

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-17360, Water Right Application G-15198, in the name of John and)
Janna Vanden Brink , Trustees of the John and Janna Vanden Brink) **PROPOSED**
Family Trust, northwest Farm Credit Services, FLCA, and Northwest) **FINAL ORDER**
Farm Credit Services, PCA) **TO DENY**

Permit Information

Application: G-15198
Permit: G-17360
Basin: 7 – Umatilla / Watermaster District 21
Date of Priority: August 16, 2000
Source of Water: a well within Willow Creek Basin
Purpose or Use: Irrigation use on 119.2 Acres
Maximum Rate: 1.49 cubic feet per second (cfs)

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 apply water to full beneficial use from October 1, 2017, 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
Well 1 – MORR 52027
Well 2 – MORR 1735/36/37
Proposed Well 2 – not constructed
Well 4 – MORR 51114
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 June 7, 2001, Permit G-13962 was issued by the Department. The permit authorizes the use of up to 1.49 cfs of water from a well within Willow Creek Basin for irrigation of 119.2 acres. The permit specified complete application of water was to be made on or before October 1, 2005.
2. On December 12, 2011 an assignment from Marvin Padberg to John and Janna Vanden Brink , Trustees of the John and Janna Vanden Brink Family Trust, northwest Farm Credit Services, FLCA, and Northwest Farm Credit Services, PCA, was recorded in the records of the Water Resources Department.
3. On January 27, 2021, the permit holder submitted an “Application for Extension of Time” (Application) to the Department, requesting the time to apply water to full

beneficial use under the terms and conditions of Permit G-17360 be extended from October 1, 2017 to October 1, 2023.

4. On February 23, 2021, notification of the Application for Extension of Time for G-17360 was published in the Department's Public Notice. No public comments were received regarding the extension application.
5. One prior permit extensions have been granted for Permit G-13962. The most recent extension request was approved on July 19, 2013¹, resulted in the completion dates for construction and full application of water being extended from October 1, 2005, to October 1, 2017.
6. On February 26, 2015, the Department approved Permit Amendment T-11689 (Special Order Volume 95, Page 152) authorizing additional points of appropriation. Superseding Permit G-17360 was issued by the Department on February 26, 2015, to reflect the changes.

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)]

7. On January 27, 2021, 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)]

8. Construction of the well began prior to permit issuance.
9. According to the well log received by the Department on March 3, 1969, construction of MORR 1735 (Well 2) began September 22, 1968. The well was subsequently altered under MORR 38 beginning December 16, 1975, and deepened under MORR 37 on March 15, 1977.

Based on Finding of Fact 8, and 9, the Department has determined that the prosecution of the construction of the well began prior to October 1, October 1, 2005.

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).

¹ The Final Order approving the extension of time is incorrectly dated July 19, 2012. July 19, 2013, is the date this Final Order was issued.

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

10. Construction of the well began prior to permit issuance.
11. Construction of wells authorized by Permit Amendment T-11689 began prior to permit issuance. According to well log received by the Department on February 8, 2003, construction of MORR 51114 (Well 4) began December 30, 2002.
12. Work was accomplished during the original development time frame under Permit G-17360 includes installation of a pump, electrical equipment, mainline and a pivot.
13. During the most recent extension period, being from October 1, 2005, to October 1, 2017, the following was accomplished, construction of MORR 52027 (Well 1) began August 24, 2012, and was completed on December 17, 2012. This work was accomplished prior to the July 19, 2013, issuance of the Final Order approving an Extension of Time from October 1, 2005, to October 1, 2017.

The Application does not provide evidence of work accomplished during the period since the Final Order authorizing an Extension of Time from October 1, 2005, to October 1, 2020, was issued.

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

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

14. The Department has considered the permit holder’s compliance with conditions, and has identified the following concerns: (1) the record does not show that an instantaneous flow meter with totalizer has been installed on each well, (2) Well 1 and Well 4 have not been reconstructed to meet construction standards and casing requirements, and (3) the required March static water level measurements have not been received by the Department.

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.

15. The Application identifies that OWRD ground water staff have been taking measurements of the static water level in the well. The measurements taken by OWRD ground water staff have occurred in months other than March, and therefore do not satisfy the requirement of the permit holder to make and submit annual March static water level measurements.

Based on FOF 14, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-17360:

- “Prior to use from the proposed points of appropriation, the permittee shall install an instantaneous flow meter with totalizer on each well³.
- Both MORR 51114 (Well #4) and MORR 52027 (Well #1) shall be reconstructed to meet current well construction standards. MORR 51114 (Well #4) must be continuously cased and continuously sealed from land surface to a depth of 205 feet below land surface. MORR 52027 (Well #1) must be continuously cased and continuously sealed from land surface to a depth of 1055 feet below land surface. and
- To monitor the effect of water use from the well(s) authorized under this permit, the Department requires the water user to make and report annual static water level measurements. The water level shall be measured in the month of March. Reports shall be submitted to the Department within 30 days of measurement.⁴

Failure to comply with permit conditions constitutes illegal use of water. 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.

The Application does not provide evidence towards perfecting the water right under the terms and conditions of the permit. Therefore, the Department has determined the permit holder has not been diligent in developing or perfecting the water use permit, or has complied with all terms and conditions specified in Permit G-17360.

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

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

16. A maximum rate of 1,000 gallons per minute (2.23 cfs) of water has been appropriated from the Well 4 for irrigation of 120.0 acres. This exceeds the amount of water for irrigation use authorized under this permit. The authorized amount of water for irrigation use is 1.49 cfs.
17. A maximum rate of 800 gallons per minute (1.78 cfs) of water has been appropriated from the Well 2 for irrigation of 120.0 acres. This exceeds the amount of water for irrigation use authorized under this permit. The authorized amount of water for irrigation use is 1.49 cfs. This well is no longer in use.

³ Annual water use reports submitted indicate water use is calculated based on power consumption and ratio of volume of water pumped.

⁴ The Department ground water staff have measured static water levels in the month of February.

18. No water has been appropriated from Well 1 under this permit.
19. Water use reports submitted to the Department under reporting identification number 67771 identifies water has continued to be appropriated each year since the issuance of Permit G-17360 from Well 4 (MORR 51114) for irrigation of 830.0 acres. Well 4 is identified as being a point of appropriation under Water Right Certificate 89128, which authorized irrigation on 522.6 acres. The combined total acres authorized for irrigation under Water Right Certificate 89128, and Permit G-17360 is 642.6 acres. This exceed the number of authorized irrigated acres allowed by the combination of both rights.
20. Use of water has occurred form Well 4 prior to reconstruction of the well as required by Permit G-17360.
21. In summation, application of water to full beneficial use was due primarily to lack of financial resources to reconstruct the wells to meet minimum well construction standards, and the specific conditions contained in Permit G-17360.

The Department has determined that beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2017, and water has been appropriated from multiple aquifers and applied to land not authorized for irrigation.

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

22. An approximate total of \$490,000 has been invested. The costs included items associated with repair and maintenance costs of the pump in Well 4, and cost of well testing done by OWRD Groundwater section, 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 \$370,000 which is about 27 percent of the total projected cost for complete development of this project. An additional \$1,000,000 investment is needed to complete this project, which includes bringing the subject wells into compliance with minimum well construction standards and installing the required totalizing flowmeters at each point of appropriation.
23. During the most recent extension of time period, no investment has been made in applying water to full beneficial use.

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 does not provide evidence of work has been accomplished towards completion of the water system during the most recent extension of time period; the permit holder has not demonstrated noncompliance with permit conditions, and; beneficial use of water has not been demonstrated. The Application does provide evidence of illegal water use from MORR 51114 because multiple source aquifers are being appropriated from, and land not authorized for irrigation has been irrigated. The Department has determined the applicant has not demonstrated reasonable diligence in previous performance under Permit G-17360.

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.

24. 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-17360; 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).

25. The points of appropriation for Permit G-17360, located within the Rhea Creek Basin, are not located within a limited or critical groundwater area.
26. Rhea Creek is not located within or above any state or federal scenic waterway.
27. The points of appropriation is in an area listed by the Department of Environmental Quality as a water quality limited stream.

continued on following page

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.

28. Rhea 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.

29. An approximate total of \$370,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

30. The Application identifies a contract with Dairy Gold to produce 302,000 gallons of milk.

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

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

31. 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)]

32. 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)]

33. The Application identifies the dairy lagoons needed to be reconstructed in 2019. The date for complete application of water under Permit G-17360 is October 1, 2017. The reconstruction of the lagoon occurred outside the development timeline authorized by the permit.

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

34. The Application identifies health issues which have occurred over the last two years. The date for complete application of water under Permit G-17360 is October 1, 2017.

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

35. The water user identifies an investment of approximately a half a million dollars to irrigate the acres authorized, which would be lost if the extension of time is denied.

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

36. The Application provides evidence of good faith of the appropriator under Permit G-17360.

Based on Findings of Fact 14, 16, 17, 18, 19, 20, and 23, 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.

37. As of January 27, 2021, 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.

Based on FOF 14, 16, 17, 18, 19, 20, 23, and 36, the Department cannot find that the applicant can complete the project or apply water to full beneficial use within the time requested for the extension because the applicant did not begin construction within the time allowed in the permit (5 years).

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 apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

CONCLUSIONS OF LAW

1. The permit holder has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The permit holder has not complied with the time allowed for construction work under the permit pursuant to ORS 537.630 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).

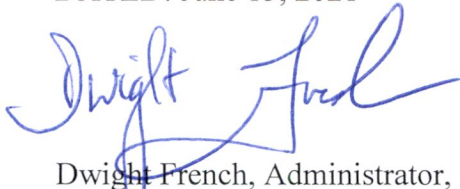
3. The permit holder has not demonstrated reasonable diligence in coming into compliance with permit conditions, and has appropriated water at a rate greater than what is authorized and on lands not authorized. OAR 690-315-0040(3)(c).
4. The Application established that there has been no construction, no financial investment or reasonable diligence toward developing the project during the most recent extension of time period, being October 1, 2005, to October 1, 2017. 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 apply water to beneficial use under Permit G-17360 from October 1, 2017, to October 1, 2023.

DATED: June 15, 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 30, 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;
 - 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;

