

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)	PROPOSED
Permit G-17244, Water Right Application G-17644, in the)	FINAL ORDER
name of Don Toelle, and John Toelle)	TO DENY

Permit Information

Application:	G-17644
Permit:	G-17244
Basin:	12 – Malheur Lake / Watermaster District 10
Date of Priority:	April 2, 2013
Source of Water:	Well 1, Well 2, Well 3, and Well 4 in East Cow Creek Basin
Purpose or Use:	Primary irrigation of 71.8 acres and supplemental irrigation of 199.6 acres
Maximum Rate:	4.52 cubic feet per second (cfs), being 1.2 cfs for primary irrigation of 71.8 acres and 3.32 cfs for supplemental irrigation of 199.6 acres

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 May 29, 2019, to October 1, 2024.

- Deny an extension of time to apply water to full beneficial use from May 29, 2019, to October 1, 2024.

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

WELL REFERENCE

Well 1 – HARN 52771
Well 2 – Not constructed
Well 3 – HARN 52770
Well 4 – HARN 52421

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 May 29, 2014, Permit G-17244 was issued by the Department. The permit authorizes the use of up to 4.52 cfs of water, being 1.2 cfs for primary irrigation of 71.8 acres and 3.32 cfs for supplemental irrigation of 199.6 acres cfs from Well 1, Well 2, Well 3, and Well 4, in East Cow Creek Basin. The permit specified completion of construction, and application of water was to be made within five years of the date of permit issuance, being May 29, 2019.
2. On June 24, 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-17244 be extended from May 29, 2019, to October 1, 2024. This is the first permit extension requested for G-17244.
3. On July 2, 2019, notification of the Application for Extension of Time for G-17244 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)]

4. On June 24, 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)]

5. Construction of the well began prior to May 29, 2019, as specified in the permit as being the date to apply water to full beneficial use.
6. According to the well log received by the Department on September 8, 2015, construction of HARN 52421 (Well 4) began August 4, 2015.

Based on Finding of Fact (FOF) 5 and 6, the Department has determined that the prosecution of the construction of the well began prior to October 1, May 29, 2019.

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.¹

7. During the development time authorized by the permit, construction of HARN 52770 (Well 3) and HARN 52771 (Well 1) was completed.

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.

Based on FOF 7, the Department has determined that work has been accomplished within the time allowed in the permit.

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

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

8. The Department has considered the permit holder's compliance with conditions, and has identified the following concern; the record does not show that a totalizing flow meter or other suitable measuring device has been installed at each point of appropriation. The Department recognizes that it is the intent of the permit holder to comply with all permit conditions at the time the conditions become applicable.

Based on FOF 8, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-17244:

- "Before water use may begin under this permit, the permittee shall install a totalizing flow meter, or other suitable measuring device as approved by the Director, at each point of appropriation."

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.

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.

9. A maximum rate of 500 gallons per minute from Well 1, 1,200 gallons per minute from Well 3, and 280 gallons per minute from Well 4 has been appropriated for testing purposes only. No water has been appropriated and no acres have been irrigated under Permit G-17244.
10. Delay of beneficial use of water under Permit G-17244 was due, in part, to insufficient yield of water from the first two wells.

Based on FOF 8, and 9, the Department has determined that beneficial use of water has not yet been demonstrated under this permit.

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

11. An investment of \$112,178, which is approximately 10 percent of the total projected cost for complete development of this project, has been made. An additional \$1,000,000 investment is needed for the completion of this project.

Based on FOF 11, 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 not demonstrated compliance with permit conditions, and; beneficial use of water has not been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit G-17244.

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.

12. 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-17244; 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).

13. The points of appropriation for Permit G-17244, 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).

14. Cow Creek is not located within or above any state or federal scenic waterway.
15. The points of appropriation are not in an area listed by the Department of Environmental Quality as a water quality limited stream.

Based on FOF 13, the Department has determined that the resource cannot support the development of water under Permit G-17244.

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.

16. Cow Creek 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.

17. An approximate total of \$112,178 has been invested in the project.

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

Other economic interests dependent on completion of the project.

18. The Application identifies local equipment and seed providers, as well as hay contractors, as economic interests that may be dependent on the 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.

19. 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)]

20. Over time, the irrigation from the proposed wells will generate a return on the investment made.

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

21. Delay in the development of this project, caused by any other governmental requirements, has not been identified.

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

22. Unforeseen events were identified that contributed to the extended length of time needed to fully develop and perfect Permit G-17244, in that one of the permit holders passed away in 2015, causing a delay in the development of the permit.

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

23. A denial of the extension would result in a loss of the investment to date.

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

24. The Application provides evidence of good faith of the appropriator under Permit G-17244.

Based on Findings of Fact 5, 6, 11, and 17, above, the Department finds that the Applicant has 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.

25. As of June 24, 2019, the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, and applying water to full beneficial use.

Based on FOF 25, the Department finds that the applicant can complete the project and apply water to full beneficial use within the time requested for the extension.

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 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 diligence in the development of the

permit. However, the market and present demands for water within the GHVGAC demonstrates that the resource cannot support the development of water under the permit, and that good cause does not exist 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 there has been construction, financial investment and reasonable diligence toward developing the project.
4. The Department cannot find that good cause exists to allow additional development under the permit because the resource cannot support the continued development.

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-17244 from May 29, 2019, to October 1, 2024.

Deny the time to apply water to beneficial use under Permit G-17244 from May 29, 2019, to October 1, 2024.

DATED: August 6, 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 **September 20, 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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