

**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-15267 (modified by Permit Amendment T- )	)	PROPOSED
9652), Water Right Application G-15690, in the name of )	)	FINAL
John L. McPherson and Jani K. McPherson	)	ORDER

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Permit Information

Application:	G-15690
Permit:	G-15267 (modified by Permit Amendment T-9652)
Basin:	14 – Klamath / Watermaster District 17
Date of Priority:	January 25, 2002
Source of Water:	three wells in Spring Lake Basin
Purpose or Use:	Irrigation use on 422.0 acres and supplemental irrigation of 181.0 acres
Maximum Rate:	Not to exceed a maximum cumulative rate of 7.54 cubic feet per second (cfs), being no more than 4.46 cfs from each well, further limited to 5.28 cfs for irrigation and 2.26 cfs for supplemental irrigation

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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 1 2017, to October 1, 2026<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 1 – KLAM 53940  
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 November 12, 2002, Permit G-15267 was issued by the Department. The permit authorizes the use of up to 7.54 cfs of water from three wells in Spring Lake Basin, being no more than 4.46 cfs from each well, further limited to 5.28 cfs for irrigation of 422.0 acres and 2.26 cfs for supplemental irrigation of 181.0 acres. The permit specified complete application of water was to be made on or before October 1, 2007.

2. On July 12, 2004, the Department approved Permit Amendment T-9652 (Special Order Volume 60, Page 471) authorizing a change in the point of appropriation under Permit G-15267 (modified by Permit Amendment T-9652) which is hereafter referred to simply as Permit G-15267.
3. One prior permit extension has been granted for Permit G-15267. The extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2007, to October 1, 2017.
4. On October 3, 2017, permit holder, Jani K. McPherson, 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-15267 be extended from October 1, 2017, to October 1, 2024.
5. On October 10, 2017, notification of the Application for Permit G-15267 was published in the Department's Public Notice. No public comments were received regarding the Application.
6. On April 18, 2019, the permit holder submitted an amendment to their Application. The amendment requested the extended time to apply water to full beneficial use of the water system be changed from October 1, 2024, to October 1, 2026.

### **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 October 3, 2017, 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. Construction of the well began prior to October 1, 2007, as specified in the permit as being the date to apply water to full beneficial use.
9. According to the well log received by the Department on July 3, 2003, construction of KLAM 53940 (Well 1) began June 18, 2003.

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, 2007.

**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 1, 2007, to October 1, 2017, the following was accomplished:
  - installed 10" mainline and 2 60 hp booster pumps from Well 1;
  - installed dragon filter, mainline, and booster pump to be connected to Well 2 once constructed; and
  - purchased 15" pipe, flowmeter and connectors for installation of delivery system to Well 3 site.

The Application provides evidence of progress of physical work made 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 and previous extension conditions.*

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

Based on FOF 11, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-15267.

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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 previous extension.*

12. A maximum rate of 3.35 cfs of water has been appropriated from Well 1 for irrigation of 422.0 acres and supplemental irrigation of 181.0 acres. No water has been appropriated from Well 2, or Well 3.
13. Delay of full beneficial use of water under Permit G-15267 was due, in part, to the death of permit holder and project manager John L. McPherson, in September 2015, along with legal disputes from 2010 through 2014 that strained the budget of the farming operation.

Based on FOF 11, and 12, the Department has determined that beneficial use of water has been demonstrated from Well 1, under this permit as 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)]**

14. An investment of approximately \$171,101, which is about 48 percent of the total projected cost for complete development of this project. An additional \$186,900 investment is needed for the completion of this project.

Based on FOF 14, 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-15267.

**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-15267; 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. Spring Lake is located above the Klamath 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. Spring 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.

19. An approximate total of \$171,101 has been invested in the project.

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

Other economic interests dependent on completion of the project.

20. Other economic interests dependent on completion of the project 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.

21. The points of appropriation for Permit G-15267, located within the Klamath Basin Project Area. Groundwater levels in much of the Klamath Basin Project Area, which includes the Klamath River Valley between Upper Klamath lake and Keno, the Lost Valley Subbasin, and parts of the Tule Lake Subbasin) have shown considerable declines since 2001, most strikingly in the Merrill/Malin area to the east of the permitted wells where water data show declines exceeding 30 feet since 2000. Wells in the vicinity of the permitted wells have shown less-substantial declines, but available data show approximately 5 feet of decline since 2001. Water levels declines have not been as extreme in this area due to; 1) less-intensive pumping, and 2) hydraulic-connection to Klamath River and other surface water. During the drought declaration in 2018, the Department limited duty on emergency drought permits in issued in the Klamath Basin in response to declining water levels, and denied drought permits in areas of the largest declines. Water-level data highlight the sensitivity of the groundwater resources to additional pumping and the Department has determined that additional use would not be in the capacity of the resource, since additional groundwater pumping will further exacerbate declines.
22. OAR 690-315-0050(6) requires the Department to place a checkpoint condition on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. A "Checkpoint Condition" is specified under Item 2 of the "Limitations and Conditions" section of this PFO to meet this condition.

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

23. The income from the project will provide an adequate return on investment by providing a stable water supply, and allow for proper business forecasting, which will allow for the planting and establishment of more high value crops.

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

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

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

25. Unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-15267, in that the permit holders face legal issues between 2010, and 2014, followed by the passing of permit holder and project manager, John L. McPherson in September 2015. Materials were purchased, and work was planned for 2015 and 2016, which were delayed after the death of John L. McPherson.

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

26. A denial of the extension would result in undue hardship as significant investment has been made in the materials to develop Well 2, and Well 3, when constructed will eliminate the need to secure “wheeling agreements” to transport water from Well 1, through the district’s ditch systems, to the land intended to be irrigated by Well 2, and Well 3.

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

27. The Application provides evidence of good faith of the appropriator under Permit G-15267.

Based on FOF 8, 9, 10, 11, 12, 14, and 19, 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.*

28. As of October 3, 2017, the remaining work to be completed consists of completing construction of the water system, which includes the construction of well 2, and Well 3; meeting all permit conditions, which include installation of meters on Well 2 and Well 3, and continuing to submit annual water use reports and March static water level measurements; and applying water to beneficial use from Well 2, and Well 3.

Given the amount of development left to occur, the Department has determined that the permit holder’s request to have until October 1, 2026, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15267 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). The Application establishes that the permit holder has demonstrated reasonable diligence in the development of Permit G-15267; however, the



Department ground water section has determined that additional development, beyond the 3.35 cfs of water applied for irrigation of 422.0 acres, and supplemental irrigation of 181.0 acres, in not within the capacity of the resource. When considering the needs of the permit holder, specifically the need to establish Well 2, and Well 3, to eliminate the need of the permit holder to secure “wheeling agreements” from the districts to transport water from Well 1 to the acres authorized under the permit, the Department has determined that there is good cause to allow for the construction of Well 2, and Well 3.

## **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 12 and 21, the Department determined the need to place a “Development Limitation” on this extension of time in order to mitigate the effects of the subsequent development on competing demands on the resource. This condition, specified under Item 1 of the “Conditions” section of this PFO, was determined to be necessary because the Department has determined that the additional development would exceed the capacity of the resource.
2. OAR 690-315-0050(6) requires a checkpoint condition on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. A “Checkpoint Condition” is specified under Item 2 of the “Limitations and Conditions” section of this PFO to meet this condition.

## **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 28, application of water to beneficial use can be accomplished by October 1, 2026, 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 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 that no additional rate of appropriation is developed under Permit G-15267; OAR 690-315-0050(5).

6. For extensions exceeding five years, the Department shall establish progress checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between progress check points will not exceed five years periods, as required by OAR 690-315-0050(6).

## 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-15267 from October 1, 2017, to October 1, 2026.

Subject to the following conditions:

### LIMITATIONS AND CONDITIONS

1. **Development Limitation**

Development of Permit G-15267 is limited to a maximum combined rate of 3.35 cfs of water from Well 1 (KLAM 53940, Well 2, and Well 3, for irrigation of 422.0 acres, and supplemental irrigation of 181.0 acres. No additional rate of water may be developed under Permit G-15267.

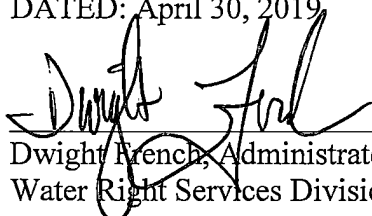
2. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2024**. *A form will be enclosed with your Final Order.*

(a) At each checkpoint, the permit holder shall submit and the Department shall review evidence of the permit holder's diligence towards completion of the project and compliance with terms and conditions of the permit and extension. If, after this review, the Department determines the permit holder has not been diligent in developing and perfecting the water use permit, or complied with all terms and conditions, the Department shall modify or further condition the permit or extension to ensure future compliance, or begin cancellation proceedings on the undeveloped portion of the permit pursuant to ORS 537.260 or 537.410, or require submission of a final proof survey pursuant to ORS 537.250;

b) The Department shall provide notice of receipt of progress reports in its weekly notice and shall allow a 30 day comment period for each report. The Department shall provide notice of its determination to anyone who submitted comments.

DATED: April 30, 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 **June 14, 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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