

**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	)	<b>PROPOSED</b>
Permit G-17272, Water Right Application G-17068, in the	)	<b>FINAL ORDER</b>
name of Rupp Ranches	)	<b>TO DENY</b>

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Permit Information

Application:	G-17068
Permit:	G-17272
Basin:	7 – Umatilla / Watermaster District 5
Date of Priority:	June 10, 2008
Source of Water:	Well 1, Well 2, Well 3, and Well 4, in Columbia River Basin
Purpose or Use:	Irrigation use on 1,000 Acres
Maximum Rate:	12.5 cubic feet per second (cfs)

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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 complete construction of the water system from April 13, 2015, to October 1, 2020.
  
- Deny an extension of time to apply water to full beneficial use from April 13, 2015, 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  
Well 1 – UMAT 57044  
Well 2 – UMAT 57042  
Well 3 – UMAT 57041  
Well 4 – UMAT 57043  
cfs – cubic feet per second  
gpm – gallons per minute  
bls – below land surface  
AMSL – above mean sea-level

## **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 April 13, 2010, Permit G-16671 was issued by the Department. The permit authorizes the use of up to 12.5 cfs of water from Well 1, Well 2, and Well 3, in Columbia River Basin for irrigation use on 1,000 acres. The permit specified completion of construction and application of water was to be made on or before April 13, 2015.
2. On February 18, 2015, the Department approved Permit Amendment T-11586 (Special Order Volume 95, Page 93) authorizing an additional point of appropriation. A superseding Permit G-17272 was issued by the Department on February 18, 2015, to reflect the changes.

3. On March 29, 2016, the permit holder 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-17272 be extended from April 13, 2015, to October 1, 2020. This is the first permit extension requested for G-17272.
4. On April 4, 2017, notification of the Application for Extension of Time for G-17272 was published in the Department's Public Notice. No public comments were received regarding the extension application.
5. On August 2, 2018 and August, 3, 2018, the permit holder submitted additional information to supplement their Application for Extension of Time. The additional information included a map intended to illustrate the acres irrigated under the permit.

#### **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)]**

6. On March 29, 2016, 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)]**

7. Construction of the well began prior to April 13, 2015, as specified in the permit as being the date to apply water to full beneficial use.
8. According to the well log received by the Department on July 16, 2012, construction of UMAT 57041 (Well 3) began October 21, 2011.

Based on Finding of Fact (FOF) 7 and 8, the Department has determined that the prosecution of the construction of the well began prior to April 13, 2015.

#### **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>1</sup>*

9. Work was accomplished during the original development time frame under Permit G-17272 is as follows:

- competed construction UMAT 57042 (Well 2);
- competed construction UMAT 57043 (Well 4);
- competed construction UMAT 57044 (Well 1); and
- installed a pipe, pivots, and pumps.

10. Since April 13, 2015, the permit holder has installed an additional pivot.

Based on FOF 7, 8, and 9, the Department has determined that work has been accomplished within 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.*

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 water chemistry samples have been collected, (2) the record does not show that a Groundwater Characterization Report has been submitted, and (3) the record shows that the water user has allowed for excessive water level declines, as defined by Commission rule (OAR 690-08-0001(d)), being greater than 50 feet below the highest known water level within the groundwater reservoir, or part thereof.

12. On August 22, 2018, Department's Ground Water Section determined the highest known level within the affected part of the aquifer targeted by each well is as follows:

- Well 1 is 437.00 feet above mean sea-level (AMSL) as measured on February 18, 2014;
- Well 2 is 792.00 feet AMSL as measured on September 20, 2012;
- Well 3 is 844.83 feet AMSL as measured on September 20, 2002; and
- Well 4 is 476.80 feet AMSL as measured on March 13, 2013.

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<sup>1</sup> "Actual Construction" is defined in OAR 690-315-0020(3)(d)(A) and (B) as physical work performed toward completion of the water system which demonstrates the water right permit holder's good faith and intention to complete the project with reasonable diligence. Actual construction does not include planning a diversion system, formulating a business plan, securing financing, letting contracts, purchasing but not installing equipment, surveying, clearing land or planting crops.

13. According to static water level measurements, as of February 2018, water levels in each well is as follows:
- Well 1 is 344.97 feet AMSL as of February 21, 2018 (decline of 92.03 feet);
  - Well 2 is 658.81 feet AMSL as of February 4, 2018 (decline of 133.19 feet);
  - Well 3 is 659.86 feet AMSL as of February 21, 2018 (decline of 184.97 feet); and
  - Well 4 is 423.65 feet AMSL as of February 21, 2018 (decline of 53.15 feet).
14. OAR 690-008-0001(4)(d) defines “Declined Excessively” means any cumulative lowering of the water levels in a ground water reservoir or a part thereof which: (d) Constitutes a lowering of the annual high water level within a ground water reservoir, or part thereof, greater than 50 feet below the highest known water level.”

Based on FOF 11, 12, 13, and 14, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-17272:

1. “Groundwater samples shall be collected from water-bearing zones developed from each well. Samples shall be analyzed by a state certified laboratory for general chemistry (common ions, including fluoride), standard water-quality parameters (pH, dissolved solids, specific conductance) and for dating of groundwater (radiocarbon, stable isotopes, tritium and CFCs).”
2. “The permittee shall submit a report that characterizes the groundwater resource contained within the Columbia River Basalt Group developed under this permit. the report at a minimum shall address: 1) basalt stratigraphy and structure, including cross sections; 2) constant rate well testing and aquifer testing results and analyses; 3) groundwater chemistry and groundwater dating results; 4) mechanism and potential for natural recharge and discharge; 5) potential for sustainability of the groundwater resource; 6) water-level comparisons and analysis of potential for interference with senior wells and wells in Stage Gulch Critical Groundwater Area; and 7) potential for additional sustainable groundwater development in the area.”
3. “The water user shall not allow excessive decline, as defined in Commission rules, to occur within the aquifer as a result of use under this permit”

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 or previous extension conditions.*

15. According to the Application, as of March 29, 2016, a maximum rate of 6,300 gallons per minute (gpm) [14.0 cfs] of water has been appropriated; being 1,100 gpm [2.45 cfs] of water from Well 1, 1,800 gpm [4.0 cfs] of water from Well 2, 2,100 gpm [4.68 cfs] of water from Well 3, and 1,300 gpm [2.9 cfs] of water from Well 4, for irrigation of 989.0

acres. This exceeds the amount of water for irrigation use authorized under this permit. The authorized amount of water for irrigation use is 12.5 cfs.

16. According to the Application, the permit holder developed irrigation use on 879.0 acres by the year 2015.

Beneficial use of water has not been demonstrated under this permit as all permit conditions necessary to demonstrated beneficial use have not been satisfied by April 13, 2015.

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

17. An approximate total of \$2,920,928 has been invested. The costs included items associated land leveling, which are not “actual construction” of the water system 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 \$2,415,928 which is the total cost for complete development of this project.

Based on FOF 17, the Department has determined that the permit holder has made an investment, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

The Application provides evidence that work has been accomplished towards completion of the water system; the permit holder has not demonstrated compliance with permit conditions necessary to demonstrate beneficial use, 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-17272.

**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.

18. 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-17272. The determination of water availability was dependant upon the conditions contained in the permit to collect and analyze data pertaining to groundwater within the Columbia River Basalt Group and the potential for interference with senior water users and wells within the Stage Gulch Limited Groundwater Area.

**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).

19. The points of appropriation for Permit G-17272, located within the Columbia River Basin, are not located within a limited or critical groundwater area.
20. Columbia River is not located within or above any state or federal scenic waterway.
21. 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.

22. Columbia 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.

23. An approximate total of \$2,415,928 has been invested in the project.

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

Other economic interests dependent on completion of the project.

24. No other economic interests dependent on the 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.

25. On March 30, 2018, the Department's Ground Water Section determined that the resource cannot support additional development under Permit G-17292, due to annual water-level declines in the permitted wells that range from 8.85 feet to 26.0 feet.
26. On March 30, 2018, the Department's Ground Water Section determined that the reference levels for the permitted wells are as follows:
  - Well 1 (UMAT 57044) is 502.40 feet below land surface (bls)
  - Well 2 (UMAT 57042) is 243.00 feet bls;
  - Well 3 (UMAT 57041) is 239.30 feet bls; and
  - Well 4 (UMAT 57043) is 573.20 feet bls.

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

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

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

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

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

29. Unforeseen events that contributed to the extended the length of time needed to fully develop and perfect Permit G-17272, have not been identified.

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

30. The Application identifies a denial of the extension would result in undue hardship, as approximately \$3,000,000 have been invested in the project. Other potential sources of water which may be available include potential aquifer storage and recovery projects.

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

31. The permit was issued after the permit holder agreed to conditions being placed on the permit that would supply data and analysis which, in part, would provide evidence that the permitted use does not interfere with senior water users or wells within the Stage Gulch Critical Groundwater Area.

Based on Findings of Fact 11, 12, 13, 14, and 31, above, the Department finds that the Applicant has not demonstrated good faith as the water user has not demonstrated compliance with permit conditions intended to protect senior water users from interference caused by this water use, and



has allowed for excessive water-level declines. The Department has determined that, in the absence of the required data collection and analysis as conditioned in the permit, development and use of water under this permit cannot continue.

**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.*

32. As of March 29, 2016, the remaining work to be completed consists of meeting all permit conditions, which include collecting and analyzing water samples for water chemistry, and submitting a groundwater characterization report; and applying water to full beneficial use.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2020, 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-17272 is neither reasonable nor 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 not 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).

**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. The Application established that there has been construction, financial investment and reasonable diligence toward developing the project. The permit holder has not 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), because the permit holder has not complied with permit conditions requiring data-collection intended to establish grounds for regulation if the use authorized under this permit demonstrates interference with senior wells and/or well within the Stage Gulch Limited Groundwater Area, and has allowed for excessive declines in the aquifers as a result of use under this permit.

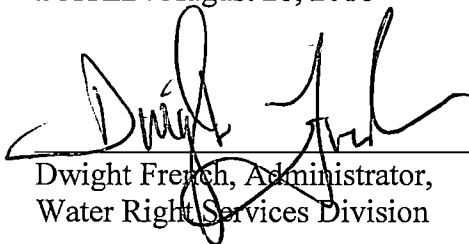
## PROPOSED ORDER

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

Deny the time to complete construction of the water system under Permit G-17272 from April 13, 2015, to October 1, 2020.

Deny the time to apply water to beneficial use under Permit G-17272 from April 13, 2015, to October 1, 2020.

DATED: August 28, 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 **October 12, 2018**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.
2. A written protest shall include:
  - a. The name, address and telephone number of the petitioner;
  - b. A description of the petitioner's interest in the proposed final order and if the protestant claims to represent the public interest, a precise statement of the public interest represented;
  - c. A detailed description of how the action proposed in the proposed final order would adversely affect or aggrieve the petitioner's interest;
  - d. A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;
  - e. Any citation of legal authority supporting the petitioner, if known;
  - f. Proof of service of the protest upon the water right permit holder, if petitioner is other than the water right permit holder; and

- g. The applicant or non-applicant protest fee required under ORS 536.050.
- 3. Within 60 days after the close of the period for requesting a contested case hearing, the Director shall:
  - a. Issue a final order on the extension request; or
  - b. Schedule a contested case hearing if a protest has been submitted, and:
    - 1) Upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or
    - 2) The applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests.

**Notice Regarding Service Members:** Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>

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- If you have questions about statements contained in this document, please contact Jeffrey D. Pierceall at (503) 986-0802.
  - If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at 503-986-0820.
  - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0900.
  - Address any correspondence to : Water Right Services Division  
725 Summer St NE, Suite A  
Salem, OR 97301-1266  
Fax: 503-986-0901
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