

**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-16920, Water Right Application G-17109, in ) PROPOSED FINAL  
the name of Iwasaki Brothers, Inc ) ORDER

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Permit Information

Application: G-17109  
Permit: G-16920  
Basin: 2C – Lower Willamette / Watermaster District 18  
Date of Priority: September 23, 2008  
Source of Water: Well 1 (WASH 64048) and Well 2 in Rock Creek Basin  
Purpose or Use: Nursery use on 22.2 acres  
Maximum Rate: 0.33 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 complete construction of the water system from May 31, 2017, to October 1, 2023.
- Grant an extension of time to apply water to full beneficial use from May 31, 2017, to October 1, 2023<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(5), 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

FOF – Finding of Fact

PFO – Proposed Final Order

Well 1 – WASH 64048

cfs – cubic feet per second

gpm – gallons per minute

## **AUTHORITY**

Generally, see ORS 537.630 and OAR Chapter 690 Division 315.

**ORS 537.630(2)** 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(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 May 31, 2012, Permit G-16920 was issued by the Department. The permit authorizes the use of up to 0.33 cfs of water from Well 1 (WASH 64048) and Well 2 in Rock Creek Basin for nursery use on 22.2 acres. The permit specified completion of construction and application of water was to be made within five years of the date of permit issuance, being May 31, 2017.
2. On December 26, 2017, Jim Iwasaki, Officer for Iwasaki Brothers, Inc, 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-16920 be extended from May 31, 2017, to October 1, 2023. This is the first permit extension requested for Permit G-16920.

3. On December 28, 2017, the permit holder submitted additional information to supplement their Application. The information was to clarify the rate of water used for nursery operations, anticipated costs to complete the construction of the water system, and to document installation of a meter on Well 1.
4. On January 2, 2018, notification of the Application for Permit G-16920 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 December 26, 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.
7. According to the well log received by the Department on June 9, 2006, construction of Well 1 (WASH 64048) began May 24, 2006.

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 May 31, 2017.

### **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.<sup>2</sup>*

8. Construction of the well began prior to permit issuance.
9. Work was accomplished during the original development time frame under Permit G-16920, including installation of irrigation mainline to serve 6.68 acres of nursery use.

Based on FOF 7, 8, and 9, the Department has determined that work has been accomplished prior to permit issuance and within the time allowed in the permit, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

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

10. The Department has considered the permit holder's compliance with conditions for Well 1, 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-16920 for Well 1.

11. The Department has considered the permit holder's compliance with conditions for Well 2, and has identified the following concerns: (1) the record does not show that a totalizing meter has been installed, and (2) the required March static water level measurements 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 11, the Department has determined that the permit holder has not demonstrated compliance with any of the permit conditions as required by Permit G-16920 for Well 2, as Well 2 has not been constructed.

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 time.*

12. A maximum rate of 50 gallons per minute (0.11 cfs) of water has been appropriated from Well 1 for nursery use.

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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.

13. Due to bacteria found in the well, water use from Well 1 has not occurred since 2013.

Based on FOF 10 and 12, the Department has determined that beneficial use of water has been demonstrated from Well 1 under this permit as all permit conditions were satisfied by May 31, 2017.

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

14. An investment of approximately \$20,250, which is approximately 21 percent of the total projected cost for complete development of this project. An additional \$74,820 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 for Well 1, a financial investment has been made, and; beneficial use of water has been demonstrated from Well 1. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit G-16920.

**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.

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-16920; 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).

16. The points of appropriation for Permit G-16920, located within the Tualatin River Basin, are not located within a limited or critical groundwater area.
17. Tualatin River 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.

**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.

19. Tualatin 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.

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

Economic interests dependent on completion of the project.

20. An approximate total of \$20,250 has been invested in the project.

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

Other economic interests dependent on completion of the project.

21. There are no other economic interests dependent on completion of the project identified.

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

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

22. OAR 690-315-0050(6) requires the Department to place 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 1 of the “Limitations and Conditions” section of this PFO to meet this condition.

**Fair Return Upon Investment [OAR 690-315-0040(2)(f)]**

23. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date as the use of water from the wells will reduce the costs of water provided to the nursery from the municipal water supply.

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

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

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

25. Unforeseen events were identified that contributed to the extended length of time needed to fully develop and perfect Permit G-16920, in that a water quality test in 2013 determined that bacteria levels in the water were “Too Numerous To Count”, making the water unsuitable for application to plants unless chemically treated.

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

26. A denial of the extension would result in undue hardship, and that an investment has been made in the water system and continued use of the municipal water supply is not sustainable for long term operation of the nursery.

**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-16920.

Based on FOF 6, 7, 8, 9, 10, 12, 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 December 26, 2017, the remaining work to be completed consists of completing construction of the water system, which includes constructing Well 2, installing a treatment facility and extending the irrigation mainline; meeting all permit conditions, which include installing a totalizing flow meter on Well 2, reporting annual March static water level measurements and 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, 2023, to complete construction of the water system and

to accomplish the application of water to beneficial use under the terms and conditions of Permit G-16920 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(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 1 of the “Limitations and 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 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, 2023, as required by OAR 690-315-0040(1)(c).
4. The applicant can complete the project within the time period requested for the extension on the project.
5. The applicant has demonstrated good cause for the extension.
6. For extensions exceeding five years, the Department shall establish progress checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between progress check points will not exceed five years periods, as required by OAR 690-315-0050(6).



## 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-16920 from May 31, 2017, to October 1, 2023.

Extend the time to apply water to beneficial use under Permit G-16920 from May 31, 2017, to October 1, 2023.

Subject to the following conditions:

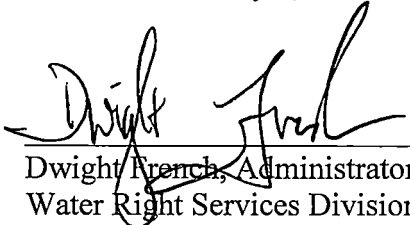
### LIMITATIONS AND CONDITIONS

**1. Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2022**. *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: February 6, 2018

  
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 **March 23, 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;
  - 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  
                                                           Salem, OR 97301-1266
- Fax: 503-986-0901
-