

Oregon Water Resources Department
Water Right Services Division

Application for Extension of Time

In the Matter of the Application for an Extension of Time	)	SUPERCEEDING
for Permit G-15460, Water Right Application G-15528, in	)	PROPOSED
the name of Phyllis Brinkley	)	FINAL
		ORDER

Permit Information

Application:	G-15528
Permit:	G-15460 (modified by Permit Amendments T-9594, and T-10322)
Basin:	2C – Lower Willamette / Watermaster District 20
Date of Priority:	June 8, 2001
Source of Water:	three wells, plus and additional three wells authorized by Permit Amendment T-10322, in Clackamas River Basin
Purpose or Use:	nursery use on 124.8 acres
Maximum Rate:	3.12 cubic feet per second (cfs), being 3.12 cfs from three wells for nursery use on 124.8 acres, and limited to 1.0 cfs from the additional two wells for nursery use on 40.0 acres, and 1.51 cfs from the additional three wells for nursery use on 60.45 acres

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 apply water to full beneficial use from October 30, 2020, to October 1, 2026¹.
- 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 – Gregory E. Kupillas
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
bls – below land surface

POINTS OF APPROPRIATION

Well 1 – CLAC 19441
Well 2 – not constructed
Well 3 – not constructed
Well 4 – not constructed
Well 5 – not constructed
Gentry Well 1 – CLAC 59817
Gentry Well 2 – not constructed
Gentry Well 3 – 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(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 July 10, 2003, Permit G-15460 was issued by the Department. The permit authorizes the use of up to 3.12 cfs of water from three wells in Clackamas River Basin for irrigation use on nursery use on 124.8 acres. The permit specified complete application of water

was to be made on or before October 1, 2007.

2. Multiple assignments have been recorded in the records of the Water Resources Department. The current permit holders of record are Phyllis Brinkley, Leo Gentry Wholesale Nursery, and Komsart and Jenifer Rattanapai.
3. On December 10, 2003, the Department approved Permit Amendment T-9594 (Special Order Volume 58, Page 333) authorizing a change in the points of appropriation for nursery use on 40.0 acres under Permit G-15460 (modified by Permit Amendment T-9594) which is hereafter referred to simply as Permit G-15460.
4. On August 30, 2007, the Department approved Permit Amendment T-10322 (Special Order Volume 78, Page 148) authorizing a change in the points of appropriation for nursery use on 60.45 acres under Permit G-15460 (modified by Permit Amendment T-10322) which is hereafter referred to simply as Permit G-15460.
5. Two prior permit extensions have been granted for Permit G-15460. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2012, to October 30, 2020.
6. On March 29, 2021, the permit holder, Phyllis Brinkley, 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-15460 be extended from October 30, 2020, to October 1, 2026.
7. On April 13, 2021, notification of the Application for Permit G-15460 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 March 29, 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)]

9. Construction of the well began prior to permit issuance.
10. According to the well log received by the Department on August 12, 1994, construction of CLAC 19441 began July 26, 1994.

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, 2007.

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 or previous extension.²

11. Prior to permit issuance, CLAC 19441 was deepened under CLAC 57291 (Well 1), and a pump, electrical service, pressure tanks, and irrigation equipment were installed.
12. Work was accomplished during the original development time frame under Permit G-15460 is as follows:
 - constructed CLAC 59817 (Gentry Well 1);
 - installed greenhouses;
 - installed a bulge, pumps, control system and above ground irrigation system; and
 - installed a meter on Gentry well 1.
13. During the most recent extension period, being from October 1, 2012, to October 30, 2020, no additional work towards the completion of the water system was accomplished.
14. Since October 30, 2020, a meter was installed on Well 1

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

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.

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, and previous extension conditions.

15. 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 Well 1 by October 1, 2007, (2) the required March static water level measurements have not been received for Well 1, and (3) annual reports of the amount of water used each month have not been received by the Department.

Based on FOF 15, the Department has determined that the permit holder has not demonstrated compliance with permit conditions as required by Permit G-15460.

In order to legally perfect the use of water under this permit, the permit holder must demonstrate that all conditions of the permit have been satisfied.

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

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

16. A maximum rate of 128 gallons per minute (0.28 cfs) of water has been appropriated for nursery use on 44.0 acres, being 28 gallons per minute from Well 1 for nursey use on 8.6 acres, and 100 gallons per minute for nursery use on 35.4 acres.
17. Delay of full beneficial use of water under Permit G-15460 was due, in part, significant health issues experienced by the permit holder during the most recent extension of time period.

The Department has determined that beneficial use of water, in compliance with the terms and conditions of the permit, has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 30, 2020.

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

18. An approximate total of \$566,800 has been invested. The costs included items associated with planning, applications, and repair 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 \$175,600 which is about 21 percent of the total projected cost for complete development of this project. An additional \$656,000 investment is needed to complete this project, which includes developing additional wells and the remaining acres for irrigation.

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 minimal evidence of progress towards completion of the water system; a financial investment has been made; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use has not been demonstrated. The Department has determined the applicant has demonstrated the minimum necessary for the Department to find reasonable diligence towards complete application of water to a beneficial use.

The Market and Present Demands for Water [OAR 690-315-0040(4)(a-f)]

The Department's determinations of market and present demand for water or power to be supplied shall consider the requirements set forth under OAR 690-315-0040(4)(a-f). In accordance with OAR 690-315-0040(4), the Department shall consider, but is not limited to, the following factors when determining the market and the present demand for water or power to be supplied:

- *(a) The amount of water available to satisfy other affected water rights and scenic waterway flows;*
- *(b) Special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d);*
- *(c) The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife;*
- *(d) Economic investment in the project to date;*
- *(e) Other economic interests dependent on completion of the project; and*
- *(f) Other factors relevant to the determination of the market and present demands for water and power.*

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

The amount of water available to satisfy other affected water rights and scenic waterway flows.

19. 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-15460; 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).

20. The points of appropriation for Permit G-15460, located within the Clackamas River Basin, are not located within a limited or critical groundwater area.

21. Clackamas River is located above Clacamas Scenic Waterway.
22. The points of appropriation are 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.

23. Clackamas River 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.

24. An approximate total of \$175,600 has been invested in the project.

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

Other economic interests dependent on completion of the project.

25. Other economic interests dependent on completion of the project have not been identified.

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

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

26. On July 8, 2021, the Department’s Ground Water Section determined reference levels for the following wells:
 - CLAC 19441/57291 – 254.25 feet below land surface (bls)
 - CLAC 59817 – 145.0 feet bls
27. 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.
- 28.

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

29. 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)]

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

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

31. During the most recent extension of time period, the permit holder has faced a number of unforeseen events which resulting in a delay in additional development under the permit. In 2015, Duncan Brinkley passed away, which began legal issues pertaining to his trust. During much of this same time, Phyllis Brinkley experienced a series of health related events, which resulted in the need for significant recovery. Additionally, the Dowty Fire of 2020 resulted in evacuations and significant smoke damage.

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

32. 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)]

33. The Application provides evidence of good faith of the appropriator under Permit G-15460.

Based on FOF 9, 10, 11, 12, 14, 16, 18, and 24, 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.

34. As of March 29, 2021, the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, which include making and submitting annual March static water level measurements, reporting annual water use, and installing meters on any new well constructed under the permit; 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, 2026, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15460 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 apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d). Specific consideration has been given to the unforeseen events experienced by the permit holder during this most recent extension of time period, which resulted in an inability for additional development to occur during this period.

LIMITATIONS AND CONDITIONS

1. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to ensure future diligence. The Department has determined the need to place a "Static Water Level and Annual Water Use Report Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary due to non-compliance with permit conditions requiring submittal of annual water use report, and March static water level measurements.
2. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to ensure future diligence. The Department has determined the need to place a "Last Extension Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. This condition, specified under Item 2 of the "Conditions" section of this PFO, was determined to be necessary due to non-compliance with permit conditions requiring submittal of annual water use report, and March static water level measurements; and the amount of time already authorized for development under this permit.
3. 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 3 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 32, full application of water to beneficial use can be accomplished by October 1, 2026, 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, but the extension is conditioned to ensure future diligence and is granted only for the reasonable time necessary to complete water development and apply water to beneficial use. OAR 690-315-0050(5).
5. The applicant has demonstrated good cause for the extension, but the extension must be conditioned to ensure this is the last extension granted in order to ensure future diligence; OAR 690-315-0050(5).
6. For extensions exceeding five years, the Department shall establish progress checkpoints to determine if diligence is being exercised 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 apply water to beneficial use under Permit G-15460 from October 30, 2020, to October 1, 2026.

This Proposed Final Order supersedes the Proposed Final Order issued on August 17, 2021, to correct the date identified as the new date to complete construction and apply water to the beneficial use.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. Static Water Level and Annual Water Use Report Condition

The permit holder shall submit a monthly water use reports beginning no later than December 1, 2021. If the required monthly water use reports are not submitted By December 1, 2021, the extension of time will be terminated.

The permit holder shall submit a March 2022, static water level measurement for Well 1(CLAC 19441/57291) by no later than April 29, 2022, and March static water level measurements annually thereafter. If the required March 2022 static water level measurement is not received by the Department by April 29, 2022, the extension of time will be terminated.

2. **Last Extension Condition**

This may be the last extension of time granted for Permit G-15460. Any future extensions of time request will be denied, unless the permit holder can provide the Department with evidence that diligence is shown during this extension period. Evidence that diligence is shown must include timely submittal of monthly water use reports and March static water level measurements.

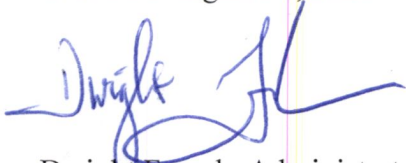
Additionally, any future extensions of time request may be denied, unless the permit holder can provide the Department with evidence that beneficial use of the water is shown during this extension period. In addition, all normal extension standards and rules will be evaluated. ORS 539.010(5); OAR 690-315-0040.

3. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2025**. *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: August 31, 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 **October 15, 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;
 - f. Proof of service of the protest upon the water right permit holder, if petitioner is other than the water right permit holder; and
 - g. The applicant or non-applicant protest fee required under ORS 536.050.
3. Within 60 days after the close of the period for requesting a contested case hearing, the Director shall:
 - a. Issue a final order on the extension request; or
 - b. Schedule a contested case hearing if a protest has been submitted, and:
 - 1) Upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or
 - 2) The applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests.

NOTICE TO ACTIVE DUTY SERVICEMEMBERS: Active duty Servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

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- If you have questions about statements contained in this document, please contact Jeffrey D. Pierce at 503- 986-0802.
 - If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at 503-986-0820.
 - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0900.
 - Address any correspondence to : Water Right Services Division
725 Summer St NE, Suite A
Salem, OR 97301-1266
Fax: 503-986-0901
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