

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-17304, Water Right Application G-17748, in the)
name of Matt McElligott)

**PROPOSED
FINAL ORDER
TO DENY**

Permit Information

Application:	G-17748
Permit:	G-17304
Basin:	9 – Powder / Watermaster District 8
Date of Priority:	January 2, 2014
Source of Water:	Well 1 and Well Option 2 in Warm Springs Creek Basin
Maximum Rate and Use:	2.33 cubic feet per second (cfs), being 0.16 cfs for primary irrigation of 9.4 acres, and 2.17 cfs for supplemental irrigation of 130.55 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 October 23, 2019, to October 1, 2029.

- Deny an extension of time to apply water to full beneficial use from October 23, 2019, to October 1, 2029.

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 October 23, 2014, Permit G-17304 was issued by the Department. The permit authorizes the use of up to 2.33 cfs of water, being 0.16 cfs for primary irrigation of 9.4 acres, and 2.17 cfs for supplemental irrigation of 130.55 acres from Well 1 and Well Option 2 in Warm Springs 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 October 23, 2019.
2. On December 12, 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-17304 be extended from October 23, 2019, to October 1, 2029. This is the first permit extension requested for G-17304.
3. On December 12, 2019, notification of the Application for Extension of Time for G-17304 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 December 9, 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)]

ORS 537.630 (2) states in part that “the holder of a permit issued pursuant to ORS 537.625 shall prosecute the construction of a well or other means of developing and securing the ground water with reasonable diligence and complete the construction within a reasonable time fixed in the permit by the Water Resources Department, not to exceed five years after the date of approval of the application. However, the department, for good cause shown, shall order and allow an extension of time, including an extension beyond the five-year period, for the completion of the well or other means of developing and securing the ground water or for complete application of water to beneficial use” [emphasis added]. Permit G-17304 was issued pursuant to ORS 537.625. The application states that construction of the well has not yet begun.

OAR 690-315-0040(5) states “ if the extension is requested pursuant to OAR 537.230 or 573.630, the applicant must have begun actual construction work, as defined in OAR 690-315-0020(3)(d)(A) and (B), during the period required by statute. If the Department finds the applicant did not begin construction by that date, the permit cannot be extended, and the Department may begin cancellation proceeding pursuant to ORS 537.260 or 537.410.”

5. The Application provides no evidence of any action taken to begin construction of a well authorized under this permit, within the time period in permit ending October 23, 2019.

Based on FOF 5, the Department cannot find that construction of the well authorized under Permit G-17304 began (was prosecuted) within five years of permit issuance, being October 23, 2014, to October 23, 2019, the date established pursuant to ORS 537.630. An extension cannot be granted to extend the time needed to prosecute (begin) construction.

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

6. Work accomplished within the time allowed in the permit consists of purchasing and installing wheel-lines, which are also utilized under Certificate 83766.

Based on FOF 6, 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)]

7. There has been no permit holder conformance with the permit conditions.

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-17304.

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

8. No water has been appropriated under this permit.
9. Beneficial use of water has not been demonstrated under this permit.

Based on FOF 5, 7, 8, and 9, the Department finds there is no evidence of progress made towards completion of the water development and application to full beneficial use as allowed in the time period specified in the permit.

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

10. An investment of approximately \$15,700, which is approximately 5 percent of the total projected cost for complete development of this project. These costs are associated with the purchase and installation of wheel-line, which may also be utilized under Water Right Certificate 83766. An additional \$303,190 investment is needed for the completion of this project.

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 10, the Department has determined that the permit holder had made an investment in irrigation equipment, intended to be utilized under a combination of water right, including Permit G-17304.

11. No investment has been made toward developing a well.

Based on FOF 11, the Department finds there is no evidence towards perfecting the water right under the terms and conditions of the permit.

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

The Application provides evidence that no work has been accomplished towards completion of a well; 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 not demonstrated reasonable diligence in previous performance under Permit G-17304.

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-17304; 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-17304, located within the Warm Springs Creek Basin, are not located within a limited or critical groundwater area.
14. Warm Springs 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.

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. Warm Springs 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.

17. An approximate total of \$15,700 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 an adjacent neighbor as an economic interest 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.

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. The permit holder anticipates a return on investment within ten years of completing the proposed development.

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. No unforeseen events were identified that contributed to the extended length of time needed to fully develop and perfect Permit G-17304.

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

23. The permit holder identifies that the land would be greatly de-valued without the proposed development.

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

24. The Application does not provide evidence of good faith of the appropriator under Permit G-17304, because construction of a well authorized under the permit has not begun.

Based on Findings of Fact 5, 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.

25. As of December 9, 2019, the remaining work to be completed consists of beginning and completing construction of a well, completing construction of the water system, meeting all permit conditions, which include installing a totalizing flow meter, submitting annual March static water level measurements, and submitting annual water use reports; and applying water to full beneficial use.

Based on FOF 5, 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 begin construction of a well or other means of securing the groundwater resource, within the time allowed in the permit (5 years), as required by ORS 537.630, and OAR 690-315-0040(1)(b), and 690-315-0040(5).

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 there has been no construction of a well or other means of securing the groundwater resource. 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-17304 from October 23, 2019, to October 1, 2029.

Deny the time to apply water to beneficial use under Permit G-17304 from October 23, 2019, to October 1, 2029.

DATED: January 21, 2020



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 **March 6, 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
Fax: 503-986-0901 Salem, OR 97301-1266
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Mailing List for Extension PFO Copies

PFO Date: January 21, 2020

Copies Mailed

Application: G-17748

By: _____

Permit: G-17304

On: _____

Original mailed to Applicant:

Matt McElligott
49026 Highway 30
North Poewder, OR 97867

Copies sent to:

1. WRD - App. File G-17748/ Permit G-17304
2. Paul Garvin, CWRE
43685 Pocahontas Rd.
Baker City, OR 97814

Fee paid as specified under ORS 536.050 to receive copy:

3. None

Receiving via e-mail (10 AM Tuesday of signature date)
(DONE BY EXTENSION SPECIALIST)

4. WRD - Watermaster District 8, Marcy Osborn
5. WRD - ER Regional Manager, Jason Spriet

CASEWORKER: JDP