

Oregon Water Resources Department
Water Right Services Division

Application for Extension of Time

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| In the Matter of the Application for an Extension of Time |) | PROPOSED |
| for Permit G-17548, Water Right Application G-16816, in the name |) | FINAL |
| of Tim Hellberg, and Trina Hellberg Miles and Darrell Miles |) | ORDER |

Permit Information

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| Application: | G-16816 |
| Permit: | G-17548 |
| Basin: | 7 – Umatilla / Watermaster District 5 |
| Date of Priority: | March 16, 2007 |
| Source of Water: | two wells within the Columbia River Basin |
| Purpose or Use: | Irrigation use on 22.8 acres and temperature control |
| Maximum Rate: | 0.438 cubic foot per second (cfs), being no more than 0.28 cfs for irrigation |

Please read this Proposed Final Order in its entirety.

In Summary, the Department proposes to:

- Grant an extension of time to complete construction of the water system from October 1, 2017, to October 1, 2020.
- Grant an extension of time to apply water to full beneficial use from October 1, 2017, to October 1, 2020¹.

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.

¹Pursuant 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 1 – MORR 1237
Well 2 – MORR 1234
cfs - cubic foot per second
gpm - gallons per minute

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 August 7, 2008, Permit G-16366 was issued by the Department. The permit authorized the use of up to 0.438 cfs of water from Well (MORR 1237) within the Columbia River Basin, for irrigation use on 22.8 acres and temperature control, being no more than 0.28 cfs for irrigation. The permit specified construction of the water system was to be completed by October 1, 2012, and complete application of water was to be made on or before October 1, 2012.
2. On January 9, 2017, the Department approved Permit Amendment T-11452 (Special Order Volume 103, Page 714) authorizing an additional point of appropriation under Permit G-16366 (modified by Permit Amendment T-11452). A superseding Permit G-17548 was issued by the Department on January 9, 2017, to reflect the changes.

3. One prior permit extensions has been granted for Permit G-17548. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2012, to October 1, 2017.
4. On November 26, 2018, the permit holder, Tim Hellberg, 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-17548 be extended from October 1, 2017, to October 1, 2020.
5. On December 11, 2018, notification of the Application for Permit G-17548 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)]

6. On November 26, 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 March 18, 1971, construction of MORR 1237 (Well 1) began March 2, 1971.

Based on Finding of Fact (FOF) 8 and 9, the Department has determined that the prosecution of the construction of the well began prior to October 1, 2012.

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.²

9. During the most recent extension period, being from October 1, 2012, to October 1, 2017, the following was accomplished:

- installed a pivot, mainline and electrical power; and
- gained approval of a Permit Amendment authorizing the use of water from MORR 1234 (Well 2).

Based on FOF 9, the Department has determined that work has been accomplished during the last extension period, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use .

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

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

10. 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 meter or other suitable measuring device has been installed on Well 2, and (2) the record does not show that annual water use reports have been submitted for Well 2.

Based on FOF 10, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-17548:

- “Before water use may begin under this permit, the permittee shall install a totalizing flow meter or other suitable measuring device as approved by the Director at each point of appropriation.” and
- “The permittee shall keep a complete record of the amount of water used each month and shall submit a report which includes the recorded water use measurements to the Department annually”

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.

² “**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.

11. A maximum rate of 500 gallons per minute (gpm) [1.11 cfs] of water has been appropriated, being 200 gpm [0.45 cfs] from Well 1, and 300 gpm [0.67 cfs] from Well 2 for irrigation of 14.8 acres. This exceeds the amount of water authorized for irrigation use authorized under this permit, being 0.438 cfs, however, Well 2 is utilized under Permit G-15807 and Certificate 88342.
12. Delay of full beneficial use of water under Permit G-17548 was due, in part, to the permit holder's failure to install a totalizing flow meter on Well 2.

Based on FOF 11, the Department has determined that beneficial use of water has not yet been demonstrated from Well 2 under this permit because not all permit conditions were satisfied by October 1, 2017.

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

13. An investment of approximately \$46,700, which is about 97 percent of the total projected cost for complete development of this project. An additional \$1,200 investment is needed for the completion of this project.

Based on FOF 13, the Department has determined that the permit holder had made an investment, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

The Application provides evidence of progress towards completion of the water system; a financial investment has been made; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use has not been demonstrated. The Department has determined the applicant has demonstrated the minimum necessary for the Department to find reasonable diligence towards complete application of water to a beneficial use.

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

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

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

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

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

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

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

14. A review of the amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit G-17548; furthermore, water availability for other affected water rights and scenic waterway flows after the permit was issued is determined when an Application for a new water right is submitted.

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

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

15. The points of appropriation for Permit G-17548, located within the Columbia River Basin, is located within Ordinance Basalt Critical Groundwater Area.
16. Columbia River is not located within or above any state or federal scenic waterway.
17. 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.

18. 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.

19. An approximate total of \$46,700 has been invested in the project.

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

Other economic interests dependent on completion of the project.

20. There are no other economic interests dependent on completion of the project identified.

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

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

21. No other factors relevant to the determination of the market and present demand for water and power have been identified.

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

22. 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)]

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

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

24. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-17548.

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

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

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

26. The Application provides evidence of good faith of the appropriator under Permit G-17548.

Based on FOF 7, 8, 9, 11, and 13, 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.

27. As of November 26, 2018, the remaining work to be completed consists of installing a totalizing flow meter on Well 2, meeting all permit conditions, which include submitting annual water use reports to the Department; 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-17548 is both reasonable and necessary.

Good Cause [OAR 690-315-0040(1)(d)]

The Department must find that there is "good cause" to approve the extension. In making a "good cause" finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).

The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and fair and reasonable return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the permit holder had no control, whether denial of the extension will result in undue hardship to the applicant and whether there are no other reasonable alternatives for meeting water use needs, any other factors relevant to a determination of good cause, and has determined that the applicant has shown that good cause exists for an extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

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 7 through 26, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2020, 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 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.

continued on following page

PROPOSED ORDER

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

Extend the time to complete construction of the water system under Permit G-17548 from October 1, 2017, to October 1, 2020.

Extend the time to apply water to beneficial use under Permit G-17548 from October 1, 2012, to October 1, 2020.

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;
 - 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:

