

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)
Permit G-17441, Water Right Application G-16867, in the)
name of Golden Rule Farms, Inc)

**PROPOSED
FINAL ORDER
TO DENY**

Permit Information

Application: G-16867
Permit: G-17441
Basin: 12 – Malheur Lake / Watermaster District 10
Date of Priority: May 23, 2007
Source of Water: three wells in Mahleur Lake Basin
Purpose or Use: Irrigation use on 160.0 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 complete construction of the water system from October 1, 2018, to October 1, 2019.

- Deny an extension of time to apply water to full beneficial use from October 1, 2018, to October 1, 2019.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
Well - HARN 51693
Well 1 – HARN 51904
Well 2 – HARN 51924
Well 3 - HARN 50358
Well 18 - HARN 50777
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 September 11, 2008, Permit G-16376 was issued by the Department. The permit authorizes the use of up to 2.0 cfs of water from a well in Mahleur Lake Basin for irrigation use on 160.0 acres. The permit specified completion of construction, and complete application of water was to be made on or before October 1, 2012.
2. On January 21, 2014, an assignment by proof from Tracy Hill, to Helen Den Hoed was recorded in the records of the Water Resources Department.
3. One prior permit extension has been granted for Permit G-16376. The extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2012, to October 1, 2018.

4. On May 21, 2015, the Department approved Permit Amendment T-11828 (Special Order Volume 95, Page 828) authorizing a change in the point of appropriation, an additional point of appropriation, and a change in the place of use under Permit G-16376 (modified by Permit Amendment T-11828). Superseding Permit G-17356 was issued by the Department on May 21, 2015, to reflect the changes. On May 27, 2015, superseding Permit G-17441 was issued to describe a correcting order for Permit Amendment Application T-11828, to correctly describe the location of Well 2 (HARN 51924). Permit G-17441 authorizes the use of up to 2.0 cfs of water from three wells in Mahleur Lake Basin for irrigation use on 160.0 acres.
5. On August 8, 2016, an assignment by proof from Helen Den Hoed, to Golden Rule Farms, Inc., was recorded in the records of the Water Resources Department.
6. On March 16, 2017, Permit Amendment T-12609, was filed by Golden Rule Farms, Inc., to change the points of appropriation and the place of use under Permit G-17441. The application is currently pending review.
7. On November 19, 2018, Timothy P. Puckett, president of Golden Rule Farms, Inc, 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-17441 be extended from October 1, 2018, to October 1, 2019.
8. On January 15, 2019, notification of the Application for Permit G-17441 was published in the Department’s Public Notice. Multiple public comments were received regarding the Application.
9. In summary, most of the commenters are opposed to the extension of time, and subsequent permit amendment because groundwater levels in the area where the permit is being utilized have experienced excessive decline, and there is concern over the effect of development of this permit on domestic water supply wells.
10. One comment was received from WaterWatch of Oregon, which addressed additional concerns, including illegal use of water under the permit, and lack of condition compliance.

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)]

11. 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)]

12. Construction of the well began prior to October 1, 2012, as specified in the permit as being the date to apply water to full beneficial use.
13. According to the well log received by the Department on March 8, 2010, construction of HARN 51693 (Well) began February 18, 2010.

Based on Finding of Fact (FOF) 12, and 13, 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.

14. No additional work was accomplished, as authorized by Permit G-17441, during the previous extension of time period.

Based on FOF 14, the Department cannot find evidence of progress made towards completion of the water development and application of water to full beneficial use as allowed in the previous extension of time period, being from October 1, 2012, to October 1, 2018. Therefore, the Department cannot find good cause or reasonable diligence towards the complete application of water to a beneficial use under G-17441.

15. A review of the Department’s record identifies that the above work was accomplished in the development of irrigation on ground perfected under Water Right Certificates 91556, and 91445.^{1,2,3}

¹ The Application for Extension of Time refers to the map submitted with Permit Amendment T-12609, to identify the acres irrigated under Permit G-17441. The acres authorized for irrigation under Permit G-17100 are located in Township 26 South, Range 31 East, Section 4 and 9. The acres that have been irrigated according to Permit Amendment T-12609 are located in Township 25 South, Range 31 East, Sections 27, 28, and 33.

Based on FOF 14, the Department has determined that the work asserted in the Application for Extension of Time was accomplished in the development of Water Right Certificate 91556, and 91445, which had been fully perfected on the land that Permit Amendment T-12609 is proposing to move the place of use under Permit G-17441.

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

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

16. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the required March static water level measurements have not been received by the Department, (2) HARN 50358 (Well 3) and HARN 50777 (Well 18) have been constructed in a location that deviates from the locations of wells from that proposed in the permit application, and the change has not been authorized in writing by the Department, and (3) HARN 51904 has not been partially abandoned from 355 to 760 feet below ground surface.

Based on FOF 16, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-17441:

- “The permittee shall report an initial March static water level measurement once well construction is complete”; and
- “If the number, location, source, or construction of any well deviates from that proposed in the permit application or required by permit conditions, this permit may not be valid, unless the Department authorizes the change in writing.
- Prior to use of water, the bottom portion of well HARN 51904 (well tag L-102456) shall be properly abandoned for 355 to 760 feet below ground surface in a manner compliant with OAR 690-220.

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)]

17. No water has been appropriated under this permit.
18. Beneficial use of water has not been demonstrated under this permit.

Based on FOF 16, 17, and 18, the Department has determined beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2018.

² Because construction work, identified in FOF 15 above, occurred under Certificate 91556, the Department cannot consider this development under Permit G-17441.

³ Because construction work, identified in FOF 15 above, occurred under Certificate 91445, the Department cannot consider this development under Permit G-17441.

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

19. An investment for approximately \$225,000, which is approximately 99 percent of the total projected cost for complete development of this project. An additional \$1000 investment is needed for the completion of this project.
20. No financial investment has been made toward developing the beneficial water use during the previous extension of time period, being October 1, 2012, to October 1, 2018.

Based on FOF 20, the Department finds there is no evidence towards perfecting the water right under the terms and conditions of the permit during the previous extension of time period.

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

The Application does not provide evidence of work accomplished towards completion of the water system during the most recent extension of time period; 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-17441.

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-17441; 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-17441, 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).
23. Malheur Lake is not located within or above any state or federal 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. Malheur 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.

26. An approximate total of \$225,000 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. Other factors relevant to the determination of the market and present demand for water and power have been identified.
29. On January 7, 2019, the Department's Ground Water Section determined that the reference levels are not available.

Based on FOF 16, the Department has determined that the permit holder has not demonstrated compliance with the condition requiring the submittal of an initial static water level measurement from the wells authorized for use under this permit. Additionally, the Department has determined that reference levels for Well 1, Well 2, Well 3, and Well 18, cannot be determined. Illegal water use from Well 1, Well 2, Well 3, and Well 18, has occurred, and the permit holder has not submitted static water level measurements for these wells, the Department cannot recreate reference levels in these wells. Because water has been used, and reference levels to compare future measurements to cannot be determined, the Department cannot determine that the use will not impair or be detrimental to the public interest.

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

30. The use and income from the permitted water development would likely result in reasonable returns upon the investment made to date.

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

31. Delay in the development of this project was caused by any other governmental requirements.

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

32. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-17441.

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

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

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

34. The Application does not provide evidence of good faith of the appropriator under Permit G-17441.

Based on Findings of Fact 14, 16, 17, 18, and 20, 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.

Based on FOF 14, 16, 17, 18, 20, and 29, 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 demonstrate reasonable diligence in the development of Permit G-17441, as authorized, during the most recent extension of time period, being October 1, 2012, to October 1, 2018.

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 complete construction and 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. The permit holder has not 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).

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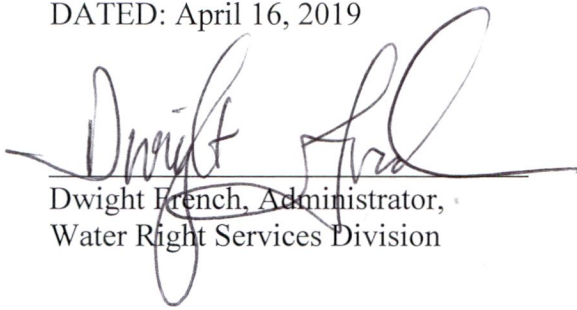
PROPOSED ORDER

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

Deny the time to complete construction of the water system under Permit G-17441 from October 1, 2018, to October 1, 2019.

Deny the time to apply water to beneficial use under Permit G-17441 from October 1, 2018, to October 1, 2019.

DATED: April 16, 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 **May 31, 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 TO ACTIVE DUTY SERVICEMEMBERS: Active duty Servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

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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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Mailing List for Extension PFO Copies

PFO Date: April 16, 2019

Copies Mailed

Application: G-16867

By: _____

Permit: G-17441

On: _____

Original mailed to Applicant:

Golden Rule Farms, Inc
P.O. Box 255
Christmas Valley, OR 97641

Copies sent to:

1. WRD - App. File G-16867/ Permit G-17441

Fee paid as specified under ORS 536.050 to receive copy:

2. None

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

3. WRD - Watermaster District 10, JR Johnson
4. WRD – ER Regional Manager, Jason Spriet

CASEWORKER: JDP