

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources

Application – Application for Extension of Time

PFO – Proposed Final Order

cfs – cubic feet per second

Well 1 – CLAC 10379

Well 2 – CLAC 62685

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 January 17, 2008, Permit G-16280 was issued by the Department. The permit authorizes the use of up to 0.33 cfs of water from Well 1 (CLAC 10379) and Well 2 (CLAC 62685) in Bear Creek Basin for irrigation use on 26.09 acres. The permit specified completion of construction and complete application of the water to the use was to be made on or before October 1, 2012.
2. On February 15, 2017, the permit holder, Christopher Xiong, 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-16280 be extended from October 1, 2012, to October 1, 2037. This is the first permit extension requested for Permit G-16280.

3. On February 21, 2017, notification of the Application for Permit G-16280 was published in the Department's Public Notice. No public comments were received regarding the Application.
4. On March 22, 2017, and March 24, 2017, the permit holder submitted additional information to supplement their Application. The additional information provided was to make a determination on the Market and Present Demands.

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 February 15, 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. The permit holder states, construction of CLAC 62685 (Well 2) began July 3, 1977.
7. On July 14, 2006, the Department received an email from Steinman Brothers Drilling Company, which states that construction of Well 2 began July 3, 1977, as no original well log was found for Well 2.
8. According to the well log report received by the Department on March 14, 1983, construction of CLAC 10379 (Well 1) began February 11, 1983.

Based on Finding of Fact (FOF) 6, 7, and 8, 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 permit²)

9. Construction of the well began prior to permit issuance. Construction of Well 2 was completed July 15, 1977. Construction of Well 1 was completed February 28, 1983. In 2006, the permit holder installed the irrigation system, which consisted of 3 inch buried PVC mainline, 2 inch above ground and buried PVC laterals, and 6,000 feet of drip tape.
10. No additional work towards completion of construction was accomplished during the original development time frame under Permit G-16280.
11. Since October 1, 2012, the permit holder has maintained the water system.

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

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

The water right permit holder’s conformance with the permit conditions

12. The Department has considered the permit holder’s compliance with conditions, and has identified the following concern: (1) the record does not show that a totalizing flow meter or other suitable measuring device has been installed on Well 1 and Well 2.

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-16280:

- “Before water use may begin under this permit, the permittee shall install a totalizing flow meter or other suitable measuring device as approved by the Director at each point of appropriation.”

Failure to comply with permit conditions constitutes illegal use of water. 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.

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.

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 rate of 0.2 cfs of water has been appropriated from Well 1, for irrigation of 15.0 acres.
14. No water has been appropriated from Well 2.

Based on FOF 12, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2012.

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

15. An approximate total of \$24,250 has been invested in the water system. The costs included items associated with repair, maintenance, and updating of the system 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” prior to issuance of Permit G-16280 is approximately \$20,000 which is about 47 percent of the total projected cost for complete development of this project. No additional investment has been made towards the complete application of water to the beneficial use during the development time frame authorized under Permit G-16280. An additional \$23,000 investment is needed to complete this project, which includes installation of totalizing flow meters at each well, installing a pump in Well 2, installing additional mainline to connect Well 2 to the existing delivery system, and applying water to beneficial use on the remaining 11.09 acres.

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; a financial investment has been made; 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-16280; 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-16280, located within the Pudding River Basin, are within the Glad Tidings Groundwater Limited Area, which conditions groundwater developed from the basalt aquifer as classified for exempt uses only.
18. Pudding 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. Pudding 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.

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

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

Other economic interests dependent on completion of the project.

22. The Application did not identify economic interests other than those of the applicant's that may be dependent on completion of the project.

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

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

23. 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)]

24. The Application states the permit holder has been expanding farmable acres with growth of the farm business; however the business has not grown enough to support the installation of a pump and motor in Well 2, or the need to farm additional acres.

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

25. 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)]

26. No unforeseen events were identified.

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

27. The Application states a denial of the extension would result in undue hardship. The business is only open March through October, and provides the primary source of income during this time.

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-16280.

Based on FOF 6, 7, 8, 9, 13, 15, and 21, the Department has determined that the applicant has shown good faith and reasonable diligence.

Duration of Extension [OAR 690-315-0040(1)(c)]

Under OAR 690-315-0040(1)(c), in order to approve an extension of time for water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

29. As of February 15, 2017, the Application states the remaining work to be completed consists of completing construction of the water system, including installing a pump and motor in Well 2, and connecting Well 2 to the irrigation system; meeting all permit conditions, which include installing a totalizing flow meter or other suitable measuring device on Well 1 and Well 2; and applying water to full beneficial use on the remaining 11.09 acres.
30. The Application does not provide the Department evidence that an Extension of Time of 25 years beyond the completion date of October 1, 2012, authorized under Permit G-16280, is either reasonable or necessary.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2037, 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-16280 is not reasonable or necessary. The Department has determined that an extension of 10 years from the date of complete application of water prescribed in Permit G-16280, to October 1, 2022, 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. The Department determined the need to place a "Water Use/Meter Installation Condition", and a "Last Extension Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. These condition, specified under

Items 1 and 2 of the “Conditions” section of this PFO, and based on FOF 10, 12, 14, and 15, was determined to be necessary due to no additional work having been accomplished during the development time authorized in Permit G-16280 and failure to comply with the condition requiring installation of a totalizing flow meter at each point of appropriation.

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 30, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2022, as required by OAR 690-315-0040(1)(c).
4. The applicant can complete the project within the time period requested for the extension on the project, but the extension is conditioned to mitigate the effects of the subsequent development on competing demands on the resource and is granted only for the reasonable time necessary to complete water development and apply water to beneficial use. OAR 690-315-0050(5).
5. The applicant has demonstrated good cause for the extension, but the extension must be conditioned to ensure this is the last extension granted in order to ensure future diligence; OAR 690-315-0050(5).

continued on following page

PROPOSED ORDER

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

Extend the time to complete construction of the water system under Permit G-16280 from October 1, 2012, to October 1, 2022.

Extend the time to apply water to beneficial use under Permit G-16280 from October 1, 2012, to October 1, 2022.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

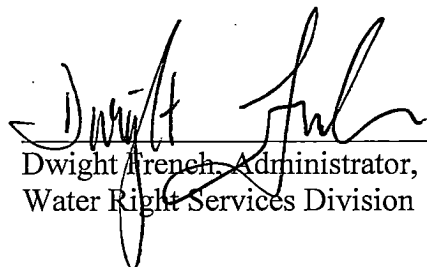
1. Water Use/Meter Installation Condition

No water may be appropriated under Permit G-16280, from CLAC 62685 or CLAC 10379, until a totalizing flow meter has been installed. The permittee shall keep and maintain a record of the amount (volume) of water used each month, and shall submit a report which includes the recorded water use measurements to the Department annually.

2. Last Extension Condition

This may be the last extension of time granted for Permit G-16280. Any future extensions of time request may be denied, unless the permit holder can provide the Department with evidence that a totalizing flow meter has been installed at each point of appropriation. In addition, all normal extension standards and rules will be evaluated. ORS 539.010(5); OAR 690-315-0040.

DATED: April 24, 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(1) and 690-315-0060, the applicant or any other person adversely affected or aggrieved by the proposed final order may submit a written protest to the proposed final order. The written protest must be received by the Water Resources Department no later than **June 8, 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>

