

**Oregon Water Resources Department  
Water Right Services Division**

**Application for Extension of Time**

In the Matter of the Application for an Extension of Time	)	PROPOSED
for Permit G-16970, Water Right Application G-16904, in	)	FINAL
the name of Dennis and Andrea Flynn	)	ORDER

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Permit Information

Application:	G-16904
Permit:	G-16970
Basin:	13 – Goose and Summer Lakes / Watermaster District 12
Date of Priority:	June 2, 2007
Source of Water:	Well 1 in Crooked Creek Basin
Purpose or Use:	Irrigation of 229.9 acres
Maximum Rate:	2.9 cubic feet per second (cfs)

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***Please read this Proposed Final Order in its entirety as it contains additional conditions not included in the original permit.***

*In Summary, the Department proposes to:*

- Grant an extension of time to complete construction of the water system from October 26, 2017, to October 1, 2027.
- Grant an extension of time to apply water to full beneficial use from October 26, 2017, to October 1, 2027<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

PFO – Proposed Final Order

cfs – cubic feet per second

Well 1 – LAKE 52476

Monitoring Well – LAKE 52477

FOF – Finding of Fact

## **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 October 26, 2012, Permit G-16970 was issued by the Department, consistent with the terms of a settlement agreement. The permit authorizes the use of up to 2.9 cfs of water from Well 1 in Crooked Creek Basin for irrigation use on 229.9 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 October 26, 2017.
2. On December 16, 2014, an assignment from Valley Falls Ranch, INC, to Dennis and Andrea Flynn was recorded in the records of the Water Resources Department.

3. On March 5, 2018, the permit holder, Dennis and Andrea Flynn, 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-16970 be extended from October 26, 2017, to October 1, 2023.
4. On March 9, 2018, the permit holder submitted additional information to supplement their Application. The additional information was to clarify information provided in the Application about compliance with permit conditions.
5. On March 13, 2018, notification of the Application for Permit G-16970 was published in the Department's Public Notice. No public comments were received regarding the Application.
6. On June 14, 2018, the permit holder submitted an amendment to the Application. The amendment requested 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-16970 be changed from October 26, 2023, to October 1, 2027.

#### **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 March 5, 2018, 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 October 26, 2017, as specified in the permit as being the date to apply water to full beneficial use.
9. According to the well log received by the Department on July 5, 2013, construction of LAKE 52476 (Well 1) began March 4, 2013.

Based on Finding of Fact (FOF) 8 and 9, the Department has determined that the prosecution of the construction of the well began prior to October 26, 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>*

10. Work was accomplished during the original development time frame under Permit G-16970 is as follows:

- completed construction of Well 1;
- began construction of LAKE 52477 (Monitoring Well);
- installed a pump, meter, and mainline pipes;
- installed a pivot; and
- installed a meter.

Based on FOF 9, and 10, the Department has determined that work has been accomplished 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.*

11. The Department has considered the permit holder’s compliance with conditions, and has identified the following concerns: (1) the record does not show that adjacent to each flow meter a clearly visible monument with a sign noting the flow meter has been installed, (2) the required annual March static water level measurements have not been received by the Department, (3) a dedicated measuring tube has not been installed on Well 1, (4) a survey quality location of the Monitoring Well has not been received by the Department, (5) a clearly visible sign noting the Monitoring Well has not been installed, and (6) the construction of the Monitoring Well does not meet the construction requirement of being continuously cased and continuously sealed to a minimum depth of 20 feet.

Based on FOF 11, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-16970:

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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.

- “... adjacent to each flow meter shall be a clearly visible monument with a sign noting the flow meter.”
- “The permittee shall report an initial March static water-level measurement once well construction is complete and annual measurements thereafter.”
- “Wells with pumps shall be equipped with an unobstructed, dedicated measuring tube pursuant to figure 200-5 in OAR 690-200.”
- “A survey quality location of the completed monitoring well shall be submitted to the Department watermaster in Lakeview, the Department water rights staff in Salem, and the Department groundwater staff in Salem.”;
- “Adjacent to the monitoring well shall be a clearly visible sign noting the monitoring well.”; and
- “The monitoring well shall be continuously cased and continuously sealed to a depth of 20 feet minimum, or more if warranted by the constraints or conditions encountered during construction.”

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.

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

*The amount of beneficial use made of the water during the permit time limits.*

12. A maximum rate of 1.0 cfs of water has been appropriated from the Well 1 for irrigation of 90.0 acres.

Based on FOF 11, 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 26, 2017.

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

13. An approximate total of \$179,710 has been invested. The costs included items associated with repair and maintenance costs of a 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” to date is approximately \$141,333 which is about 41 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional investment of approximately \$199,400 is needed to complete this project, which includes conducting a pump test, and depending on the results of that test either, install a larger pump, deepen Well 1, and/or apply for a Permit Amendment to add an additional point of appropriation, and if

approved, construct an additional well; install three small pivots; install additional pipeline to the pivots; and install buried electrical power lines to the wells. The costs associated with the reconstruction or alteration of the Monitoring Well to meet the construction standard set forth in the permit has not been included in the anticipated additional cost above.

Based on FOF 13, 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.**

14. 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-16970; 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).

15. The point of appropriation for Permit G-16970, located within the Chewaucan River Basin, is not located within a limited or critical groundwater area.
16. Chewaucan River is not located within or above any state or federal scenic waterway.
17. 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.

18. Chewaucan 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.

19. An approximate total of \$141,333 has been invested in the project.

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

Other economic interests dependent on completion of the project.

20. No other economic interests dependent on completion of the project have been identified.

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

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

21. No other factors relevant to the determination of the market and present demand for water and power have been identified.
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. Production of high quality hay is essential for maintaining livestock. The ability to produce quality hay with the permitted water use will enable the ranch to grow much of its own winter feed and would not need to rely on purchasing feed, which costs are volatile.

**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. Production from Well 1 has been much less than anticipated. Determining the cause of the low production has been an ongoing effort, and includes replacing the pump in the well three times during the development of the permit. During one of the pump replacements, a screen was unintentionally dislodged from the pump. A well driller was required to remove the screen that was stuck in the well bore before a new pump could be installed. Once the pump was installed, it was discovered that the pump still would not produce the full rate authorized in the permit.

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

26. A denial of the extension would result in the loss of the ability to produce hay on the ranch. This would expose the ranch to volatile costs of purchasing hay at market price.

**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-16970.

Based on FOF 8, 9, 10, 12, 13, and 19, 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 March 5, 2018, the remaining work to be completed consists of completing construction of the water system which includes, reconstructing or altering the Monitoring Well to meet the construction requirement contained within the permit; conducting a pump test, and depending on the results of that test either, installing a larger pump, deepening Well 1, and/or applying for a Permit Amendment to add an additional point of appropriation, and if approved, constructing an additional well; installing three



small pivots; installing additional pipeline to the pivots; and installing buried electrical power lines to the wells; meeting all permit conditions; which include submitting annual March static water level measurements, installing a monument and sign at Well 1, installing a dedicated measuring tube on Well 1, installing a sign at the Monitoring Well, and submitting a survey quality location of the Monitoring Well to the Department; and applying water to full beneficial use on the remaining 139.9 acres.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2027, 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-16970 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. 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 8 through 27, completion of construction and full application

of water to beneficial use can be accomplished by October 1, 2027, 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-16970 from October 26, 2017, to October 1, 2027.

Extend the time to apply water to beneficial use under Permit G-16970 from October 26, 2017, to October 1, 2027.

Subject to the following conditions:

## **LIMITATIONS AND CONDITIONS**

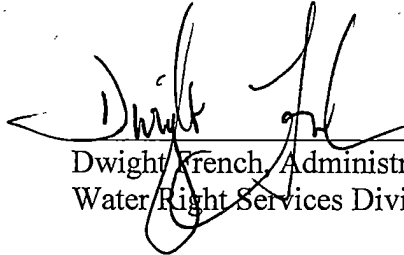
### **1. Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2023**. *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: June 26, 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 **August 10, 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  
Fax: 503-986-0901                              Salem, OR 97301-1266
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