

**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-15989, Water Right Application G-16439 )	FINAL
(modified by Permit Amndment T-10331 and T-10528), in )	ORDER
the name of The Miller Ranch Co	

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Permit Information

Application:	G-16439
Permit:	G-15989 (modified by Permit Amndment T-10331 and T-10528)
Basin:	4 – Hood / Watermaster District 3
Date of Priority:	April 14, 2005
Source of Water:	six wells in Starvout Creek Basin
Purpose or Use:	Irrigation use on agricultral and irrigation use on 1014.2 acres
Maximum Rate:	12.678 cubic feet per second (cfs)

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***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, 2020, to October 1, 2030.
- Grant an extension of time to apply water to full beneficial use from October 1, 2020, to October 1, 2030<sup>1</sup>.
- 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.

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<sup>1</sup>Pursuant 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 – Niall Boggs, PE, CWRE  
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

## **WELLS**

Well 1 – WASC 2217  
Well 2A – WASC 51558  
Well 3A – WASC 51532  
Well 4A – WASC 51672  
Well 5 – Not Constructed  
Well 6 – Not Constructed

## **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(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 December 16, 2005, Permit G-15989 was issued by the Department, consistent with the terms of a settlement agreement. The permit authorizes the use of up to 12.678 cfs of water, from six wells in Starvout Creek Basin; bein 0.558 cfs from Well 1, 2.424 cfs each from Well 2, Well 3, Well 4, Well 5, and Well 6, for agricultral and irrigation use on 1014.2 acres. The permit specified construction of the water system was to be completed by October 1, 2010, and complete application of water was to be made on or before October 1, 2010.

2. On June 14, 2007, the Department approved Permit Amendment T-10331 (Special Order Volume 72, Page 333) authorizing a change in the points of appropriation and additional points of appropriation under Permit G-15989 (modified by Permit Amendment T-10331).
3. On May 27, 2008, the Department approved Permit Amendment T-10528 (Special Order Volume 74, Page 995) authorizing a change in the point of appropriation and a change in place of use under Permit G-15989 (modified by Permit Amendment T-10331 and T-10331) which is hereafter referred to simply as Permit G-15989.
4. One prior permit extensions have been granted for Permit G-15989. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2010, to October 1, 2020.
5. On August 27, 2020, Charley Miller, president of The Miller Ranch Co, 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-15989 be extended from October 1, 2020, to October 1, 2030.
6. On September 9, 2020, notification of the Application for Permit G-15989 was published in the Department's Public Notice. No public comments were received regarding the Application.
7. On October 30, 2020, the permit holder submitted additional information to supplement their Application. The additional information was to clarify work accomplished towards the construction of the water system.

### **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 August 27, 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. Construction of an authorized well began prior to permit issuance.
10. According to the well log received by the Department on July 7, 1995, construction of WASC 2217 (Well 1) began March 20, 1995.

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 October 1, 2010.

**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>2</sup>*

11. Construction of the well began prior to permit issuance.
12. Work was accomplished during the original development time frame under Permit G-15989 includes:
  - construction of WASC 51158 (Well 2A), WASC 51532 (Well 3A), and WASC 51672 (Well 4A);
  - installation of pumps, controls, valves, risers and electrical power; and
  - installation of buried pipelines and irrigation equipment.
13. During the most recent extension period, being from October 1, 2010, to October 1, 2020, the following was accomplished:
  - installation of tanks, pumps, and irrigation equipment; and
  - installation of a wheel line.

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.

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<sup>2</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.

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

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

14. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns.

Based on FOF 14, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-15989.

**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.*

15. A maximum rate of 6.75 cfs of water has been appropriated being 0.557 cfs from Well 1, 1.336 cfs from Well 2A, 2.428 cfs from Well 3A, and 2.428 cfs from Well 4A for irrigation of 776 acres and agricultural use.
16. Delay of full beneficial use of water under Permit G-15989 was due, in part, damage to previously planted tree stock, requiring reinvestment in new stock, and market conditions resulting from a record cherry crop in 2017 and tariffs on exports beginning in 2018, which reduced the access to capital necessary to complete the development of the water system.

Based on FOF 14, and 15, the Department has determined that beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2020.

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

17. An approximate total of \$3,488,494 has been invested. The costs included items associated with operation and maintenance costs of a system which are not "actual construction" under this permit and therefore are not counted towards development. After deducting these costs, the approximate total investment for "actual construction" to date is approximately \$3,435,494 which is about 60 percent of the total projected cost for complete development of this project. An additional \$2,337,500<sup>3</sup> investment is needed to complete this project, which includes developing the remaining acres for irrigation, installing new pivots in areas not previously irrigated, and a possible permit amendment.

Based on FOF 17, 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.

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<sup>3</sup> Anticipated costs included in the Application associated with purchasing of crops have been excluded from the cost remaining for the development of the water system.

### **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-15989.

### **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.

18. 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-15989; 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).

19. The points of appropriation for Permit G-15989, located within the Starvout Creek Basin, are not located within a limited or critical groundwater area.
20. Starvout Creek is not located within or above any state or federal scenic waterway.

21. The points of appropriation are in an area listed by the Department of Environmental Quality as a water quality limited stream.
- Upper Fifteen Mile Creek (1<sup>st</sup> through 4<sup>th</sup> order stream) impairment causes; Temperature, Habitat Modification and Sedimentation.

**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.

22. Starvout Creek is located within an area ranked “low” for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife.

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

Economic interests dependent on completion of the project.

23. An approximate total of \$3,435,494 has been invested in the project.

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

Other economic interests dependent on completion of the project.

24. Other economic interests dependent on completion of the project have been identified. Portions of the irrigated land are under lease by third party.

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

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

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-15989, in that portions of the previously planted orchard were damaged due to environmental factors, resulting in a loss of revenue, and a need to invest in replacement trees stock..

**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-15989.

Based on FOF 9, through 17, 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 August 27, 2020, the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, which include X; 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, 2030, 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-15989 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 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, 2030, 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-15989 from October 1, 2020, to October 1, 2030.

Extend the time to apply water to beneficial use under Permit G-15989 from October 1, 2020, to October 1, 2030.

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 and 2029**. *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 15, 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 **January 29, 2021**, 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:

