

**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-13346 (modified by Permit Amendment	)	PROPOSED FINAL
T-8036), Water Right Application G-14556, in the name of	)	ORDER
Robert Dion and Mary O'Malley	)	

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Permit Information

Application:	G-14556
Permit:	G-13346 (modified by Permit Amendment T-8036)
Basin:	2B – Middle Willamette / Watermaster District 16
Date of Priority:	June 30, 1997
Source of Water:	A well in the Yamhill Creek Basin
Purpose or Use:	Irrigation of 6.0 acres
Maximum Rate:	0.075 cubic foot per second (cfs)

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***Please read this Proposed Final Order in its entirety as it contains additional conditions not included in the original permit.***

*In Summary, the Department proposes to:*

- Grant an extension of time to apply water to full beneficial use from October 1, 2010, to October 1, 2022<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**

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 – YAMH 50957

FOF – Finding of Fact

## **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.

**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.

**OAR 690-315-0050(6)** requires the Department, for extensions exceeding five years, to establish checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between checkpoints will not exceed five year periods.

## **FINDINGS OF FACT**

1. On March 9, 1998, Permit G-13346 was issued by the Department. The permit authorizes the use of up to 0.075 cfs of water from a well in the Yamhill Creek Basin for irrigation of 6.0 acres. The permit specified actual construction of the well to begin by March 9, 1999, and complete application of water to the use was to be made on or before October 1, 2002.

2. On August 20, 1998, the Department approved Permit Amendment T-8036 (Special Order Volume 52, Page 765) authorizing a change in the point of appropriation under Permit G-13346 (modified by Permit Amendment T-8036) which is hereafter referred to simply as Permit G-13346.
3. On May 23, 2017, an assignment from Robert V. Applegate and Debbie L. Gorham to Robert Dion and Mary O'Malley was recorded in the records of the Water Resources Department.
4. One prior permit extension has been granted for Permit G-13346. The most recent extension request resulted in the completion date for full application of water being extended from October 1, 2002, to October 1, 2010.
5. On June 6, 2017, the permit holder, Robert Dion and Mary O'Malley, 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-13346 be extended from October 1, 2010, to October 1, 2022.
6. On June 13, 2017, notification of the Application for Permit G-13346 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)]**

7. On June 6, 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)]**

8. Actual construction of the well began prior to the March 9, 1999 deadline specified in the permit. According to the permit holder, construction of YAMH 50957 (Well) began March 18, 1998.
9. According to the well log received by the Department on March 23, 1998, construction of the Well began March 18, 1998.

The Department has determined based on Finding of Fact (FOF 8 and 9) that the prosecution of the construction of the Well began prior to March 9, 1999.

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

10. During the most recent extension period, being from October 1, 2002, to October 1, 2010, the previous permit holder installed 20 hose micro sprinkler kits.
11. No other work has been accomplished since October 1, 2010.

Based on FOF 10, the Application provides evidence of progress of physical work made towards completion of the water system, enough to qualify as the minimum necessary for the Department to find good cause and reasonable diligence towards complete application of water to a beneficial use.

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

**Compliance with Conditions**

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

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

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

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

13. The Application states a maximum rate of 8 gpm (0.02 cfs) of water has been appropriated from the Well for irrigation of about 1.0 acre.

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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.

14. According to the permit holder, delay of full beneficial use of water under Permit G-13346 was due, in part, to the previous permit holder not completing development of water use under the permit. The permit holder needs more time in which to obtain the full quantity of water allowed under the permit.

Beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2010.

**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 about \$11,650 has been invested, which is approximately 18 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$54,000 investment is needed for the completion of the water delivery system.

The Department has determined based on FOF 15, 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 minimal 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-13346.

**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-13346; 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.

**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).

17. The point of appropriation for Permit G-13346, located within the North Yamhill River Basin, is not located within a limited or critical groundwater area.
18. North Yamhill River is not located within or above any state or federal scenic waterway.
19. The point of appropriation is not in an area listed by the Department of Environmental Quality as a water quality limited stream.

**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.

20. North Yamhill River 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.

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

Economic interests dependent on completion of the project.

21. The Application states an approximate total of \$11,650 has been invested in the project.

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

Other economic interests dependent on completion of the project.

22. The Application states there is a severe shortage of the cider apple varieties needed by Oregon’s growing hard cider industry to enable Oregon cider makers to produce a high quality product, and compete effectively. Growing the apple varieties that are most demanded provides an important service to this budding industry.

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

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

23. The Application states the permit holder looked into a rainwater collection system, but it would be exorbitantly expensive for cider apple irrigation. Pleasant View Water District strictly prohibits use of water for commercial irrigation projects, so there are no other sources of water available.

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

**Fair Return Upon Investment**

24. The Application states that based on estimated crop yields and sale prices determined from interviews of other people in the industry, the permit holder will break even on their investment within 7 years of planting.

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

**Other Governmental Requirements**

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

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

**Unforeseen Events**

26. The Application did not identify unforeseen events.

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

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

27. The Application states the permit holder would have to abandon their plan to plant cider apples, as there are no other viable options.

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

**Good Faith of the Appropriator**

28. The Application provides evidence of good faith of the appropriator under Permit G-13346.

Based on FOF 8, 9, 10, 12, 13, 15, and 21, 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.*

29. As of June 6, 2017, the Application states the remaining work to be completed consists of installation of a drip irrigation system, including two 5,000 gallon storage tanks; and applying water to full beneficial use on the remaining 5.0 acres.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2022, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-13346 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 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 that has lapsed, being 19 years, since the issuance of Permit G-13346 on March 9, 1998.
2. OAR 690-315-0050(6) requires a checkpoint condition on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. A "Checkpoint Condition" is specified under Item 2 of the "Conditions" section of this PFO to meet this condition.

**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 8 through 28, full application of water to beneficial use can be accomplished by October 1, 2022, 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).

**Continued on the 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 apply water to beneficial use under Permit G-13346 from October 1, 2010, to October 1, 2022.

Subject to the following conditions:

### LIMITATIONS AND CONDITIONS

1. **Last Extension Condition**

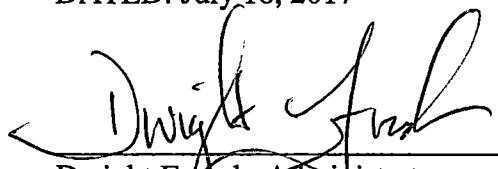
This is to be the last extension of time granted for Permit G-13346. Any future extensions of time requests shall be denied.

2. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2021. A form will be enclosed with your Final Order.**

- (a) At each checkpoint, the permit holder shall submit and the Department shall review evidence of the permit holder's diligence towards completion of the project and compliance with terms and conditions of the permit and extension. If, after this review, the Department determines the permit holder has not been diligent in developing and perfecting the water use permit, or complied with all terms and conditions, the Department shall modify or further condition the permit or extension to ensure future compliance, or begin cancellation proceedings on the undeveloped portion of the permit pursuant to ORS 537.260 or 537.410, or require submission of a final proof survey pursuant to ORS 537.250;
- (b) The Department shall provide notice of receipt of progress reports in its weekly notice and shall allow a 30 day comment period for each report. The Department shall provide notice of its determination to anyone who submitted comments.

DATED: July 18, 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 **September 1, 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.

**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>

