

**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-15965, Water Right Application G-16411,) / PROPOSED FINAL ORDER
in the name of Jesse Van De Stroet and) TO DENY
Tanya Van De Stroet)

Permit Information

Application:	G-16411
Permit:	G-15965
Basin:	12 – Malheur Lake / Watermaster District 10
Date of Priority:	March 10, 2005
Source of Water:	Well 1 and Well 2 in Malheur Slough Basin
Purpose or Use:	Irrigation use on 255.2 Acres
Maximum Rate:	3.19 cubic feet per second (cfs)

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.

In Summary, the Department proposes to:

- Deny an extension of time to apply water to full beneficial use from October 1, 2016, to October 1, 2020.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time

Department – Oregon Department of Water Resources

FOF – Finding of Fact

PFO – Proposed Final Order

cfs – cubic feet per second

gpm – gallons per minute

GHVGAC – Greater Harney Valley Groundwater Area of Concern

Well 1 – HARN 50789

Well 2 – HARN 50285

APOA – additional points of appropriation

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.

FINDINGS OF FACT

1. On September 22, 2005 Permit G-15965 was issued by the Department. The permit authorizes the use of up to 3.19 cfs of water from Well 1 and Well 2 in Malheur Slough Basin for irrigation use on 255.2 acres. The permit specified complete application of water was to be made on or before October 1, 2009.
2. One prior permit extension has been granted for Permit G-15965. The most recent extension request resulted in the completion date for full application of water being extended from October 1, 2009, to October 1, 2016.

3. On October 23, 2015, an assignment by proof from Vernon Cox to Jesse Van De Stroet and Tanya Van De Stroet was recorded in the records of the Water Resources Department.
4. On October 25, 2017, the permit holder 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-15965 be extended from October 1, 2016, to October 1, 2020.
5. On October 31, 2017 notification of the Application for Extension of Time for G-15965 was published in the Department's Public Notice. No public comments were received regarding the extension application.
6. On November 28, 2017, the permit holder submitted additional information to supplement their Application. The additional information clarified the amount of work accomplished, and maximum instantaneous rate used.

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 October 25, 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. Construction of the well began prior to permit issuance.
9. According to the well log received by the Department on March 20, 1998, construction of HARN 50282 (Well 2) began March 5, 1998.

Based on Finding of Fact 8 and 9, the Department has determined that the prosecution of the construction of the well began prior to October 1, 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 previous extension.¹

10. During the most recent extension period, being from October 1, 2009, to October 1, 2016, the following work was accomplished:
 - Installed additional irrigation equipment;
 - Installed 6600 feet of 12 inch buried PVC mainline to additional wells not authorized by Permit G-15965; and
 - Constructed unauthorized well HARN 52456 and unauthorized well HARN 52491.
11. No additional work has been accomplished since October 1, 2016.

Based on FOF 10, the Department has determined that work has been accomplished during the last extension period, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

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

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

Based on FOF 12, the Department has determined that the permit holder has demonstrated compliance with following permit conditions as required by Permit G-15965.

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

The amount of beneficial use made of the water during the permit or previous extension conditions.

13. A maximum combined rate of 800 gpm (1.78 cfs) of water, being 500 gpm (1.11 cfs) from HARN 50789 (Well 1), and 300 gpm (0.67 cfs) from Well 2, has been appropriated for irrigation of 255.2 acres.

¹ “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. Delay of full beneficial use of water under Permit G-15965 was due, in part, to an insufficient yield of water from Well 1 and Well 2. The permit holder needs more time in which to gain approval for a Permit Amendment to add additional points of appropriation (APOA), in order to obtain the full quantity of water allowed under the permit.

Based on FOF 12, the Department has determined that beneficial use of water has been demonstrated under this permit because all permit conditions were satisfied by October 1, 2016.

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

15. The Application identifies an approximate total of \$641,000 has been invested. The costs included the construction of two wells not authorized under Permit G-15965, and submittal of annual water usage reports which are not “actual construction” under this permit and therefore are not counted towards development. After deducting these costs, the approximate total investment for “actual construction” to date is approximately \$380,000 which is the total cost for complete development of this project.

Based on FOF 15, 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 of progress towards completion of the water system; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use has not been demonstrated. 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.*

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-15965; 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 points of appropriation for Permit G-15965, are located in the Greater Harney Valley Groundwater Area of Concern (GHVGAC) which was established to ensure that groundwater in the GHVGAC is appropriated within the capacity of the resource and that new appropriations of groundwater assure the maintenance of reasonably stable groundwater levels and prevent depletion of the groundwater resource. Current data, comprising substantial evidence, indicate that groundwater levels are declining in areas of the GHVGAC. Additional allocation of groundwater within the GHVGAC may exacerbate these declines. A comparison between estimated annual recharge and previously allocated groundwater volumes indicates that groundwater is fully allocated in some areas of the basin. 690-512-0020(1).
18. Lower Silvies River is not located within or above any state or federal 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.

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. Lower Silvies River 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.

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

Economic interests dependent on completion of the project.

21. An approximate total of \$380,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

22. Current buyers of the hay grown by the permit holder would have to find another source of hay if the extension is denied.

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

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

23. On January 29, 2018, the Department's Groundwater section determined the proposed well for this extension application are within the GHVGAC where observed groundwater level declines are occurring in most areas. The decline indicates that demand for groundwater is exceeding the annual average recharge. An analysis by the Department confirms the volume of groundwater permitted for annual use exceeds the average annual volume recharge to groundwater. The Department also estimates that approximately 30 percent of the total acreage permitted for groundwater use has yet to be developed. Groundwater development for these acres under already-existing permits will further increase the groundwater level decline rate. Based on the location of the Point of Appropriation, the Department finds that the proposed groundwater use will occur from the same groundwater source exhibiting groundwater declines. Groundwater is therefore determined to be over-appropriated [see OAR 690-400-0010(11)(a)(B)] and development of the remaining portion of this permit is not within the capacity of the resource.

Based on FOF 23, the Department has determined that the resource cannot support the additional development of water authorized under Permit G-15965.

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

24. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date. The income from hay grown by the permit holder should provide a fair and reasonable return on the investment.

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

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

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

26. Unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-15965, in that the permit holders were faced with an insufficient yield of water from Well 1 and Well 2, which restricted their ability to complete development of the project in a timely manner.

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

27. A denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs. The permit holder has made significant financial investments toward developing this permit, which would be lost in the event that the Department denies the proposed extension, and/or permit amendment. The two authorized wells do not produce enough water to adequately irrigate the entire 255.2 acres under this permit.

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

28. The Application provides evidence of good faith of the appropriator under Permit G-15965.

Based on Findings of Fact 8, 9, 10, 12, 13, 15, and 21, above, the Department finds that the Applicant has demonstrated good faith.

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 October 25, 2017, the remaining work to be completed consists of gaining approval of a Permit Amendment to add APOA; meeting all permit conditions, which includes installing meters and submitting annual water use reports and March static water level measurements for the additional wells; and applying water to full beneficial use.

Based on FOF 17 and 23, the Department cannot find that the applicant can complete the project or apply water to full beneficial use within the time requested for the extension, because demand on the resource cannot support the development of the undeveloped portion of water under Permit G-15965.

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

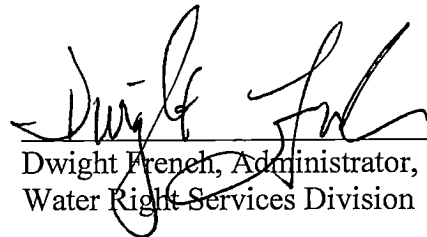
1. The permit holder has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The permit holder has complied with the time allowed for construction work under the permit pursuant to ORS 537.630 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. Based on Market and Present Demand of water, being FOF 17 and 23, pursuant to 690-315-0040(4), water is not available to support additional development. Development of the remaining portion of this permit is not within the capacity of the resource, pursuant to OAR 690-400-0010(11)(a)(B).

PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department proposes to issue an order to:

Deny the time to apply water to beneficial use under Permit G-15965 from October 1, 2016, to October 1, 2020.

DATED: February 20, 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 **April 6, 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 Corey A Courchane at (503) 986-0825.

 - 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
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