

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-16284, Water Right Application G-16802, in the)
name of Martin Brothers Land, William Martin, Douglas)
Martin

**PROPOSED
FINAL ORDER
TO DENY**

Permit Information

Application:	G-16802
Permit:	G-16284
Basin:	5 – Deschutes / Watermaster District 3
Date of Priority:	February 22, 2007
Source of Water:	a well in Fulton Canyon Basin
Purpose or Use:	Irrigation use on 132.5 Acres
Maximum Rate:	1.56 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 complete construction of the water system from October 1, 2012, to October 1, 2024.

- Deny an extension of time to apply water to full beneficial use from October 1, 2012 or , to October 1, 2024.

ACRONYM QUICK REFERENCE

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

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 January 17, 2008, Permit G-16284 was issued by the Department. The permit authorizes the use of up to 1.56 cfs of water from a well in Fulton Canyon Basin for irrigation use on 132.5 acres. The permit construction of the water system was to be completed by October 1, 2012, and complete application of water was to be made on or before October 1, 2012.
2. On August 27, 2021, the permit holder 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-16284 be extended from October 1, 2012, to October 1, 2024. This is the first permit extension requested for G-16284.
3. On September 14, 2021, notification of the Application for Extension of Time for G-16284 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)]

4. On August 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)]

5. According to the Application, construction of the well began in May 2007. The Application provides Well Identification Tag Number L85680 to identify the well.
6. The Department record does not include a Well Construction Report associated with Well Identification Tag Number L85680.
7. The Department record does identify Start Card 188938 as being received from Tippet's Well Drilling, LLC, on May 4, 2007. The Start Card identifies Martin Brothers as the owner for whom the well would be constructed.

The Department cannot determine that prosecution of construction of the well began by October 1, 2012, because documentation demonstrating that construction began has not been provided to the Department. Though Start Card 188938 was submitted identifying the intent to begin construction of a well, evidence that construction began within the time authorized by the permit has not been provided to the Department.

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)]

8. No work was completed during the original development time frame under Permit G-16284.

Based on FOF 8, The Department cannot find evidence of progress made towards completion of the water development and application of water to full beneficial use as allowed in the time period specified in the permit. Therefore, the Department cannot find good cause or reasonable diligence towards the complete application of water to a beneficial use under G-16284.

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

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

9. 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, (2) the required March static water level measurements have not been received by the Department, (3) annual reports of the amount of water used each month have not been received by the Department, and (4) the record does not show that the well produces water only from the basalt ground water reservoir. The Department recognizes that it is the intent of the permit holder to comply with all permit conditions at the time the conditions become applicable.

Based on FOF 9, the Department has determined that the permit holder has not demonstrated compliance with any of the permit conditions as required by Permit G-16284.

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

10. No water has been appropriated under this permit.
11. Beneficial use of water has not been demonstrated under this permit.

The Department finds there is no evidence of progress made towards completion of the water development and application to full beneficial use as allowed in the time period specified in the permit.

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

12. An investment of approximately \$45,000, which is approximately 16 percent of the total projected cost for complete development of this project. An additional \$245,000 investment is needed for the completion of this project.

Based on FOF 12, 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 that work has been accomplished towards completion of the water system; the permit holder has not demonstrated compliance with permit conditions, and; beneficial use of water has not been demonstrated. The Department has determined the applicant has not demonstrated reasonable diligence in previous performance under Permit G-16284.

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.

13. 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-16284; 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).

14. The point of appropriation for Permit G-16284, located within the Fulton Canyon Basin, is not located within a limited or critical groundwater area.
15. Fulton Canyon is not located within or above any state or federal scenic waterway.

16. 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.

17. Fulton Canyon 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.

18. An approximate total of \$45,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

19. The Application did not identify economic interests other than those of the applicant’s that may be dependent on 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.

20. 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)]

21. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date if the Application is approved.

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

22. Delay in the development of this project was caused by any other governmental requirements.

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

23. The Application identifies a ‘financial hardship’ as an unforeseen event.

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

24. The Application asserts 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)]

25. The Application does not provides evidence of good faith of the appropriator under Permit G-16284.

Based on Findings of Fact 8, 9, 10, and 11, 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.

26. As of August 27, 2021, the remaining work to be completed consists of completing construction of the water system, which includes installing a pump in the Well, installing the irrigation system, and establishing an electrical connection, meeting all permit conditions, and applying water to beneficial use.

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 demonstrate diligence in the development of the water use authorized under the permit because no work has been accomplished during the development tile period as provided by the permit..

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 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 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 Application established that there has been no construction since the permit was issued, and reasonable diligence toward developing the project has not been demonstrated. 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).

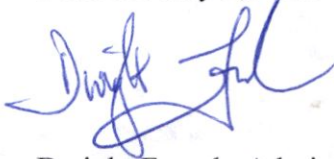
PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department proposes to issue an order to:

Deny the time to complete construction of the water system under Permit G-16284 from October 1, 2012, to October 1, 2024.

Deny the time to apply water to beneficial use under Permit G-16284 from October 1, 2012, to October 1, 2024.

DATED: July 5, 2022



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 **August 19, 2022**, 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;

