1985.
15. According to the well log received by the Department on February 2, 1986, construction of Well 2 began April 15, 1985.

Based on Findings of Fact (FOF) 14 and 15, the Department has determined that the prosecution of the construction of the well began prior to April 30, 1991.

**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.<sup>2</sup>)

16. During the most recent extension period, being from October 1, 2014, to October 1, 2016, the permit holder completed 17 new raceways, including piping, for fish culture and began construction of Well 9.
17. Since October 1, 2016, the applicant does not state any additional work has been accomplished.

Based on FOF 16, the Department has determined that work has been accomplished during the last extension period, 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, permit amendment, and previous extension conditions.*

18. The Application states that the artesian wells have control valves installed to regulate the flow of water.
19. The Department has considered the permit holder's compliance with conditions placed on the permit with the approval of Permit Amendment T-11749 and included in the superseding Permit G-17749, and has identified the following concerns: (1) the record does not show that a totalizing flowmeter or other suitable measuring device has been installed on each point of appropriation, and (2) the record does not show that all the wells listed on the permit have been assigned an OWRD Well Identification Number. The Department recognizes that these conditions are new upon approval of Permit Amendment T-11749, and it is the intent of the permit holder to comply with all permit conditions now that the conditions are applicable.

Based on FOF 19, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-17749:

- **"Before water use may begin under this order, the water user shall install a totalizing flow meter, or, with prior approval of the Director, another suitable measuring device, at each point of diversion (new and existing).";** and

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<sup>2</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.

- “Prior to using water from any well listed on this permit, the permittee shall ensure that the well has been assigned an OWRD Well Identification Number (Well ID). The tag showing the Well ID shall be permanently attached to the well. If a well does not have a Well ID tag, the permittee shall apply for one from the Department and attach it to the well within 60 days of the date the permit is issued.”

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.

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

20. The Application states that the total combined production capacity of the wells used under this permit is 19.53 cfs.
21. The Application states a combined maximum rate of approximately 11.0 cfs of water has been appropriated from Well 1, Well 2, Well 3, Well 4, Well 6, and Well 7, for irrigation of 50.1 acres and supplemental irrigation of 569.6 acres, and 5.0 cfs of water has been appropriated from Well 5 and Well 8 for fish culture. According to the permit holder, the rates are approximate based on measurements using temporary weirs of the flow through the ditch system before and after well construction.

Based on FOF 19, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2016.

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

22. The Application states the permit holder has invested about \$583,000, which is approximately 76 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$180,000 investment is needed for the completion of this project.

Based on FOF 22, 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 not demonstrated compliance with all permit conditions, a financial investment has been made, and; beneficial use of water has not been demonstrated.

The Department has determined the applicant has demonstrated reasonable diligence towards in previous performance under Permit G-17749.

**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)**

23. 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-11024; 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)**

24. The points of appropriation for Permit G-17749, located within the Ana River Basin, are not located within a limited or critical groundwater area.
25. Ana River is not located within or above any state or federal scenic waterway.
26. The points of appropriation are 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)**

27. 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.

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

28. The Application states an approximate total of \$583,000 has been invested in the project.

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

29. 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)**

30. 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)**

31. The Application identifies that the use and income from the permitted water development will likely result in reasonable returns upon the investment made to date. The Application states that there is a demand for quality trout in the region and the permit allows the use of the high quality of water needed to meet the demand.

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

32. 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)**

33. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit G-17749, in that construction of authorized Well 9 was delayed when the drilling rig collapsed while constructing the well. At the time the Application was submitted, the drilling rig was still located on the property waiting for insurance underwriter to make a determination on the insurance policy payout.



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

34. 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)**

35. The Application provides evidence of good faith of the appropriator under Permit G-17749.

Based on FOF 14, through 18, 21, 22, and 28, 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.*

36. As of December 14, 2016, the Application states the remaining work to be completed consists of completing construction of the water system, which includes completing construction on Well 9 and installing additional raceways and piping; meeting all permit conditions, which include installing a totalizing flowmeter or other suitable device, as approved by the Director, on each of the wells (new and existing); and applying water to full beneficial use.

Based on FOF 36, the Department has determined that the permit holder's request to have until October 1, 2020, 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-17749 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).

## **LIMITATIONS AND CONDITIONS**

1. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to ensure future diligence, and/or mitigate the effects of the subsequent development on competing demands on the resource. The Department determined the need to place a "Last Extension Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary due to the amount of time already allowed for development of this permit.

## **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 actual 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 14 through 35, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2020, 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, but the extension is conditioned to mitigate the effects of the subsequent development on competing demands on the resource and is granted only for the reasonable time necessary to complete water development and apply water to beneficial use. OAR 690-315-0050(5).
5. The applicant has demonstrated good cause for the extension, but the extension must be conditioned to ensure this is the last extension granted in order to ensure future diligence; OAR 690-315-0050(5).

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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:

Extend the time to complete construction of the water system under Permit G-17749 from October 1, 2016, to October 1, 2020.

Extend the time to apply water to beneficial use under Permit G-17749 from October 1, 2016, to October 1, 2020.

Subject to the following condition:

### LIMITATIONS AND CONDITIONS

1. **Last Extension Condition**

This is to be the last extension of time granted for Permit G-17749. Any future extensions of time requests shall be denied.

DATED: June 6, 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 21, 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;

