

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)	PROPOSED
Permit G-11578, Water Right Application G-12421, in the)	FINAL ORDER
name of Wildhorse Meadows, LLC)	TO DENY

Permit Information

Application:	G-12421
Permit:	G-11578
Basin:	5 – Deschutes / Watermaster District 11
Date of Priority:	February 20, 1991
Source of Water:	Well #5 in the Whychus ¹ (Squaw) Creek Basin
Purpose or Use:	Irrigation use on 240.0 Acres
Maximum Rate:	1,530 gallons per minute (gpm)

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, 2020, to October 1, 2025.

- Deny an extension of time to apply water to full beneficial use from October 1, 2020, to October 1, 2025.

¹ Squaw Creek was renamed in 2006 to Whychus Creek.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
gpm – gallons per minute

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 July 20, 1992, Permit G-11578 was issued by the Department. The permit authorizes the use of up to 1,530 gpm of water from Well #5 in the Squaw Creek Basin for irrigation use on 240.0 acres. The permit specified actual construction of the well to begin by July 20, 1993, construction of the water system was to be completed by October 1, 1994, and complete application of water was to be made on or before October 1, 1995.
2. On November 5, 2003, an assignment from KMB Enterprises, to Wildhorse Meadows, LLC was recorded in the records of the Water Resources Department.
3. Four prior permit extensions have been granted for Permit G-11578. 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. The Final Order approving the most recent extension of time, issued July 15, 2011, was conditioned to be the last extension granted for Permit G-11578.

4. On December 23, 2020, Matt Cyrus, Manager of Wildhorse Meadows LLC, 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-11578 be extended from October 1, 2020, to October 1, 2025.
5. On February 26, 2021, notification of the Application for Extension of Time for G-11578 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)]

6. On December 23, 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)]

7. Actual construction of the well began prior to the July 20, 1993, deadline specified in the permit.
8. According to the well log received by the Department on August 26, 1991, construction of DESC 992 (Well #5) began February 15, 1991.

Based on Finding of Fact (FOF) 6, & 7, the Department has determined that the prosecution of the construction of the well began prior to July 20, 1993.

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

9. During the most recent extension period, being from October 1, 2010, to October 1, 2020, the following was accomplished:
- developed an additional 5.7 acres of irrigation;
 - installed irrigation hookups; and
 - constructed ponds.

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 minimal 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, and previous extension conditions.

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

The Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-11578.

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.

11. A maximum rate of 1,248 gpm of water has been appropriated from the Well #5 for irrigation of 221.8 acres.
12. Delay of full beneficial use of water under Permit G-11578 was due, in part, the COVID-19 pandemic, and the Green Ridge Fire of 2020. These delays identified all occurred during the final year of the previous extension. No delays have been identified for the years 2010, through 2019.

Beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2020.

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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.

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

13. The Application identifies an approximate total of \$9,670,500 has been invested. The costs included items associated with land clearing, construction of a clubhouse, and work on entitlements, which are not “actual construction” of the water system 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 \$4,500,500 which is about 99 percent of the total projected cost for complete development of this project. An additional \$9,100 investment is needed to construct the remaining ponds. The Application identified costs of clearing land and planting crops, which are not considered work towards the construction of the water system, and have been deducted from the remaining cost.

Based on FOF 13, the Department has determined that the permit holder had made an investment.

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, and; beneficial use of water has been demonstrated. The Department has determined the applicant has demonstrated minimal diligence in previous performance under Permit G-11578.

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.

14. 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-11578; 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).

15. The point of appropriation for Permit G-11578, located within the Whychus Creek Basin, is located within the Upper Deschutes Groundwater Mitigation Area. New appropriations of groundwater within the Deschutes Groundwater Study Area have the potential for substantial interference with surface water rights as described in OAR 690, division 9, and will measurably reduce scenic waterway flows as defined in ORS 390.835 unless mitigation is provided pursuant to the rules in this division. Permit G-11578, was issued prior to the establishment of the study area. Additional development of water under Permit G-11578, twenty-nine years after permit issuance, will have the practical effect of reducing flows in the scenic waterway.
16. Whychus Creek is located above the Deschutes Scenic Waterway.
17. The point 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.

18. Whychus 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.

19. An approximate total of \$4,500,500 has been invested in the project.

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

Other economic interests dependent on completion of the project.

20. The Application identifies outside contractors and operations and maintenance staff as having economic interest in the 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.

21. 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)]

22. 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)]

23. The Application identifies a burning ban in April of 2020.
24. The Application does not identify any additional government requirements which delayed the completion of the project prior to 2020.

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

25. The Application identifies the COVID-19 pandemic as an unforeseen event which delayed the completion of the project.
26. The Application does not identify unforeseen events during the most recent extension of time period prior to 2020.

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

27. A denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs. The Application states an extension is needed to complete the project as a means of income. The Application asserts no other feasible sources of water are available.

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

28. The Application provides evidence of good faith of the appropriator under Permit G-11578.

Based on Findings of Fact 7, through 13, and 19, above, the Department finds that the Applicant has demonstrated good faith.

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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 December 23, 2020, the remaining work to be completed consists of completing construction of the water system, and applying water to full beneficial use.

Based on FOF 3, 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 previous extension of time was conditioned to be the last extension granted for Permit G-11578. Though the permit holder has identified delays in the complete development of the water use under the permit, the delays identified are isolated to the year 2020. The Final Order approving the extension of time from October 1, 2010, to October 1, 2020, provided an additional ten years to complete development of the water use under the permit. The four previous extensions of time, along with the original development timeline has provided 29 years to complete the development of the water use.

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 Final Order approving an extension of time issued July 15, 2011, included the following condition: “This is to be the last extension of time granted for Permit G-11578. Any future extensions of time requests will be denied.” The condition was determined necessary due to the number of previous extension granted for this permit pursuant to OAR 690-315-0050(5). The previous extension of time in combination with the original development time has provided 29 years to develop the use under this permit.

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 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 minimal construction, minimal financial investment and minimal diligence toward developing the project during the most recent extension of time period, being 2010, to October 1, 2020. Additionally, the Final Order approving an extension of time issued July 15, 2011, included the following condition: “This is to be the last extension of time granted for Permit G-11578. Any future extensions of time requests will be denied.” In light of this condition, the permit holder has not shown that good cause exists for an additional extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

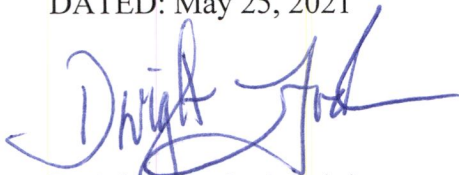
PROPOSED ORDER

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-11578 from October 1, 2020, to October 1, 2025.

Deny the time to apply water to beneficial use under Permit G-11578 from October 1, 2020, to October 1, 2025.

DATED: May 25, 2021



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 **July 9, 2021**, 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;

