

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-16352, Water Right Application G-16936, in the)
name of 4-DSD, LLC)

**PROPOSED
FINAL ORDER
TO DENY**

Permit Information

Application:	G-16936
Permit:	G-16352
Basin:	6 – John Day / Watermaster District 4
Date of Priority:	October 1, 2007
Source of Water:	Well 1 (WHEE 50331), Well 2 (WHEE 50335) and Well 6 (WHEE 50334) in Willow Creek Basin; Well 3 (WHEE 50328) in Tubb Creek Basin; and Well 4 (WHEE 50337) and Well 5 (WHEE 50330) in Indian Creek Basin
Purpose or Use:	Irrigation use on 800.0 acres
Maximum Rate:	10.0 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, 2019, to October 1, 2024.

- Deny an extension of time to apply water to full beneficial use from October 1, 2019, to October 1, 2024.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time	Well 1 – WHEE 50331
Department – Oregon Department of Water Resources	Well 2 – WHEE 50335
FOF – Finding of Fact	Well 3 – WHEE 50328
PFO – Proposed Final Order	Well 4 – WHEE 50337
gpm – gallons per minute	Well 5 – WHEE 50330
cfs – cubic feet per second	Well 6 – WHEE 50334
Application – Application for Extension of Time	

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 July 10, 2008, Permit G-16352 was issued by the Department. The permit authorizes the use of up to 10.0 cfs of water from Well 1 (WHEE 50331), Well 2 (WHEE 50335) and Well 6 (WHEE 50334) in Willow Creek Basin; Well 3 (WHEE 50328) in Tubb Creek Basin; and Well 4 (WHEE 50337) and Well 5 (WHEE 50330) in Indian Creek Basin for irrigation use on 800.0 acres. The permit specified completion of construction and complete application of water was to be made on or before October 1, 2012.
2. On May 6, 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-16352 be extended from October 1, 2019, to October 1, 2024.

3. One prior permit extension has been granted for Permit G-16352. The extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2012, to October 1, 2019, and was subject to conditions.
4. On May 7, 2019, notification of the Application for Extension of Time for G-16352 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 May 6, 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. Construction of the well began prior to permit issuance.
7. According to the well log received by the Department on July 24, 2007, construction of WHEE 50331 (Well 1) began July 10, 2007.

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 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 permit or previous extension.¹

8. During the most recent extension period, being from October 1, 2012, to October 1, 2019, the following was accomplished:
- pumps, mainlines and power lines installed in Indian Creek and Barnyard fields;
 - 500 feet of mainline and 800 feet of wheel line installed in Indian Creek Area;
 - 7,500 feet mainline, 1,000 feet of wheel line install in Tubbs West Valley; and
 - 1,000 feet mainline and 1,000 feet of wheel line installed in Waterman West; and
 - two solid set irrigation systems and mainline installed in Barnyard field.

Based on FOF 8, the Department has determined that work has been accomplished during the last extension period.

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 required March static water level measurements have not been received by the Department, (2) wells are not constructed in accordance with permit conditions, and (3) water has been appropriated from the wells that are not constructed according to permit conditions in opposition to the conditions of the previous extension of time.

Based on FOF 9, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions and previous extension condition as required by Permit G-16352:

- "The permittee shall report an initial March static water-level measurement once well construction is completed and annual measurements thereafter. Annual measurements are required whether or not the well is used";
- "The wells shall be continuously cased and continuously sealed to a minimum depth of 350.0 feet below land surface"; and
- "The permit holder shall provide documentation that all the wells authorized under Permit G-16352 are continuously cased and continuously sealed to a minimum of 350 feet below ground surface before any water is appropriated under Permit G-16352."

Failure to comply with permit conditions constitutes illegal use of water. Beneficial use of water under this permit, therefore, has not yet been demonstrated. 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.

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.

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. A maximum rate of 750 gallons per minute (gpm) (1.67 cfs) of water has been appropriated, for irrigation of 235.0 acres, being 275 gpm (0.61 cfs) from Well 1, for irrigation of 86.0 acres; 275 gpm (0.61 cfs) from WHEE 50328 (Well 3) for irrigation of 86.0 acres; 100 gpm (0.22 cfs) from WHEE 50337 (Well 4) for irrigation of 31 acres; and 100 gpm (0.22 cfs) from WHEE 50334 (Well 6) for irrigation of 31 acres.
11. Delay of full beneficial use of water under Permit G-16352 was due, in part, to the size and scope of the project.

Based on FOF 9, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2019.

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 \$1,150,000, has been made, which is approximately 53 percent of the total projected cost for complete development of this project. An additional \$1,000,000 investment is needed for the completion of this project.

Based on FOF 12, the Department has determined that the permit holder had made an investment in the development of the water system.

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

The Application provides evidence of progress towards completion of the water system; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use has not been demonstrated. The permit holder has not demonstrated reasonable diligence towards the completion of the water system within the terms and conditions of the permit or the previous extension of time. Though the permit holder has invested in the development of the water system infrastructure, and in the irrigation of the land authorized under the permit, the permit holder has not made an investment to come into compliance with the permit condition requiring that the well be constructed in a manner that will eliminate interference with hydraulically connected streams and springs. The previous extension of time was conditioned so that no water was to be appropriated from any well under Permit G-16352, until the permit holder provides evidence that the wells are constructed to meet the standards of the condition in the permit. The Application demonstrates that the permit holder has continued additional development, and has continued to appropriate water and to develop additional appropriation of water without demonstrating compliance with the well construction condition.

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.

13. 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-16352; 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).

14. The points of appropriation for Permit G-16352, located within the North Fork Willow Creek Basin, are not located within a limited or critical groundwater area.
15. North Fork Willow Creek is located above John Day Scenic Waterway.
16. 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.

17. Willow Creek is located within an area ranked “high” 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.

18. An approximate total of \$1,150,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

19. The Application identifies the ranch as being important to the local economy.

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

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

20. 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)]

21. 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)]

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

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

23. The Application identifies the “Great Recession” as being a factor that contributed to the delay in the development of the project.

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

24. The Application identifies that denial of the extension would result in an undue hardship in that the ranch is reliant on the use of water from the wells for irrigation.

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

25. The permit holder has not demonstrated compliance with permit conditions intended to prevent interference with hydraulically connected streams and springs, which is a condition contained in Permit G-16352. The previous extension of time identified non-compliance with this condition, and further conditioned the permit so that water could not be used under the permit until the permit holder provides evidence that the wells are constructed to meet this condition. The permit holder has not provided documentation that the wells are constructed in such a manner as to satisfy this condition, and the permit holder has continued to develop and use water under this permit.
26. The Application does not provide evidence of good faith of the appropriator under Permit G-16352.

Based on Findings of Fact 9, 25, and 26, above, the Department finds that the Applicant has not demonstrated good faith in the development of the permit in accordance with the terms and conditions of the permit.

Duration of Extension [OAR 690-315-0040(1)(c)]

Under OAR 690-315-0040(1)(c), in order to approve an extension of time for water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

27. As of May 6, 2019, the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, which include continuously casing and continuously sealing all wells to a minimum of 350.0 feet below land surface; and applying water to full beneficial use.

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 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-16352 from October 1, 2019, to October 1, 2024.

Deny the time to apply water to beneficial use under Permit G-16352 from October 1, 2019, to October 1, 2024.

DATED: June 25, 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 **August 9, 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.

-
- If you have questions about statements contained in this document, please contact Jeffrey D. Pierce 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
-