

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
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 April 11, 1996, Permit G-12369 was issued by the Department. The permit authorizes the use of up to 1.0375 cfs of water from two wells in Umatilla River Basin for irrigation of 83.0 acres. The permit specified actual construction of the well to begin by April 11, 1997, construction of the water system was to be completed by October 1, 1998, and complete application of water was to be made on or before October 1, 1999.
2. One prior permit extensions has been granted for Permit G-12369. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 1999, to October 1, 2010.
3. On March 25, 2019, the permit holder 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-12369 be extended from October 1, 2010, to October 1, 2023.

4. On April 2, 2019, notification of the Application for Extension of Time for G-12369 was published in the Department's Public Notice. No public comments were received regarding the extension 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)]

5. On March 25, 2019, 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)]

6. Actual construction of the well began prior to the April 11, 1997 deadline specified in the permit.
7. According to the well log received by the Department on July 3, 1997, construction of UMAT 50573 (Well 1) began April 11, 1997.

Based on Finding of Fact (FOF) 6 and 7, the Department has determined that the prosecution of the construction of the well began prior to April 11, 1997.

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 permit or previous extension.¹

¹ "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.

8. During the most recent extension period, being from October 1, 1999, to October 1, 2010, no work was accomplished towards the development of the water use under Permit G-12369.

Based on FOF 8, 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 time period specified in the permit. Therefore, the Department cannot find good cause or reasonable diligence towards the complete application of water to a beneficial use under G-12369.

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

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

9. 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, (2) the required March static water level measurements have not been received by the Department, and (3) progress reports that were due to be submitted in October 2004, and 2009, have not been submitted.

Based on FOF 9, the Department has determined that the permit holder has not demonstrated compliance with following (or any of the) permit conditions as required by Permit G-12369:

- “Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director.”
- “Static water level shall be measured in the month of March. Reports shall be submitted to the Department within 30 days of measurement.” and
- “The permittee must submit a written progress report to the Department by October 1, of the years 2004 and 2009.”

The Application does not provide evidence towards perfecting the water right under the terms and conditions of the permit. Therefore, the Department has determined the permit holder has not been diligent in developing or perfecting the water use permit, or has complied with all terms and conditions specified in Permit G-12369.

Beneficial Use of Water OAR [690-315-0040(3)(b)]

The amount of beneficial use made of the water during the permit or previous extension conditions.

10. No water has been appropriated under Permit G-12369.
11. Delay of beneficial use of water under Permit G-12369 was due, in part, to high turnover within the owners' association.

Based on FOF 9 and 10, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because no water has been appropriated, and not all permit conditions were satisfied by October 1, 2010.

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

12. An investment of approximately \$10,000, was made during the original development period under Permit G-12369, being from April 11, 1996, to October 1, 1999.
13. No investment has been made towards the development of Permit G-12369 during the previous extension of time period, being October 1, 1999, to October 1, 2010.
14. No investment has been made towards the development of Permit G-12339 since the end of the previous extension of time period, which ended on October 1, 2010.

Based on FOF 13, the Department has determined that the permit holder has not made an investment towards the development of the water system under Permit G-12369 during the most recent extension of time period, being October 1, 1999, to October 1, 2010.

Based on FOF 14, the Department has determined that the permit holder has not made an investment towards the development of the water system under Permit G-12369 since the end of the previous extension of time period, which ended on October 1, 2010.

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

The Application provides evidence that no work has been accomplished towards completion of the water system during the previous 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-12369.

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-12369; 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. The points of appropriation for Permit G-12369, located within the Tutuilla Creek Basin, are not located within a limited or critical groundwater area.
17. Tutuilla Creek is not located within or above any state or federal scenic waterway.
18. 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.

19. Tutuilla Creek is located within an area ranked “moderate” 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.

20. An approximate total of \$10,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

21. 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.

22. 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)]

23. The use and income from the permitted water development will not likely result in reasonable returns upon the investment made to date.

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. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-12369.

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

26. The Application identifies that the Owners in Grecian Heights will lose all previous investment in the project.

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

27. The Application does not provide evidence of good faith of the appropriator under Permit G-12369.

Based on Findings of Fact 8, 9, 10, 11, 13, and 14, 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.

28. As of March 25, 2019, the remaining work to be completed consists of completing construction of the wells and water system, meeting all permit conditions, which include installing water meters, and submitting annual static water level measurements; and applying water to full beneficial use.

Based on FOF 8, 9, 10, 11, 13, and 14, 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 the water system under Permit G-12369 during the previous extension of time period, being from October 1, 1999, to October 1, 2010, or since the end of the most recent extension of time period which ended on October 1, 2010.

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 the permit holder has not demonstrated 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).

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-12369 from October 1, 2010, to October 1, 2023.

Deny the time to apply water to beneficial use under Permit G-12369 from October 1, 2010, to October 1, 2023.

DATED: May 14, 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 28, 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.

