

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	)	PROPOSED
Permit G-17960, Water Right Application G-14594, in the	)	FINAL ORDER
name of Wayne O. Bennett and Barbra M Bennett	)	TO DENY

Permit Information

Application:	G-14594
Permit:	G-17960
Basin:	5 – Deschutes / Watermaster District 11
Date of Priority:	August 11, 1997
Source of Water:	two wells in Dry Creek Basin
Purpose or Use:	Irrigation use on 4.8 Acres
Maximum Rate:	0.06 cubic foot per second (cfs), being 0.056 cfs from Well 1 and 0.056 cfs from Well 2, provided further the total quantity diverted in combination with any other right perfected under Permit G-13426 shall not exceed 0.223 cfs for Well 1 and 0.223 cfs for Well 2

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.630 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315.

In Summary, the Department proposes to:

- Deny an extension of time to apply water to full beneficial use from October 1, 2018, to October 1, 2023.

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 foot per second

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 June 22, 1998, Permit G-13426 was issued by the Department. The permit authorizes the use of up to 0.238 cfs of water from two wells in Dry Creek Basin for irrigation use on 19.0 acres. The permit specified actual construction of the well was to begin by April 30, 1999, and complete application of water was to be made on or before October 1, 2002.
2. On April 4, 2013, an assignment from Merile Glass, to Nancy Schwartz and Peter Schell; Larry Deman; and Joshua Smith and Chelsea Thornton, was recorded in the records of the Water Resources Department.
3. On September 5, 2014, the Department issued a Final Order approving an Extension of Time to complete construction of the water system from October 1, 2002, to October 1, 2018.
4. On December 14, 2017, an assignment from Joshua Smith and Nancy Schwartz, to Peter Schell; Larry Deman; and Wayne and Barbra Bennett, was recorded in the records of the Water Resources Department.

5. On June 21, 2018, the Department issued a Final Order approving assignment of Water Right Permit and Issuance of Replacement Water Right Permits [Split A Permit] requested under Application T-12804. Permits G-17959, G-17960, and G-17961, were issued to supersede Permit G-13426.
6. On November 2, 2018, Wayne and Barbra Bennett, 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-17960 be extended from October 1, 2018, to October 1, 2023.
7. On November 13, 2018, notification of the Application for Extension of Time for G-17960 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)]

8. On November 2, 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)]

9. Actual construction of the well began prior to the April 30, 1999 deadline specified in the permit.
10. According to the Application for a Permit to use Groundwater submitted to the Department on August 11, 1997, CROO 2533 (Well 1) was completed in 1988, and CROO 334 (Well 2) was completed in 1991.
11. According to the well log received by the Department on July 29, 1988, construction of CROO 2533 (Well 1) began June 26, 1988.
12. According to the well log received by the Department on December 18, 1991, construction of CROO 334 (Well 2) began November 29, 1991.

Based on Finding of Fact (FOF) 9, through 12, the Department has determined that the prosecution of the construction of the well began prior to April 30, 1999.

Based on FOF 10, 11, and 12, construction of the wells authorized for use under Permit G-13426, were completed prior to permit issuance.

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 or previous extension.¹

13. Construction of the wells authorized for use under Permit G-13426 were completed prior to permit issuance.
14. During the time period of June 22, 1998, through April 3, 2013, work accomplished as identified in the Application for Extension of Time submitted on April 3, 2012, includes:
 - underground pipelines were installed; and
 - CROO 52472 (Well 3 unauthorized) was constructed.
15. During the most recent extension period, being from October 1, 2002, to October 1, 2018, the following was accomplished:
 - underground pipelines were installed; and
 - CROO 54532 (Well 4 unauthorized) was constructed.

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, and previous extension conditions.

16. The Department has considered the permit holder’s compliance with conditions, and has identified the following concerns: (1) the record does not show that a Permit Amendment

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.

was submitted within six months of the issuance of the Final Order approving the Extension of Time issued on September 5, 2014, requesting authorization of the use of water from CROO 52472 (Well 3 unauthorized); (2) the record does not show that a complete Progress report was submitted to the Department within 30 days of October 1, 2017; and (3) the incomplete Progress report that was submitted on September 20, 2017, identified CROO 54532 (Well 4 unauthorized) was constructed and used under Permit G-13426.

Based on FOF 16, the Department has determined that the permit holder has not demonstrated compliance with following conditions as required by Permit G-13426 and the Final Order approving an Extension of Time issued on September 5, 2014:

- “The permit holder shall install meters on each of the permitted wells and submit a permit amendment application to seek authorization of a third well within six months of the Department’s issuance of a Final Order approving the permit extension. The permit holder shall provide documentation of the installation of flow meters on each well as a prerequisite of the approval of any permit amendment and for the Department’s consideration of beneficial use of water under the permit.” and
- “The permit holder must submit a completed Progress Report Form to the Department by October 1, 2017.”

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 or previous extension conditions.

17. A maximum rate of 0.06 cfs of water has been appropriated from CROO 52472 (Well 3 unauthorized) for irrigation of 3.8 acres under Permit G-17960.
18. A maximum rate of 0.056 cfs of water has been appropriated from CROO 54532 (Well 4 unauthorized). No irrigation has been identified in the Application for water used from this well.
19. A maximum rate of 0.056 cfs of water has been appropriated from CROO 334 (Well 2). No irrigation has been identified in the Application for water used from this well.

Based on FOF 17 and 18, the Department has determined that illegal water use has occurred from CROO 52472 (Well 3 unauthorized) and CROO 54532 (Well 4 unauthorized) under Permit G-17960, as these wells are not authorized for use under any permit originating from Permit G-13426, including Permit G-17960.

Based on FOF 19, the Department has determined that beneficial use of water has not yet been demonstrated as no water has been applied for irrigation from CROO 334 (Well 2).

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

20. An investment of approximately \$6,600 has been made, which is the total projected cost identified in the Application for complete development of this project.

Based on FOF 20, 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 that no work has been accomplished towards completion of the water system; the permit holder has demonstrated noncompliance 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-17960.

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.

21. 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-17960; 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).

22. The points of appropriation for Permit G-17960, located within the Dry Creek Basin, are located within the Upper Deschutes Groundwater Mitigation Area.
23. Dry Creek is located above the Deschutes Scenic Waterway.
24. 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.

25. Dry Creek 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.

26. An approximate total of \$6,600 has been invested in the project.

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

Other economic interests dependent on completion of the project.

27. 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.

28. 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)]

29. 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)]

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

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

31. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-17960.

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

32. A denial of the extension would not result in undue hardship.

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

33. The Application does not provide evidence of good faith of the appropriator under Permit G-17960.

Based on Findings of Fact 14, through 19, 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.

34. As of November 2, 2018, the Permit Holder states that construction is complete.

Based on FOF 16, 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 submit a Permit Amendment, as required by the Final Order approving an Extension of Time under Permit G-13426, issued on September 5, 2014.

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

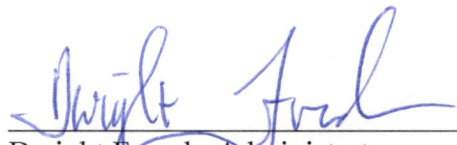
1. The permit holder has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The permit holder has not complied with the time allowed for construction work under the permit pursuant to ORS 537.630 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. The Application established that there has been 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-17960 from October 1, 2018, to October 1, 2023.

DATED: December 18, 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 **February 3, 2019**, 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;

