

**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-15861, Water Right Application G-16246, in)
the name of Bruce and Regina Ernst) **PROPOSED FINAL
ORDER**

Permit Information

Application: G-16246
Permit: G-15861
Basin: 2B – Middle Willamette / Watermaster District 16
Date of Priority: May 12, 2004
Source of Water: Well 1 and Well 2 in Mission Creek Basin
Purpose or Use: Nursery uses on 101.0 acres
Maximum Rate: 1.78 cubic feet per second (cfs)

Please read this Proposed Final Order in its entirety.

In Summary, the Department proposes to:

- Grant an extension of time to apply water to full beneficial use from October 1, 2009, to October 1, 2022¹.

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.

¹Pursuant 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

gpm – gallons per minute

cfs – cubic feet per second

Well 1 – MARI 1065

Well 2 – MARI 51275

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.

FINDINGS OF FACT

1. On February 24, 2005, Permit G-15861 was issued by the Department. The permit authorizes the use of up to 1.78 cfs of water from Well 1 and Well 2 in Mission Creek Basin for nursery use on 101.0 acres. The permit specified complete application of water was to be made on or before October 1, 2009.
2. On August 9, 2017, the permit holders, Bruce and Regina Ernst, 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-15861 be extended from October 1, 2009, to October 1, 2022. This is the first permit extension requested for Permit G-15861.
3. On August 15, 2017, notification of the Application for Permit G-15861 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)

4. On August 9, 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)

5. Construction of the wells began prior to permit issuance. The permit holder states, construction of MARI 1065 (Well 1) began December 14, 1963.
6. According to the well log received by the Department on January 29, 1964, construction of Well 1 began December 14, 1963.

Based on Finding of Fact (FOF) 5 and 6, the Department has determined that the prosecution of the construction of the well began prior to October 1, 2009.

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

7. Construction of the wells began prior to permit issuance.

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.

8. According to a well log received by the Department on January 29, 1964, construction of Well 1 was completed on January 6, 1964.
9. According to a well log received on April 25, 1997, construction of MARI 51275 (Well 2) was completed on April 17, 1997.
10. Work was accomplished during the original development time frame under Permit G-15861 is as follows, underground mainlines were installed.

Based on FOF 7, 8, 9, and 10, 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 conditions.

11. The Department has considered the permit holder's compliance with conditions for Well 1, and has identified the following concerns: (1) the record does not show that a meter or other suitable measuring device has been installed, and (2) annual reports of the amount of water used from each month from Well 1 have not been received by the Department.

Based on FOF 12, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-15861 for Well 1:

- "Before water use may begin under this permit, the permittee shall install a totalizing flow meter; and
- The permittee shall keep a complete record of the amount of water used each month and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as may be required by the Director."

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.

12. The Department has considered the permit holders compliance with conditions for Well 2, and has not identified any concerns.

Based on FOF 11, the Department has determined that the permit holder has demonstrated compliance with conditions as required by Permit G-15861 for Well 2.

Beneficial Use of Water: OAR 690-315-0040(3)(b)

The amount of beneficial use made of the water during the permit time limits.

13. The Application states a maximum combined rate of 850 gallons per minute (gpm) (1.89 cfs) of water has been appropriated, being 150 gpm (0.33 cfs) from Well 1, and 700 gpm

(1.56 cfs) from Well 2, for nursery uses on 94.0 acres. This exceeds the rate of water authorized for nursery uses under this permit. The authorized rate for nursery uses is 1.78 cfs.

Based on FOF 11, the Department has determined that beneficial use of water from Well 1 has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2009.

Based on FOF 12, the Department has determined that beneficial use of water from Well 2 has been demonstrated as all permit conditions were satisfied by October 1, 2009.

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

14. The Application states the permit holder has invested about \$112,000, which is approximately 99 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$1,000 investment is needed for the completion of this project.

The Department has determined based on FOF 14, 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 of progress towards completion of the water system; a financial investment has been made; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use has not been demonstrated from Well 1. The Department has determined the applicant has demonstrated the minimum necessary for the Department to find reasonable diligence towards complete application of water to a beneficial use.

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)

15. 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-15861; 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)

16. The points of appropriation for Permit G-15861, located within the Mission Creek Basin, are not located within a limited or critical groundwater area.
17. Mission Creek is not located within or above any state or federal scenic waterway.
18. 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)

19. Mission 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)

20. The Application states an approximate total of \$112,000 has been invested in the project.

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

21. 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)

22. 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)

23. The Application did 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)

24. 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)

25. The Application did not identify unforeseen events.

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

26. The Application did state that a denial of the extension would result in undue hardship in that the permit holders operate an active nursery and would not be able to continue without the ability to irrigate their nursery stock.

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

27. The Application provides evidence of good faith of the appropriator under Permit G-15861.

Based on FOF 5, 6, 7, 8, 9, 10, 12, 13, 14, and 20, 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.

28. As of August 9, 2017, the Application states the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, which include installing a totalizing flow meter on Well 1 and reporting annual water use; and applying water to full beneficial use.

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-15861 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).

CONCLUSIONS OF LAW

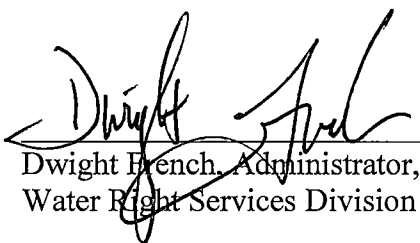
1. The applicant has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The applicant has complied with the construction timeline requirements to begin construction as required by ORS 537.630, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. Based on Finding of Facts 4 through 27, 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.
5. The applicant has demonstrated good cause for the extension.

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-15861 from October 1, 2009, to October 1, 2022.

DATED: September 19, 2017



Dwight French, Administrator,
Water Right Services Division

<p><i>If you have any questions, please check the information box on the last page for the appropriate names and phone numbers.</i></p>

Proposed Final Order Hearing Rights

1. Under the provisions of OAR 690-315-0100 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 **November 3, 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>

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- 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
 725 Summer St NE, Suite A
Fax: 503-986-0901 Salem, OR 97301-1266
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