

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-17516 Water Right Application G-13264, in)	FINAL
the name of Port of Morrow)	ORDER

Permit Information

Application:	G-13264
Permit:	G-17516
Basin:	7 – Umatilla / Watermaster District 5
Date of Priority:	January 22, 1993
Source of Water:	Well 4A, Well 5A, Port Well #6, Port Well #7, EB Well #1, EB Well #2, EB Well #3, Farm Well #2, and Farm Well #3, within the Umatilla Basin
Purpose or Use:	Irrigation of 118.8 acres, supplemental irrigation of 851.0 acres, and industrial use
Maximum Rate:	15.34 cubic feet per second (cfs), being 9.77 cfs for irrigation, and 5.57 cfs for industrial use

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, 2018, to October 1, 2025.
- Grant an extension of time to apply water to full beneficial use from October 1, 2018, to October 1, 2025¹.
- 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

Agent – Bruce Brody-Heine, CWRE
Application – Application for Extension of Time
Department – Oregon Department of Water Resources
Port – Port of Morrow
FOF – Finding of Fact
PFO – Proposed Final Order
cfs - cubic feet per second

WELLS

Well 4A – MORR 679
Well 5A – MORR 678
Port Well #6 – MORR 50474
Port Well #7 – MORR 50473
EB Well #1 – MORR 51515
EB Well #2 – MORR 51427
EB Well #3 – MORR 51545
Farm Well #2 – MORR 772
Farm Well #3 – MORR 769

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 September 11, 1996, Permit G-12729 was issued by the Department. The permit authorizes the use of up to 15.37 cfs of water from Well 4A, Well 5A, Port Well #6, Port

- Well #7, EB Well #1, EB Well #2, EB Well #3, Farm Well #2, and Farm Well #3, within the Umatilla Basin, being 9.77 cfs for irrigation of 118.8 acres, and supplemental irrigation of 1090.38 acres, and 5.57 cfs for industrial use. The permit specified actual construction of the well to begin by September 11, 1997, construction of the water system was to be completed by October 1, 1998, and complete application of water was to be made on or before October 1, 1999.
2. On November 29, 2004, the Department issued Special Order Volume 62, Page 236, approving Transfer T-9601 authorizing a change in place of use, the point of diversion, and the character of use under Certificate 76360 and a change in the place of use under Permit G-12729 (modified by Permit Amendment T-9601) which is hereafter referred to simply as Permit G-12729. Transfer T-9601 resulted in the cancelation of 3.48 acres of supplemental irrigation.
 3. On June 25, 2012, the Department issued Special Order Volume 87, Page 891 authorizing a change in the place of use, the character of use, and additional points of appropriation under Certificate 51822 and the partial cancelation of Permit G-12729 (modified by Transfer T-9601, and further modified by Transfer T-10269) superseding Permit G-16935 was issued by the Department to reflect the changes. Transfer T-10269 resulted in the cancelation of 235.9 acres of supplemental irrigation.
 4. On February 8, 2016, the Department approved Permit Amendment T-11992 (Special Order Volume 98, Page 773) authorizing additional points of appropriation and a change in the place of use under Permit G-16935, superseding Permit G-17516 was issued to reflect the changes. Permit G-17516 authorizes the use of up to 15.34 cfs of water from Well 4A, Well 5A, Port Well #6, Port Well #7, EB Well #1, EB Well #2, EB Well #3, Farm Well #2, and Farm Well #3, within the Umatilla Basin, being 9.77 cfs for irrigation of 118.8 acres, and supplemental irrigation of 851.0 acres, and 5.57 cfs for industrial use.
 5. Two prior permit extensions have been granted for Permit G-17516. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2008, to October 1, 2018.
 6. On July 20, 2020, Bruce Brody-Heine, Agent for the permit holder, Port of Morrow (Port), 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-17516 be extended from October 1, 2018, to October 1, 2025.
 7. On August 18, 2020, notification of the Application for Permit G-16935 was published in the Department’s Public Notice. No public comments were received regarding the 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)]

8. On July 20, 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)]

9. Actual construction of the following wells began prior to the September 11, 1997, deadline specified in the permit. Construction of MORR 678 (Well 5A) began March 15, 1987; MORR 679 (Well 4A) began April 15, 1987.
10. According to the well logs received by the Department on May 5, 1987, construction of Well 5A began March 15, 1987.

Based on Finding of Fact (FOF) 9, and 10, the Department has determined that the prosecution of the construction of the well began prior to September 11, 1997.

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 previous extension.²

11. During the most recent extension period, being from October 1, 2008, to October 1, 2018, the following was accomplished:
- gained authorization of additional points of appropriation; and
 - installed additional transmission lines to the industrial use facilities.

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.

12. Since October 1, 2018, the applicant states a totalizing flow meter was installed on MORR 769 (Farm Well #3).

The Application provides evidence of progress of physical work made towards completion of the water system, enough to qualify as the minimum necessary for the Department to find good cause and reasonable diligence towards complete application of water to a beneficial use.

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

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

13. 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 meter or other suitable measuring device has been installed on MORR 772 (Farm Well #2), and (2) MORR 51515 (EB Well#1), MORR 51427 (EB Well #2), and MORR 51545 (EB Well #3) are not equipped with usable access ports.

Based on FOF 13, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-17516:

- “Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director”; and
- The works shall be equipped with a useable access port”.

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

The amount of beneficial use made of the water during the permit time limits or previous extension conditions.

14. A maximum combined rate of 15.4 cfs of water has been appropriated from the wells, being up to 1.2 cfs from a combination of Farm Well #2 and Farm Well #3 for irrigation of 118.8 acres, and up to 5.57 cfs from a combination of EB Well #1 (5.12 cfs), EB Well #2 (1.11 cfs), and EB Well #3 (5.12 cfs). A maximum combined rate for supplemental irrigation may be appropriated from any combination of EB Well #1 (5.12 cfs), EB Well #2 (1.11 cfs), EB Well #3 (5.12 cfs), Farm Well #2 (3.34 cfs) and Farm Well #3 (3.34 cfs).
15. Delay of full beneficial use of water under Permit G-17516 was due, in part, to insufficient yield of water from the originally permitted wells. Permit Amendment T-11992 authorized the use of additional wells, which need to have useable access ports installed as a condition for use. The location of the wells, along the Columbia River, require additional permits, and road improvements to access the wellheads with a crane to perform the access tube installation.

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

16. An investment of approximately \$50,010,000, has been made in the development of the water system. An additional \$24,000 investment is needed for the completion of the water system.

Based on FOF 16, 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 demonstrated compliance with permit conditions, a financial investment has been made, and; beneficial use of water has been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit G-17516.

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.

17. 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-17516; 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.

continued on following page

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).

18. The points of appropriation for Permit G-17516, located within the Umatilla Basin, are not located within a limited or critical groundwater area.
19. Umatilla River is not located within or above any state or federal scenic waterway.
20. The points of appropriation are 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.

21. Columbia River 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.

22. An approximate total of \$50,010,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

23. The regional farming economy relies on the Port of Morrow, the industrial park and processing facilities to process their agricultural goods.

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

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

24. No other factors relevant to the determination of the market and present demand for water and power have been identified.
25. 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 1 of the “Limitations and Conditions” section of this PFO to meet this condition.

Fair Return Upon Investment [OAR 690-315-0040(2)(f)]

26. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date.

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

27. Delay in the development of this project was not caused by any other governmental requirements.

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

28. Unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-17516.

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

29. 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)]

30. The Application provides evidence of good faith of the appropriator under Permit G-17516.

Based on FOF 9, through 16, and 22, 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.

31. As of July 20, 2020, the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, which include installing a meter or other suitable measuring device on Farm Well #3, and install usable access ports on EB Well #1, EB Well #2, and EB Well #3; 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, 2025, 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-17516 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(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 1 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 actual 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 9 through 30, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2025, 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.
5. The applicant has demonstrated good cause for the extension.
6. For extensions exceeding five years, the Department shall establish progress checkpoints to determine if diligence is being excised in the development and perfection of the water use permit. Intervals between progress check points will not exceed five years periods, as required by OAR 690-315-0050(6).

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-17516 from October 1, 2018, to October 1, 2025.

Extend the time to apply water to beneficial use under Permit G-17516 from October 1, 2018, to October 1, 2025.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. Checkpoint Condition

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2024**. *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: September 29, 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 **November 13, 2020**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.

IMPORTANT: Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. mail. Please consider mailing early to ensure the Department receives the protest by the deadline specified above.

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.

