

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-15114, Water Right Application G-15573, in the)	FINAL ORDER
name of John and Marlene Bles)	TO DENY

Permit Information

Application:	G-15573
Permit:	G-15114
Basin:	14 – Klamath / Watermaster District 17
Date of Priority:	August 7, 2001
Source of Water:	a well in Sprague River Basin
Purpose or Use:	Irrigation of 160.2 Acres
Maximum Rate:	2.0 cubic feet per second (cfs)

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, 2016, to October 1, 2021.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
Well – KLAM 1434
cfs – cubic feet 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 July 24, 2002, Permit G-15114 was issued by the Department. The permit authorizes the use of up to 2.0 cfs of water from a well in Sprague River Basin for irrigation of 160.2 acres. The permit specified complete application of water was to be made on or before October 1, 2006.
2. On May 9, 2006, an assignment by proof from Lone Pine Ranch of Southern Oregon to John and Marlene Bles, was recorded in the records of the Water Resources Department.
3. Two prior permit extensions have been granted for Permit G-15114. The most recent extension request resulted in the completion date for full application of water being extended from October 1, 2010, to October 1, 2016.

4. On November 16, 2018, the permit holder 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-15114 be extended from October 1, 2016, to October 1, 2021.
5. On December 4, 2018, notification of the Application for Extension of Time for G-15114 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)]

6. On November 16, 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)]

7. Construction of the well began prior to permit issuance.
8. According to the well log received by the Department on January 12, 1970, construction of KLAM 1434 (Well) began September 8, 1969.

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 October 1, 2006.

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 previous extension.¹

9. The Application does not identify any construction towards the completion of the water system during the most recent extension period, being from October 1, 2010, to October 1, 2016.

Based on FOF 9, The Department cannot find evidence of progress made towards completion of the water development and application of water to full beneficial use during the most recent Extension of Time period, being from October 1, 2010, through October 1, 2016. Therefore, the Department cannot find good cause or reasonable diligence towards the complete application of water to a beneficial use under G-15114.

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

The water right permit holder's conformance with the permit conditions.

10. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns.

The Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-15114.

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.

11. A maximum rate of 1.72 cfs of water has been appropriated from the Well for irrigation of 138.0 acres.
12. There is no explanation why full beneficial use of water under G-15114 has been delayed.

Based on FOF 11, and 12, the Department has determined that beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2016.

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

13. The Application identifies an investment of \$120,000 has been made. The costs included items associated with repair and maintenance costs of a system, installation of fencing, and land preparation and seeding 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 \$15,000

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.

which is about 11 percent of the total projected cost for complete development of this project. The Application identifies an additional \$119,000 investment is needed to complete this project, which includes applying for a Permit Amendment to authorize an additional well, construction of an additional well, installation of mainline, and installation of irrigation equipment.

Based on FOF 13, the Department has determined that the permit holder had made an investment towards the application of water to a beneficial use.

14. The Application does not identify an investment in development of the water system during the most recent Extension of Time period, being October 1, 2010, through October 1, 2016.

Based on FOF 14, the Department has determined that the permit holder has not made an investment towards the complete application of water to the beneficial use during the most recent Extension of Time period, being October 1, 2010, through October 1, 2016, which does not provide evidence of good cause or reasonable diligence towards the complete application of water to the beneficial use.

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

The Application does not provide evidence that work has been accomplished towards completion of the water system during the most recent Extension of Time period, being October 1, 2010, through October 1, 2016; the permit holder has demonstrated compliance with permit conditions, and; beneficial use of water has been demonstrated on 138.0 acres. The Department has determined the applicant has not demonstrated reasonable diligence in previous performance under Permit G-15114.

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.

15. 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-15114; 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).

16. The point of appropriation for Permit G-15114, located within the Sprague River Basin, is not located within a limited or critical groundwater area.
17. Sprague River is located above the Klamath Scenic Waterway.
18. 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.

19. Sprague 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.

20. An approximate total of \$15,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

21. Other economic interest in the completion of the development of the permit have not been identified.

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

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

22. Other factors relevant to the determination of the market and present demand for water and power have been identified. The Application identifies that the Well has been identified as

being hydraulically connected with surface water, which has resulted in regulation of use of water from the Well under Permit G-15114, during the 2018 irrigation season.

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.

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

24. The Application identifies that delay in the timely completion of the development of the project and/or timely application of water to full beneficial was caused by the Department's regulation of the Well under the permit, which resulted in uncertainty of water availability.
25. The Application does not identify any government action which prevented the permit holder from pursuing full development of the water system.

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

26. Unforeseen events that contributed to the extended the length of time needed to fully develop and perfect Permit G-15114, have not been identified.

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

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

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

28. The Application does not provide evidence of good faith of the appropriator under Permit G-15114.

Based on Findings of Fact 9, and 14, 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.

29. As of November 16, 2018, the remaining work to be completed consists of applying for a Permit Amendment to add an additional point of appropriation more than one-mile from surface water, completing construction of the water system, meeting all permit conditions, and applying water to full beneficial use.

Based on FOF 9, and 14, 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

permit holder did not pursue additional development of the water system during the most recent Extension of Time period, being October 1, 2010, through October 1, 2016.

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 construction, no financial investment or reasonable diligence toward developing the project during the most recent Extension of time period, being October 1, 2010, through October 1, 2016. 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).

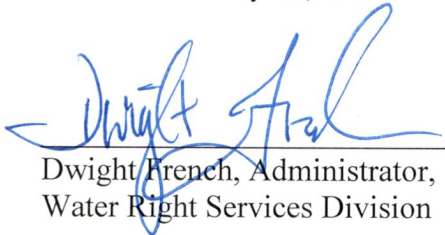
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PROPOSED ORDER

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-15114 from October 1, 2016, to October 1, 2021.

DATED: January 15, 2019


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 **March 1, 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;
 - 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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