

**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 FINAL ORDER
for Permit G-17506, Water Right Application G-15834, in)	
the name of Wood River District Improvement Co and Roger)	
Nicholson/Agir-Water LLC)	

Permit Information

Application:	G-15834
Permit:	G-17506
Basin:	14 – Klamath / Watermaster District 17
Date of Priority:	September 5, 2002
Source of Water:	six wells in Anna Creek Basin
Purpose or Use:	Supplemental Irrigation of 2,310.1 acres
Maximum Rate:	28.88 cfs cubic feet per second (cfs)

Please read this Proposed Final Order in its entirety.

In Summary, the Department proposes to:

- Grant an extension of time to apply water to full beneficial use from October 1, 2018, to October 1, 2023¹.

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
UKBCA - Upper Klamath Basin Cooperative Agreement
Well 1A – KLAM 59974
Well 1 - KLAM 58286
Well 2 – KLAM 59916
Well 3 - KLAM 59319
Well 4 - KLAM 56638 / KLAM 59741
Well 5 - KLAM 57662
cfs - cubic feet 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 16, 2004, Permit G-15708 was issued by the Department, according to the terms of a settlement agreement. Superseding Permit G-15744 was issued October 21, 2004. The permit authorized the use of up to 28.88 cfs cfs of water from five wells in Anna Creek Basin for supplemental irrigation of 2,310.1 acres. The permit specified complete application of water was to be made on or before October 1, 2008.

2. On August 25, 2005, a partial assignment from Wood River District Improvement Co. to Roger Nicholson and Agri-Water, LLC was recorded in the records of the Water Resources Department.
3. On June 25, 2008, the Department approved Permit Amendment T-10641 (Special Order Volume 75, Page 214) authorizing a change in the point of appropriation and a change in place of use under Permit G-15744 (modified by Permit Amendment T-10641) which is hereafter referred to simply as Permit G-15744.
4. On June 23, 2009, the Department approved an Extension of Time under Permit G-15744, resulting in the completion date for full application of water being extended from October 1, 2008, to October 1, 2018.
5. On February 9, 2012, the Department approved Permit Amendment T-11263 (Special Order Volume 87, Page 53) authorizing an additional point of appropriation under Permit G-15744 (modified by Permit Amendment T-11263), a superseding Permit G-16886 was issued by the Department on February 9, 2012, to reflect the changes.
6. On October 7, 2016, the Department approved Permit Amendment T-12010 (Special Order Volume 103, Page 81) authorizing a change in point of appropriation under Permit G-16886 (modified by Permit Amendment T-10210), a superseding Permit G-17506 was issued by the Department on On October 7, 2016, to reflect the changes.
7. On August 1, 2018, Lee Traynham, president of Wood River District Improvement Co, 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-17506 be extended from October 1, 2018, to October 1, 2023.
8. On August 28, 2019, notification of the Application for Permit G-17506 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)]

9. On August 1, 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)]

10. Construction of the well began prior to October 1, 2008, as specified in the permit as being the date to apply water to full beneficial use.

11. According to the well log received by the Department on September 2, 2008, construction of KLAM 56638 began August 26, 2008.

Based on Finding of Fact (FOF) 10 and 11, the Department has determined that the prosecution of the construction of the well began prior to October 1, 2008.

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

12. During the most recent extension period, being from October 1, 2008, to October 1, 2018, the following was accomplished:
- constructed KLAM 57662 (Well 5);
 - constructed KLAM 58286 (Well 1);
 - constructed KLAM 59319 (Well 3);
 - deepened KLAM 56638 under KLAM 59741 (Well 4)
 - constructed KLAM 59974 (Well 1A); and
 - constructed KLAM 59916 (Well 2);

Based on FOF 12, 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.

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.

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

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

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

Based on FOF 13, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-17506.

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.

14. A combined maximum rate of 28.88 cfs of water has been appropriated, being no more than 4,500 gallons per minute (gpm) [10.03 cfs] from Well 1A, 5,000 gpm [11.14 cfs] from Well 1, 3,000 gpm [6.68 cfs] from Well 2, 3,000 gpm [6.68 cfs] from Well 3, 4,500 gpm [10.03 cfs] from Well 4, and 5,000 gpm [11.14 cfs] from Well 5.
15. There is no explanation why full beneficial use of water under G-17506 has been delayed.

Based on FOF 13, and 14, the Department has determined that beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2018.

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

16. An investment of approximately \$1,859,714, has been made, which is about 79 percent of the total projected cost for complete development of this project. An additional \$505,500 investment is needed for the completion of this project.

Based on FOF 16, 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-17506.

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.

17. 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-17506; 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).

18. The points of appropriation for Permit G-17506, located within the Anna Creek Basin, is not located within a limited or critical groundwater area.
19. Anna Creek is located above the Klamath Scenic Waterway.
20. 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.

21. Anna Creek is located within an area ranked “highest” 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.

22. An approximate total of \$1,859,714 has been invested in the project.

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

Other economic interests dependent on completion of the project.

23. Other economic interests dependent on completion of the project include member landowners within the district who receive water under this permit.

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

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

24. On December 28, 2017, the Upper Klamath Basin Cooperative Agreement (UKBCA) was terminated. The UKACB was a cooperative agreement between water users upstream from Klamath Lake and not affiliated with the Bureau of Reclamation's Klamath Project, the State of Oregon, and the Klamath Tribes, to reach a water-sharing and habitat restoration agreement. Contained within the UKBCA are provisions intended to stay regulation of ground water wells within specific radius from the gaining reaches of surface water streams, including Well 1, Well 2, and Well 3, authorized for use under this permit. The terms of the UKBCA were incorporated in Oregon Administrative Rule Chapter 690, Division 25. Termination of the UKBCA removed these provisions resulting in the Division 25 rules being invalidated, and regulation of these wells under this permit due to calls from senior water right holders to satisfy the uses under their water rights.

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

25. 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)]

26. The delay in the timely completion of the development of the project was due in part to the Division 25 rules being invalidated.

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

27. Unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-17506, in that the permit holders did not anticipate the UKBCA and the resulting rules would not remain in effect.

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

28. A denial of the extension would result in undue hardship, in that the permit holder has developed the water use in accordance with their permit and the provisions of the UKBCA, making a significant investment in the construction of wells that may continue to be regulated in the future. The wells constructed under this permit are intended to provide supplemental irrigation water to land that would not receive their full allocation of surface water due to regulatory efforts in the Klamath Basin, and therefore represent the only other source available to maintain irrigation on these lands.

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

29. The Application provides evidence of good faith of the appropriator under Permit G-17506.

Based on FOF 10, through 16, and 22, 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.

30. As of August 1, 2018, the remaining work to be completed consists of requesting authorization of additional wells through a Permit Amendment, and if approved, constructing the newly authorized wells, completing construction of the water system, meeting all permit conditions, 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, 2023, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-17506 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 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 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 10, through 29, full application of water to beneficial use can be accomplished by October 1, 2023, 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.
5. The applicant has demonstrated good cause for the extension.

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-17506 from October 1, 2018, to October 1, 2023.

DATED: January 8, 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 **February 22, 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:

