

**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-13887, Water Right Application G-14960, in	)	FINAL
the name of Dan Nichols	)	ORDER

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Permit Information

Application:	G-14960
Permit:	G-13887
Basin:	12 – Malheur Lake / Watermaster District 10
Date of Priority:	April 1, 1999
Source of Water:	a well in the Malheur Lake Basin
Purpose or Use:	Irrigation of 105.2 acres
Maximum Rate:	1.31 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 apply water to full beneficial use from October 30, 2018, to October 1, 2019<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**

Application – Application for Extension of Time  
Department – Oregon Department of Water Resources  
FOF – Finding of Fact  
PFO – Proposed Final Order  
Well – authorized well  
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.

**OAR 690-315-0050(5)** states that extension orders may include, but are not limited to, any condition or provision needed to: ensure future diligence; mitigate the effects of the subsequent development on competing demands on the resource; and periodically document the continued need for the permit.

**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 April 27, 2001, Permit G-13887 was issued by the Department, The permit authorizes the use of up to 1.31 cfs of water from a well in the Malheur Lake Basin for irrigation of 105.2 acres. The permit specified actual construction of the well to begin by February 22, 2002, and complete application of water was to be made on or before October 1, 2005.

2. On May 4, 2009, an assignment by proof from Marie, John, Elmer, and Mary Watts to Dan Nichols was recorded in the records of the Water Resources Department.
3. One prior permit extension has been granted for Permit G-13887. The most recent extension request, which was submitted on October 3, 2014, resulted in the completion dates for construction and full application of water being extended from October 1, 2005, to October 30, 2018.
4. On May 9, 2016, the permit holder submitted an Application for Permit Amendment requesting additional points of appropriation and a change in place of use under Permit G-13887. The Application for Permit Amendment was assigned file T-12379.
5. On November 19, 2018, the permit holder, Dan Nichols, 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-13887 be extended from October 30, 2018, to October 1, 2023.
6. On December 4, 2018, notification of the Application for Permit G-13887 was published in the Department’s Public Notice. No public comments were received regarding the 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)]**

7. On November 19, 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. Actual construction of the well began prior to the February 22, 2002 deadline specified in the permit.
9. According to the Application for a Permit to Use groundwater, received by the Department on April 1, 1999, construction of the authorized well (Well 4) was complete.

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 February 22, 2002.

**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.<sup>2</sup>*

10. During the most recent extension period, being from October 3, 2014, to October 1, 2018, no physical construction was accomplished, however, Permit Amendment T-12379 was submitted to the Department.

The Application provides evidence of progress 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 conditions.*

11. The Department has considered the permit holder’s compliance with conditions, and has identified the following concern, water usage reports have not been regularly submitted to the Department, the record shows the Department has received 2000-2004 and 2007-2008.

Based on FOF 11, the Department has determined that the permit holder has demonstrated minimum compliance with permit conditions as required by Permit G-13887.

**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.**

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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.

**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.*

12. A maximum rate of 1.31 cfs of water has been appropriated from Well 4 for irrigation of 105.2 acres.
13. In addition to the rate appropriated from Well 4, the permit holder has appropriated 1.31 cfs of water from three additional wells for irrigation of 105.2 acres. Permit Amendment T-12379 proposes to add these three additional wells.
14. Delay of full beneficial use of water under Permit G-13887 was due, in part, the consideration of Permit Amendment T-12379, was not completed prior to the date for complete application of water, being October 1, 2108.

Beneficial use of water has been demonstrated from Well 4 under this permit as all permit conditions were satisfied by October 30, 2018.

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

15. An investment of approximately \$273,000, has been made, which is the total projected cost for complete development of this project.

Based on FOF 15, 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 work has been accomplished towards completion of the water system; the permit holder has demonstrated compliance with permit conditions, a financial investment has been made, and; beneficial use of water has been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit G-13887.

**The Market and Present Demands for Water [OAR 690-315-0040(4)(a-f)]**

*The Department's determinations of market and present demand for water or power to be supplied shall consider the requirements set forth under OAR 690-315-0040(4)(a-f). In accordance with OAR 690-315-0040(4), the Department shall consider, but is not limited to, the following factors when determining the market and the present demand for water or power to be supplied:*

- *(a) The amount of water available to satisfy other affected water rights and scenic waterway flows;*
- *(b) Special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water*

*management problem areas or water quality limited sources established under 33 U.S.C. 1313(d);*

- *(c) The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife;*
- *(d) Economic investment in the project to date;*
- *(e) Other economic interests dependent on completion of the project; and*
- *(f) Other factors relevant to the determination of the market and present demands for water and power.*

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

The amount of water available to satisfy other affected water rights and scenic waterway flows.

16. A review of the amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit G-13887; furthermore, water availability for other affected water rights and scenic waterway flows after the permit was issued is determined when an Application for a new water right is submitted.

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

Special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d).

17. The point of appropriation for Permit G-13887, and the additional points of appropriation requested under Permit Amendment T-12379, are located in the Greater Harney Valley Groundwater Area of Concern (GHVGAC) which was established to ensure that groundwater in the GHVGAC is appropriated within the capacity of the resource and that new appropriations of groundwater assure the maintenance of reasonably stable groundwater levels and prevent depletion of the groundwater resource. Current data, comprising substantial evidence, indicate that groundwater levels are declining in areas of the GHVGAC. Additional allocation of groundwater within the GHVGAC may exacerbate these declines. A comparison between estimated annual recharge and previously allocated groundwater volumes indicates that groundwater is fully allocated in some areas of the basin. 690-512-0020(1)
18. Mahleur Lake is not located within or above any state or federal scenic waterway.
19. 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.

20. Mahleur Lake 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.

21. An approximate total of \$273,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

22. 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.

23. 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)]**

24. 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)]**

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

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

26. The amount of time it has taken to complete the review of Permit Amendment T-12379, has delayed the completion of the project.

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

27. A denial of the extension would result in undue hardship, in that the permit holder has submitted Permit Amendment T-12379, and a denial of the Extension of Time would not allow for completion of the review of the Permit Amendment.

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

28. The Application provides evidence of good faith of the appropriator under Permit G-13887, and Permit Amendment T-12379.

Based on FOF 8, 9, 10, 12, and 15, 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.*

29. As of November 19, 2018, no work is remaining to be completed. The Extension of Time is only necessary to allow for the completion of the review of Permit Amendment T-12379, and if approved, one season of use to demonstrate beneficial use from any of the additional points of appropriation that may be authorized, at the location which is being requested to be amended through the Permit Amendment T-12379. To accomplish beneficial use from any additional point of appropriation, the permit holder must demonstrate compliance with all permit conditions, including the installation of totalizing flow meters at each additional point of appropriation, and reporting of water use from each point of appropriation that may be authorized under Permit Amendment T-12379.

Given that no development is left to occur, and that the Extension of Time is necessary for the completion of the review of Permit Amendment T-12379, the Department has determined that the permit holder's request to have until October 1, 2023, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-13887 is neither reasonable and necessary. Based on FOF 29, the Department has determined that an Extension of Time from October 30, 2018, to October 1, 2019, is sufficient for the Department to complete the review of Permit Amendment T-12379, and if approved, is sufficient enough time for the permit holder to demonstrate beneficial use under permit G-13887, as amended by Permit Amendment T-12379.

**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. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to ensure future diligence, and/or mitigate the effects



of the subsequent development on competing demands on the resource. Based on Findings of Facts 13, and 29, the Department determined the need to place a “Permit Amendment Condition” on this extension of time in order to ensure diligence is exercised in the development and perfection of water use permit. This condition, specified under Item 1 of the “Conditions” section of this PFO, was determined to be necessary because of the use of an unauthorized points of appropriation and place of use has occurred under this permit.

2. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to ensure future diligence, and/or mitigate the effects of the subsequent development on competing demands on the resource. Based on FOF 10, 11, and 17, the Department determined the need to place a “Last Extension Condition” on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. This condition, specified under Item 2 of the “Conditions” section of this PFO, was determined to be necessary due to the completion of the review of Permit Amendment T-12379 is all that is necessary for the completion of the project, and the permit holder has not demonstrated compliance with the permit requirement to submit a report of the amount of water use to the Department annually.

### **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 actual 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 29, full application of water to beneficial use can be accomplished by October 1, 2019, 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, but the extension is conditioned to ensure future diligence and/or mitigate the effects of the subsequent development on competing demands on the resource and is granted only for the reasonable time necessary to complete water development and apply water to beneficial use. OAR 690-315-0050(5).
5. The applicant has demonstrated good cause for the extension, but the extension must be conditioned to ensure this is the last extension granted in order to ensure future diligence; OAR 690-315-0050(5).

## 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 apply water to beneficial use under Permit G-13887 from October 30, 2018, to October 1, 2019.

Subject to the following conditions:

### LIMITATIONS AND CONDITIONS

1. **Permit Amendment Condition**

No water may be use from any well not currently authorized under Permit G-13887. If additional wells are authorized by the approval of Permit Amendment T-12379, the water user must demonstrate beneficial use of water from the newly authorized points of appropriation, by October 1, 2019.

2. **Last Extension Condition**

This shall be the last extension of time granted for Permit G-13887. Any future extensions of time request shall be denied.

DATED: January 22, 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 8, 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;



Mailing List for Extension PFO Copies

PFO Date: January 22, 2019

Copies Mailed

Application: G-14960

By: \_\_\_\_\_

Permit: G-13887

On: \_\_\_\_\_

Original mailed to Applicant:

Dan Nichols  
48642 McCoy Creek Rd.  
Diamond, OR 97722

Copies sent to:

1. WRD - App. File G-14960/ Permit G-13887
2. Agent or CWRE representing the Permit Holder
3. WRD - Permit Amendment File T-12379

Fee paid as specified under ORS 536.050 to receive copy:

4. None

Receiving via e-mail (10 AM Tuesday of signature date)  
(DONE BY EXTENSION SPECIALIST)

5. WRD - Watermaster District 10, JR Johnson
6. WRD - Corey Courchane (Caseworker T-12379)

CASEWORKER: JDP