

**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-16379, Water Right Application G-16956, in ) PROPOSED FINAL  
the name of Mike and Carolyn Davis ) ORDER

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Permit Information

Application: G-16956  
Permit: G-16379  
Basin: 5 – Deschutes / Watermaster District 3  
Date of Priority: November 8, 2007  
Source of Water: Well 1 (WASC 51079) and Well 2 in White River Basin  
Purpose or Use: Irrigation use on 119.0 acres  
Maximum Rate: 1.49 cubic feet 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 complete construction of the water system from October 1, 2017, to October 1, 2020.
- Grant an extension of time to apply water to full beneficial use from October 1, 2017, 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**

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 1 – WASC 51079

Well 2 – WASC 52540

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.

## **FINDINGS OF FACT**

1. On September 4, 2008, Permit G-16379 was issued by the Department. The permit authorizes the use of up to 1.49 cfs of water from Well 1 (WASC 51079) and Well 2 in White River Basin for irrigation use on 119.0 acres. The permit specified completion of construction complete application of water was to be made on or before October 1, 2012.
2. One prior permit extension has been granted for Permit G-16379. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2012, to October 1, 2017.

3. On October 18, 2017, the permit holder, Mike Davis, 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-16379 be extended from October 1, 2017, to October 1, 2020.
4. On October 24, 2017, notification of the Application for Permit G-16379 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 October 18, 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. Construction of the well began May 20, 2002.
7. According to the well log received by the Department on June 5, 2002, construction of WASC 51079 (Well 1) began May 16, 2002.

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, 2012.

**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>

8. During the most recent extension period, being from October 1, 2012, to October 1, 2017, the permit holder constructed WASC 52540 (Well 2).
9. Well 2 was constructed in a location not authorized under Permit G-16379. The Department recognizes Well 2 was constructed with the intent to be used under Permit G-16379 upon approval of a Permit Amendment authorizing a change in point of appropriation.

Based on FOF 8 and 9, the Department has determined that work has not been accomplished under Permit G-16379 during the last extension period.

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

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

Well 1

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 G-16379 for Well 1.

Well 2

11. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the record does not show that a meter or other suitable measuring device has been installed, (2) the required March static water level measurements have not been received by the Department, and (3) annual reports of the amount of water used each month have not been received by the Department. The Department recognizes that it is the intent of the permit holder to comply with all permit conditions at the time the conditions become applicable.

Based on FOF 9 and 11, the Department has determined that the permit holder has not demonstrated compliance with any of the permit conditions as required by Permit G-16379 for Well 2.

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.

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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.

**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 time limits.*

12. A maximum rate of 0.17 cfs of water has been appropriated from Well 1 for irrigation of 20.0 acres.

Based on FOF 10 and 12, the Department has determined that beneficial use of water from Well 1 has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2017.

13. No water has been appropriated from Well 2 under Permit G-16379.
14. Delay of full beneficial use of water under Permit G-16379 was due, in part, to insufficient yield of water from Well 1 which reduced potential income from the land. This prevented the permit holder from having the capital to construct and supply power to the second well. When the cost to extend power to the approved location of the second well was quoted at more than the cost to construct the well, the permit holder chose to construct the well in a location closer to existing power supply. The permit holder needs more time in which to gain approval for the change in location of the second point of appropriation to obtain the full quantity of water allowed under the permit.

Based on FOF 11, 13 and 14, the Department has determined that beneficial use of water has not yet been demonstrated under this permit from Well 2 because not all permit conditions were satisfied by October 1, 2017.

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

15. The permit holder has invested about \$86,000, which is approximately 63 percent of the total projected cost for complete development of this project. This investment includes the costs associated with the construction of Well 2, being \$19,000. The permit holder anticipates an additional \$50,000 investment is needed for the completion of this project.

Based on FOF 14, 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-16379.

**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)**

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-16379; 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)**

17. The points of appropriation for Permit G-16379, located within the White River Basin, are not located within a limited or critical groundwater area.
18. White River is located above the Deschutes Scenic Waterway.
19. 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)**

20. White River 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.

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

21. An approximate total of \$67,000 has been invested in the project to date.
22. An approximate total of \$19,000 has been invested in the construction of Well 2.

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

23. The lower acreage that borders HWY 216 will be irrigated from Well 2. This land is to be developed as a community garden where those who are interested can rent space to grow a garden for their needs.

**Other factors relevant to the determination of the market and present demand for water and power OAR 690-315-0040(4)(f).**

24. 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)**

25. The present use of water from Well 1 does not allow enough irrigation to obtain a reasonable return for the existing orchard. It has been calculated that by integrating Well 2 into the water system, enough water would be provided for the orchard to obtain a fair and reasonable return on the investment.

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

26. Delay in the development of this project was not caused by any other governmental requirements.

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

27. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-16379.

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

28. A denial of the extension would result in undue hardship in that they just invested a large amount of money to construct Well 2. Surface water in the area is located across the highway making it difficult to deliver the water to the property, and the Tygh Valley Ditch does not have the capacity for additional water users to obtain irrigation.

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

29. The Application provides evidence of good faith of the appropriator under Permit G-16379.

Based on FOF 5, 6, 7, 8, 9, 11, 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.*

30. As of October 18, 2017, the remaining work to be completed consists of submitting a Permit Amendment to change the location of Well 2, completing construction of the water system; meeting all permit conditions, which include submitting annual March static water level measurements, installing a totalizing flow meter and reporting annual water use; and applying water to full beneficial use on the remaining 99.0 acres.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 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-16379 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. Based on Findings of Facts 13, the Department determined the need to place a "Permit Amendment Condition" on this extension of time in order to ensure diligence is exercised in the



development and perfection of water use permit. This condition, specified under Item 1 of the “Conditions” section of this PFO, was determined to be necessary because Well 2 was constructed in a location not authorized under Permit G-16379.

## **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 27, 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.

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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-16379 from October 1, 2017, to October 1, 2020.

Extend the time to apply water to beneficial use under Permit G-16379 from October 1, 2017, to October 1, 2020.

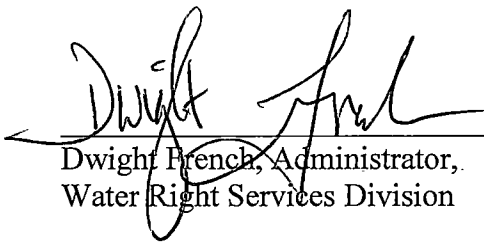
Subject to the following conditions:

### LIMITATIONS AND CONDITIONS

1. **Permit Amendment Condition**

The use of any water from Well 2 (WASC 52540) under Permit G-16379 is subject to this Condition. The permit holder shall submit an application for a permit amendment to change the location of Well 2 before any water is appropriated for irrigation under Permit G-16379. No water may be appropriated from Well 2 under Permit G-16379 until a final order approving the change in the location of Well 2 has been issued by the Department.

DATED: November 28, 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 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 **January 12, 2018**, 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;

