

**Oregon Water Resources Department
Water Right Services Division**

Application for Extension of Time

In the Matter of the Application for an Extension of Time)	PROPOSED
for Permit G-16352, Water Right Application G-16936, in)	FINAL
the name of 4-DSD, LLC)	ORDER

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)

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 complete construction of the water system from October 1, 2019, to October 1, 2027.
- Grant an extension of time to apply water to full beneficial use from October 1, 2019, to October 1, 2027¹.
- 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.

¹Pursuant 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	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	Replacement Well 1 – WHEE 50495
	Replacement Well 3 – WHEE 50496

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 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. 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.
3. On October 23, 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, 2025.
4. On October 29, 2019, notification of the Application for Permit G-16352 was published in the Department's Public Notice. No public comments were received regarding the Application.
5. On October 31, 2019, the permit holder submitted an amendment to their Application. The amendment requested the extended time to complete construction of the water system be changed from October 1, 2025, to October 1, 2027, and the extended time to apply water to full beneficial use of the water system be changed from October 1, 2025, to October 1, 2027.

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)]

6. On October 23, 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)]

7. Construction of the well began prior to permit issuance.
8. 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) 7 and 8, 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.²

9. 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, 1,00 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;
- two solid set irrigation systems and mainline installed in Barnyard field;
- constructed WHEE 50495 (Replacement Well 1) as a replacement for WHEE 50331 (Well 1);
- constructed WHEE 50496 (Replacement Well 3) as a replacement for WHEE 50328 (Well 3); and
- began construction on a replacement well for WHEE 50337 (Well 4)

Based on FOF 9, the Department has determined that work has been accomplished during the last extension period.

² “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.

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

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

10. 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, and (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 10, 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.”

11. On June 25, 2019, the Department issued a Proposed Final Order (PFO) to deny an Extension of Time for Permit G-16352. The denial was based on compliance with the above well construction conditions. Upon issuance of the PFO, the permit holder requested the Application for Extension of Time be withdrawn so the condition compliance issue could be addressed. The permit holder immediately began the process of contracting a well construction contractor to initiate repair of the wells to meet the well construction condition. In consultation with the well construction contractor, the permit holder determined that constructing replacement wells nearby the permitted wells would be preferable. The replacement wells have been constructed to meet the conditions contained in the permit. The permit holder intends to file a Permit Amendment Application once the permit is extended to gain authorization of the wells constructed as replacements to the wells identified in Permit G-16352.

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. 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.

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.

12. 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.
13. 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 10, 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.

14. A maximum rate of 400 gpm has been appropriated from Replacement Well 1 for irrigation of approximately 200 acres.

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

15. An investment of approximately \$1,738,790, has been made which is about 57 percent of the total projected cost for complete development of this project. An additional \$1,303,000 investment is needed for the completion of this project.

Based on FOF 15, 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 of progress towards completion of the water system; a financial investment has been made; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use has not been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence towards complete application of water to a beneficial use.

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.

16. 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).

17. 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.
18. North Fork Willow Creek is located above John Day Scenic Waterway.
19. 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.

20. 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.

21. An approximate total of \$1,738,790 has been invested in the project.

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

Other economic interests dependent on completion of the project.

22. 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.

23. 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)]

24. 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)]

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

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

26. 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)]

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. Additionally, the permit holder has made a significant investment in a very short period of time to address compliance with well construction conditions. A denial would make this recent investment a total loss.

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-16352.

Based on FOF 7, through 15, and 21, 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 23, 2019, the remaining work to be completed consists of submitting a Permit Amendment to gain authorization of the wells constructed to replace the wells authorized by the permit, completing construction of the water system, meeting all permit conditions, which include installation of meters, submittal of annual water use reports and March static water level measurements, and constructing all well that will be utilized under the permit to the permit specific well construction standards; and applying water to full beneficial use.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2027, to complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit G-16352 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 complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

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 Fact 11, the Department determined the need to place a "Permit Amendment Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of water use permit. This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary because Permit

G-16352 identifies specific wells by well log as the authorized points of appropriation. Though replacement wells have been constructed nearby, these replacement wells are not the wells specified in Permit G-16352.

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 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 7 through 27, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2027, 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, 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.

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 complete construction of the water system under Permit G-16352 from October 1, 2019, to October 1, 2027.

Extend the time to apply water to beneficial use under Permit G-16352 from October 1, 2019, to October 1, 2027.

Subject to the following conditions:

continued on following page

LIMITATIONS AND CONDITIONS

1. Permit Amendment Condition

The use of water from under Permit G-16352 is subject to this Condition.

The permit holder shall submit a Permit Amendment Application, requesting authorization of wells constructed as replacement for the well specified in Permit G-16352. No water may be appropriated from the replacement wells unless approved.

2. Checkpoint Condition

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2025**. *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: December 3, 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 **January 19, 2020**, 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
Salem, OR 97301-1266
Fax: 503-986-0901
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