

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

Well – HARN 50194

GHVGAC – Greater Harney Valley Groundwater Area of Concern

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 August 12, 1998, Permit G-13455 was issued pursuant to ORS 537.625, by the Department. The permit authorizes the use of up to 2.29 cfs of water, being 1.36 cfs for irrigation of 109.0 acres, and 0.93 cfs for supplemental irrigation of 74.0 acres from a well in Silver Creek Basin. The permit specified actual construction of the well to begin by May 28, 1999, and complete application of water to the use was to be made on or before October 1, 2002.
2. On April 27, 2017, the permit holder, Wayne Evans 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-13455 be extended from October 1, 2002, to October 1, 2022. This is the first permit extension requested for G-13455.

3. On May 2, 2017, notification of the Application for Extension of Time for G-13455 was published in the Department's Public Notice. No public comments were received regarding the extension application.

Review Criteria [OAR 690-315-0040]

In order to approve an Application for an Extension of Time to complete construction and/or apply water to full beneficial use pursuant to ORS 537.230 or 537.630, or to begin construction, pursuant to ORS 537.248, the Department must make the findings in OAR 690-315-0040(1)(a) – (d).

Complete Extension of Time Application [OAR 690-315-0040(1)(a)]

4. On April 27, 2017, the Department received a completed Application and the fee specified in ORS 536.050 from the permit holder.

Start of Construction [OAR 690-315-0040(1)(b) and 690-315-0040(5)]

5. The Application states that construction of HARN 50194 began April 15, 1997.
6. The Application states that HARN 50194 is not drilled in the location authorized in Permit G-13455.
7. No evidence of beginning construction of the well authorized in Permit G-13455 is located in the record of the Department.
8. ORS 537.630(2) states in part that “the holder of a permit issued pursuant to ORS 537.625 shall prosecute the construction of a well or other means of developing and securing the ground water with reasonable diligence and complete the construction within a reasonable time fixed in the permit by the Water Resources Department, not to exceed five years after the date of approval of the Application. However, the department, for good cause shown, shall order and allow an extension of time, including an extension beyond the five-year period, for the completion of the well or other means of developing and securing the ground water or for complete application of water to beneficial use.”
9. OAR 690-315-0040(5) states “if the extension is requested pursuant to OAR 537.230 or 537.630, the applicant must have begun actual construction work, as defined in OAR 690-315-0020(3)(d)(A) and (B), during the period required by statute. If the Department finds the applicant did not begin construction by that date, the permit cannot be extended, and the Department may begin cancellation proceeding pursuant to ORS 537.260 or 537.410.”

Based on Findings of Fact 6 through 9, the Department has determined that prosecution of the construction of the well did not begin prior to May 28, 1999, being the date specified in Permit G- 13455 to begin actual construction of the well. The Department cannot find that construction of the well authorized under Permit G-13455 began (was prosecuted) within the time fixed in the permit, being May 28, 1999, the date established pursuant to ORS 537.630. An extension cannot be granted to extend the time needed to prosecute (begin) construction of the well.

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.¹

10. No work was accomplished towards construction of a well or other means of securing the ground water as authorized in Permit G-13455.

Based on FOF 10, the Department has determined that actual construction of the well as authorized in Permit G-13455, was not constructed.

11. Work was accomplished towards the development of the water system during the original development time frame under Permit G-13455. The work consisted of installation of pumps, main lines, a pivot, wheel lines, and a meter.

Based on FOF 11, the Department has determined that work has been accomplished towards the development of the water system during the time allowed in the permit.

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 concerns: (1) HARN 50194 deviates from the location that is authorized in the permit; (2) the record does not show that a meter or other suitable measuring device has been installed on the authorized well; (3) annual reports of the amount of water used each month from the authorized well have not been received by the Department; (4) the required March static water level measurements of the authorized well have not been received by the Department; and (5) prosecution of construction of the well as authorized by Permit G-13455 did not begin by May 28, 1999.

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.

Based on FOF 6, 7, 8, 9, 10, and 12, the Department the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-13455:

- “If the number, location, or construction of any well deviates from that proposed in the permit application or permit conditions, the conclusions of the Technical review, Initial review or Proposed Final Order under which this permit is granted may be revised, conditions may be appropriately advised, or this permit may not be valid”;
- “Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director. The permittee shall maintain the meter or measuring device in good working order, shall keep a complete record of the amount of water used each month, and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as may be required by the Director. Further, the Director may require the permittee to report general water-use information, including the place and nature of use of water under the permit”;
- “To monitor the effect of water use from the well(s) authorized under this permit, the Department requires the water user to make and report annual static water level measurements. the static water level shall be measured in the month of March”; and
- “Actual construction of the well shall begin by May 28, 1999.”

Failure to comply with permit conditions constitutes illegal use of water. Beneficial use of water under this permit, therefore, has not yet been demonstrated. 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 or previous extension conditions.

13. The Application states a maximum rate of 2.29 cfs of water has been appropriated from HARN 50194 for irrigation of 183.0 acres. HARN 50194 is not authorized in Permit G-13455.
14. No water has been appropriated from the well authorized under Permit G-13455.

Based on FOF 6, 7, 10, 12, and 14, the Department finds that beneficial use of water has not been demonstrated, as no water has been appropriated from the well authorized under the permit and not all permit conditions have been satisfied.

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 \$350,000 has been invested. The costs includes \$50,000 for the

construction of HARN 50194, which is not the authorized point of appropriation in Permit G-13455, and therefore is not counted towards development. After deducting these costs, the approximate total investment for “actual construction” to date is approximately \$300,000.

Based on FOF 7, 10, and 12, the Department has determined that no investment towards construction of a well or other means of securing the ground water as authorized in Permit G-13455 has been made.

Reasonable Diligence of the Appropriator [OAR 690-315-0040(2)(a)]

The Application provides evidence that prosecution of construction of the well authorized in Permit G-13455 has not begun; work has been accomplished towards completion of the water system; the permit holder has not demonstrated compliance with permit conditions, and; beneficial use of water has not been demonstrated. The Department has determined the applicant has not demonstrated reasonable diligence in previous performance under Permit G-13455.

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-13455; 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 point of appropriation for Permit G-13455, located within the Chickahominy Creek Basin, is within the Greater Harney Valley Groundwater Area of Concern (GHVGAC), Northwest sub-area, 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. Chickahominy Creek is not located within or above any state or federal scenic waterway.
19. The point of appropriation is 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. Chickahominy Creek is located within an area ranked “highest” 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 \$350,000 has been invested in 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. On March 19, 2018, the Department's Groundwater section determined the proposed well for this extension application is 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 17, and 23, the Department has determined that the resource cannot support the additional development of water authorized under Permit G-13455.

OAR 690-315-0040(2)(f)

Fair Return Upon Investment

24. The Application identified that the use and income from the permitted water development will likely result in reasonable returns upon the investment made to date.

OAR 690-315-0040(2)(g)

Other Governmental Requirements

25. The Application did not identify any delay in the development of this project that was caused by any other governmental requirements.

OAR 690-315-0040(2)(h)

Unforeseen Events

26. The Application did not identify unforeseen events.

OAR 690-315-0040(2)(i)

Denial of the Extension Will Result in Undue Hardship

27. The Application states the permit holder's 183.0 acres cannot produce hay, cost effectively without the use of water authorized by the permit.

OAR 690-315-0040(2)(c)

Good Faith of the Appropriator

28. Based on Findings of Fact FOF 6, 7, 10, 12, 14, and 15, above, the Department finds that the Applicant has not 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.

Based on FOF 7, 8, 9, and 10, 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 the applicant did not begin construction within the time allowed in the permit.

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 not 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

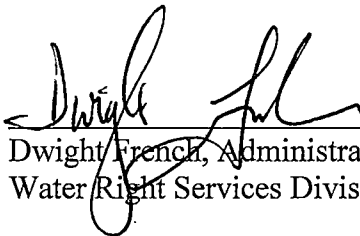
1. The permit holder has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The permit holder has not complied with the time to begin actual construction of the well under the permit pursuant to ORS 537.630(2)
3. The permit holder has not 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).
4. The Application established that there has been no reasonable diligence toward developing the project. The permit holder has not 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).

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-13455 from October 1, 2002, to October 1, 2022.

DATED: May 1, 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 15, 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:

