

**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-16224, Water Right Application G-16606, in the	)	<b>PROPOSED</b>
name of D. Paul Schanno Jr. and Dixie Schanno	)	<b>FINAL ORDER</b>
		<b>TO DENY</b>

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Permit Information

Application:	G-16606
Permit:	G-16224
Basin:	4 – Hood / Watermaster District 3
Date of Priority:	January 24, 2006
Source of Water:	Well 1 and Well 2 in Spring Branch Basin
Purpose or Use:	irrigation use on 434.6 Acres
Maximum Rate:	5.0 cubic feet per second (cfs)

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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, 2018, to October 1, 2023.
  
- Deny an extension of time to apply water to full beneficial use from October 1, 2018, to October 1, 2023.

## **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 September 13, 2007, Permit G-16224 was issued by the Department. The permit authorizes the use of up to 5.0 cfs of water from Well 1 and Well 2 in Spring Branch Basin for irrigation use on 434.6 acres. The permit specified construction of the water system was to be completed by October 1, 2011, and complete application of water was to be made on or before October 1, 2011.
2. On February 18, 2020, 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-16224 be extended from October 1, 2018 to October 1, 2023.
3. On July 30, 2013, the Department issued a Final order approving an Extension of Time from October 1, 2011, to October 1, 2018.
4. On February 25, 2020, notification of the Application for Extension of Time for G-16224 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 February 18, 2020, 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 October 1, 2011, as specified in the permit as being the date to apply water to full beneficial use.
7. According to the well log received by the Department on November 16, 2009, construction of WASC 51737 (Well 1) began July 24, 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, 2011.

### **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 and previous extension.<sup>1</sup>*

8. Work was accomplished within the time allowed in the permit as follows:

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<sup>1</sup> “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.

- a. Construction of Well 1 began prior to the October 1, 2011, deadline specified in the permit.
  - b. Work was accomplished during the original development time frame under Permit G-16224 includes beginning construction of WASC 51938 (Well 2) on September 27, 2011, and was completed on January 15, 2012.
9. During the most recent extension period, being from October 1, 2011, to October 1, 2018, Well 2 was completed. Though Well 2 was completed within the extended time period, it was completed prior to the submittal of the previous Extension of Time Application and issuance of the Final Order approving the Extension of Time from October 1, 2011, to October 1, 2018.
10. No other work has been accomplished under Permit G-16224.

Based on FOF 9, and 10, the Department has determined that no additional work towards the completion of construction and application of water to the beneficial use occurred over the last eight years.

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

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

11. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the record does not show that a totalizing flow meter or other suitable measuring device has been installed, and (2) Well 1 has not been constructed in compliance with the well construction conditions contained in the permit. 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 11, the Department has determined that the permit holder has not demonstrated compliance with following permit condition as required by Permit G-16224:

- "Well 1 shall be continuously cased and continuously sealed to a minimum depth of 425 feet below land surface."

Based on FOF 11, the Department has determined that, though the required totalizing flow meters have not been installed on Well 1 or Well 2, no water has been appropriated under Permit G-16224, therefore the requirement to install totalizing flow meters prior to water use is not necessary at this time.

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.*

12. No water has been appropriated from Well 1, or Well 2.
13. Delay of beneficial use of water under Permit G-16224 was due, in part, the cost to construct Well 1, and Well 1 not producing sufficient water to design an irrigation system.

Based on FOF 11, and 12, 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)]**

14. An investment of approximately \$110,000, which is approximately 16 percent of the total projected cost for complete development of this project, has been made between July 2007, and January 2012.
15. The Application does not identify any investment made since January 2012. An additional \$600,000 investment is needed for the completion of this project.

Based on FOF 15, the Department finds there is no evidence towards perfecting the water right under the terms and conditions of the permit, since January 2012.

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

The Application does not provide 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 Department has determined the applicant has not demonstrated the minimum necessary for the Department to find 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-16224; 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-16224, located within the Eightmile Creek Basin, is not located within a limited or critical groundwater area.
18. Eightmile Creek is not located within or above any state or federal scenic waterway.
19. The points of appropriation is 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. It 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 \$110,000 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 that a lease holder and their employees may be adversely effected by a denial of the Extension of Time. However, the Application also states that “I have an interested party who would plant some of this land in grapes.” This indicates that there is currently no lease holder who would be adversely effected by the denial of the Extension of Time.

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

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

23. 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)]**

24. The use and income from the permitted water development will not likely result in reasonable returns upon the investment made to date. The Application states that an additional investment is necessary to develop additional rate of water to support the planting of high value crops. Additionally, the Application states, “We are a wheat, hay and cattle operation. The cost of this development would not be supported by that kind of operation.”

Based on FOF 24, the Department has determined that the investment to date would not result in fair and reasonable returns on investment.

**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. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-16224.

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

27. The Application states a denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs.

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

28. The Application does not provide evidence of good faith of the appropriator under Permit G-16224.

Based on Findings of Fact 9, 10, 11, 12, and 15, 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.*

29. As of February 18, 2020, the remaining work to be completed consists of completing construction of the water system, which includes completing construction of Well 1, designing and installing an irrigation system, meeting all permit conditions, and applying water to full beneficial use.

Based on FOF 29, the Department has determined the permit holder could complete construction of the water system and apply water to beneficial use within the time requested.

**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 to begin 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, no financial investment or reasonable diligence toward developing the project during the previous eight years. 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).



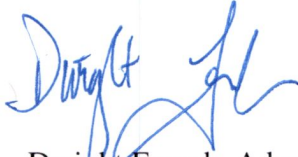
## PROPOSED ORDER

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-16224 from October 1, 2018, to October 1, 2023.

Deny the time to apply water to beneficial use under Permit G-16224 from October 1, 2018, to October 1, 2023.

DATED: March 31, 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 **May 15, 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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