

Oregon Water Resources Department
Water Right Services Division

Application for Extension of Time

In the Matter of the Application for an Extension of Time)	SUPERSEDING
for Permit G-17036, Water Right Application G-16385,)	PROPOSED
in the name of the Pinnacle Utilities, LLC)	FINAL
		ORDER

Permit Information

Application File G-16385 / Permit G-17036

Basin: 5 / Deschutes Basin / Watermaster District 11
Date of Priority: February 9, 2005

Authorized Use of Water

Source of Water: Six wells in Deschutes River Basin
Purpose or Use: Quasi-Municipal uses, including irrigation of golf courses and commercial areas, and maintenance of reservoirs
Maximum Rate: 9.28 cubic feet per second (cfs), limited to a maximum annual volume of 2,129.0 acre-feet (AF). The rate and volume are further limited by the corresponding mitigation provided. The maximum volume for irrigation of 320.0 acres of golf courses shall not exceed 717.0 AF

**This Extension of Time request is being processed in accordance with Oregon
Administrative Rule Chapter 690, Division 315.**

Please read this Proposed Final Order in its entirety.

This Proposed Final Order applies only to Permit G-17036, water right Application G-16385.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Deny an extension of time to complete construction from October 1, 2018, to October 1, 2035.
- Deny an extension of time to apply water to full beneficial use from October 1, 2018, to October 1, 2035.

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources

PFO – Proposed Final Order

WMCP – Water Management and Conservation Plan

Pinnacle – Pinnacle Utilities, LLC

Thornburgh - Thornburgh Utility Group, LLC

Units of Measure

cfs – cubic feet per second

AF – acre-feet

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) may, for good cause shown, order and allow an extension of time, for the completion of the well or other means of developing and securing the ground water or for complete application of water to beneficial use. 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) provides in pertinent part that the Water Resources Director, for good cause shown, may extend the time within which the full amount of the water appropriated shall be applied to a beneficial use. This statute 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 therefore; and the income or use that may be required to provide fair and reasonable returns upon the investment.

OAR 690-315-0080 provides in pertinent part that the Department shall make findings to determine if an extension of time for quasi-municipal water use permit holders may be approved to complete construction and/or apply water to full beneficial use.

FINDINGS OF FACT

1. On February 7, 2013, Permit G-17009 was issued to Thornburgh Utility Group, LLC (Thornburgh) by the Department. The permit authorizes the use of up to 9.28 cfs of water, limited to a maximum annual volume of 2,355.0 AF of water, from six wells in the Deschutes River Basin for quasi-municipal uses, including irrigation of golf courses and commercial areas, and maintenance of reservoirs. The rate and volume are further limited by the corresponding mitigation provided. The maximum volume for irrigation of 323.0 acres for golf courses shall not exceed 717.0 AF. The permit specified completion of construction and complete application of water was to be made within five years of permit issuance, being February 7, 2018.

2. On April 3, 2013, Superseding Permit G-17036 was issued by the Department to correctly describe the maximum annual volume. The superseding permit authorizes the use of up to 9.28 cfs of water, limited to a maximum annual volume of 2,129.0 AF of water, from six wells in the Deschutes River Basin for quasi-municipal uses, including irrigation of golf courses and commercial areas, and maintenance of reservoirs. The rate and volume are further limited by the corresponding mitigation provided. The maximum volume for irrigation of 323.0 acres for golf courses shall not exceed 717.0 AF. The permit specified completion of construction and complete application of water was to be made within five years of permit issuance, being February 7, 2018.
3. On March 10, 2014, an assignment from Thornburgh Utility Group, LLC, to Pinnacle Utilities, LLC (Pinnacle) was recorded in the records of the Water Resources Department.
4. On April 2, 2018, Pinnacle submitted an "Application for Extension of Time" (Application) to the Department requesting the time to complete construction and the time to apply water to full beneficial use under the terms and conditions of Permit G-17036 be extended from October 1, 2018, to October 1, 2035. This is the first extension of time request for Permit G-17036.
5. Notification of the Application for Extension of Time for Permit G-17036 was published in the Department's Public Notice dated April 3, 2018. No public comments were received regarding the extension application.
6. On May 8, 2018, the Department issued a Proposed Final Order to deny the Extension of Time.
7. On May 22, 2018, the Department issued an Order Withdrawing the Proposed Final Order to deny the Extension of Time for additional consideration and clarification.
8. On May 25, 2018, Janet Neuman, council for Pinnacle, submitted additional information regarding construction of Well 2.
9. On June 5, 2018, the Department issued a Proposed Final Order to approve an Extension of Time from April 3, 2018, to October 1, 2035.
10. On July 20, 2018, a protest to the Proposed Final Order was filed in opposition to the proposed approval of the extension of time¹.
11. On October 26, 2018, the Department issued a Final Order in the matter of an Application for Extension of Time for Permit G-17036.

¹ The protest submitted on July 20, 2018, will be returned on issuance of this superseding proposed final order.

12. On December 7, 2018, a Petition for Judicial Review and Declaratory Judgement of the October 26, 2018, Final Order in the Marion County Circuit Court of Appeals (Case No. A169580).
13. On January 31, 2019, the Department issued an Order on Reconsideration Withdrawing Final Order Approving Extension of Time for Permit G-17036.

Review Criteria for Quasi-Municipal Water Use Permits [OAR 690-315-0080(1)]

The time limits to complete construction and/or apply water to full beneficial use may be extended if the Department finds that the permit holder has met the requirements set forth under OAR 690-315-0080. This determination shall consider the applicable requirements of ORS 537.230², 537.630³ and/or 539.010(5)⁴

*ORS 537.630(2) states, Except for the holder of a permit for municipal use, the holder of a permit issued pursuant to ORS 537.625 shall prosecute the construction of a well or other means of developing and securing the ground water with reasonable diligence and complete the construction within a reasonable time fixed in the permit by the Water Resources Department, not to exceed five years after the date of approval of the application. However, the department, for good cause shown, shall order and allow an extension of time beyond the five year period, for the **completion** of the well or other means of developing and securing the ground water or for complete application to beneficial use.” The statute does not provide for an extension of time to begin the construction of the well or other means of securing the ground water.*

Complete Extension of Time Application [OAR 690-315-0080(1)(a)]

14. On April 2, 2018, the Department received an Application for Extension of Time and the fee specified in ORS 536.050 from the permit holder.

Start of Construction [OAR 690-315-0080(1)(b)]

15. The Application for a Permit to Use Ground Water, submitted February 9, 2005, the six wells are “Proposed”. Note 1 on page 3 of this permit application indicate a seal depth of 20 feet would be the minimum seal depth, with the final seal depth to be determined during well construction.
16. According to the Application for an Extension of Time submitted on April 2, 2018, Chart-IV, page 15 of 24, wells 1-6 have not been constructed.
17. According to the additional information submitted to the Department on May 25, 2018, three wells currently exist on the subject property, including DESC 756, DESC 3666, and DESC 3669. It is asserted in this information that DESC 756 corresponds to Well #2 on the permit.

² ORS 537.230 applies to surface water permits only.

³ ORS 537.630 applies to ground water permits only.

⁴ ORS 537.010(5) applies to surface water and ground water permits.

18. The Ground Water Review performed by the Department Ground Water Section on March 21, 2005, identifies all wells being evaluated are "Not yet drilled".
19. The Well Log for DESC 756 provides that this well was constructed with a cement seal to a depth of 18.5 feet.
20. The authorized location for Well 2 under Permit G-17036 is within the SE ¼ NW ¼, Section 29, Township 15 South, Range 12 East. DESC 756 is located within NE ¼ NE ¼, Section 29, Township 15 South, Range 12 East. These location are, at minimum, one-quarter of a mile apart.

Based on Findings of Fact (FOF) 15, 16, 17, 18, 19, and 20, the Department has determined that DESC 756 is not constructed at an authorized location under Permit G-17036. The Department cannot find that DESC 756 was the well intended for use under Permit G-17036.

21. ORS 537.630(2) states in part that "Except for the holder of a permit for municipal use, the holder of a permit issued pursuant to ORS 537.625 shall prosecute the construction of a well or other means of developing and securing the ground water with reasonable diligence and complete the construction within a reasonable time fixed in the permit by the Water Resources Department, not to exceed five years after the date of approval of the application. However, the department, for good cause shown, shall order and allow an extension of time, including an extension beyond the five-year period, for the completion of the well or other means of developing and securing the ground water or for complete application of water to beneficial use". The statute does not provide for an extension of time to begin the construction of the well or other means of securing the ground water.
22. Permit G-17036 was issued pursuant to ORS 537.625. The application does not provide evidence of prosecution of construction of the well within five years of permit issuance, being February 7, 2018.
23. OAR 690-315-0070(3)(c) requires that quasi-municipal water right permit holders must provide evidence of the actions taken to begin actual construction on the project, as defined in OAR 690-315-0020(3)(d), if required under the applicable statute.
24. The Application does not provide evidence of actual construction as defined in OAR 690-315-0020(3)(d).

Based on Findings of Fact (FOF) 21, 22, 23, and 24, the Department has determined that prosecution of construction of the well did not occur prior to February 7, 2018, as being the date for complete application of water under Permit G-17036, as required by ORS 537.630(2).

Duration of Extension [OAR 690-315-0080(1)(c) and (1)(d)]

Under OAR 690-315-0080(1)(c), (d), in order to approve an extension of time for quasi-municipal water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

25. The remaining work to be accomplished under Permit G-17036 consists of construction of six wells, installation of the necessary water system equipment, including pumps, pipe, service connections, and irrigation equipment.
26. As of October 1, 2018, no water authorized under Permit G-17036 has been appropriated for quasi-municipal purposes.
27. Permit G-17036, is the only water right held by Pinnacle at the authorized place of use.
28. Pinnacle's peak water demand within its service area boundaries was 0.0 cfs in 2018.
29. According to the Application, in 2018, the population within Thornburgh Destination Resort, being the service boundary of Pinnacle, was zero. Pinnacle estimates the population to increase to an estimated population of 3,500 by the year 2035.
30. According to the Application, their peak demand is projected to be approximately 9.28 cfs of water by the year 2035.

Given that no development has occurred under Permit G-17036, the Department has determined that the permit holder's request to have until October 1, 2035, to complete construction and to accomplish the application of water to beneficial use under the terms of Permit G-17036 is not reasonable or necessary as Pinnacle did not prosecute construction of the well prior to February 7, 2018, as required by ORS 537.630(2).

Good Cause [OAR 690-315-0080(1)(e) and (3)(a-g) and (4)]

The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0080(3).

Reasonable Diligence and Good Faith of the Appropriator [OAR 690-315-0080(3)(a), (3)(c) and (4)]

Reasonable diligence and good faith of the appropriator must be demonstrated during the permit period or prior extension period as a part of evaluating good cause in determining whether or not to grant an extension. In determining the reasonable diligence and good faith of a quasi-municipal water use permit holder, the Department shall consider activities associated with the development of the right including, but not limited to, the items set forth under OAR 690-315-0080(4) and shall evaluate how well the applicant met the conditions of the permit or conditions of a prior extension period.

31. Construction of the well and water system did not begin prior to the deadline specified in the permit.
32. No physical construction work was accomplished during the original development time frame under Permit G-17036.
33. As of April 2, 2018, the Application states that an estimated \$28,087,618 has been invested towards development of the Thornburgh Destination Resort. These costs are associated with permit fees, land acquisition, planning, and legal fees. The permit holder

has not made an investment in the construction of the water system. The permit holder estimates an additional \$194,000,000 investment is needed for the completion of this project.

34. As of October 1, 2018, none of the 9.28 cfs of water allowed has been appropriated for beneficial quasi-municipal purposes under the terms of this permit.
35. The Department has considered the permit holder's compliance with conditions, including mitigation requirements, and has identified the following concerns:
 - The record does not show that prosecution of construction of the well or other means of securing the groundwater resource occurred within the time allowed in the permit, as required by ORS 537.630(2).
 - The record does not show that a totalizing flow meter has been installed.
 - The record does not show annual water use reports have been submitted to the Department.
 - The record does not show a Water Management and Conservation Plan (consistent with OAR Chapter 690, Division 86), was submitted within five years of issuance of Permit G-17036.⁵

Cost to Appropriate and Apply Water to a Beneficial Purpose [OAR 690-315-0080(3)(b)]

36. As of April 2, 2018, the permit holder made no investment towards the cost of development of the water system. The permit holder estimates an additional \$194,000,000 investment is needed for the completion of this project.

The Market and Present Demands for Water [OAR 690-315-0080(3)(d) and (5)(a-f)]
For quasi-municipal water use permits issued after November 2, 1998, in making a determination of good cause pursuant to 690-315-0080(3)(d), the Department shall also consider, but is not limited to, the factors in 690-315-0080(5)(a-f).

The amount of water available to satisfy other affected water rights and scenic waterway flows; 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); or the habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife [OAR 690-315-0080(5)(a-f)].

37. 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-17036; furthermore, water availability for other affected water rights and scenic waterway flows after the permit was

⁵ On February 26, 2020, Pinnacle submitted the required Water Management and Conservation Plan.

issued is determined at such time that such application for a new water right is submitted. The points of appropriation for Permit G-17036 are located within the Upper Deschutes Ground Water Mitigation Area. The points of appropriation for Permit G-17036, located within the Deschutes River Basin, are located above the Deschutes Scenic Waterway. The points of appropriation are within areas ranked high for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and are located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife. The points of appropriation are not in an area listed by the Department of Environmental Quality as a water quality limited stream.

Economic investment in the project to date [OAR 690-315-0080(5)(d)].

38. As of April 2, 2018, the Application states that an estimated \$28,087,618 has been invested towards development of the Thornburgh Destination Resort. These costs are associated with permit fees, land acquisition, planning, and legal fees. The permit holder has not made an investment in the construction of the water system. The permit holder estimates an additional \$194,000,000 investment is needed for the completion of this project.

Other economic interests dependent on completion of the project [OAR 690-315-0080(5)(e)].

39. None have been identified.

Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0080(5)(f)].

40. Pinnacle Utilities, LLC projects a population increase from zero in 2018 to 3,500 by 2035.

Fair Return Upon Investment [OAR 690-315-0080(3)(e)]

41. Use and income from the permitted water development project would likely result in reasonable returns upon the investment made in the project to date.

Other Governmental Requirements [OAR 690-315-0080(3)(f)]

42. Prior to issuance of Permit G-17009, and Superseding Permit G-17036, Thornburgh encountered numerous land use permitting issues, which delayed the issuance of the Ground Water permit.
43. Between February 7, 2013, and January 1, 2018, Pinnacle continued to experience issues with gaining final approvals of the Master Plan to develop a destination resort and litigation surrounding the development of the resort.
44. On January 1, 2018, the Final Master Plan was granted final approval.

45. ORS 537.769, in part states that, “No ordinance, order or regulation shall be adopted by a local government to regulate the inspection of wells, construction of wells or water well constructors subject to regulation by the Water Resources Commission or the Water Resources Department.” A review of the documents provided by the permit holder surrounding the land use approval issues and the subsequent legal challenges did not provide evidence that the permit holder was denied access to the land, or the ability to prosecute construction of the well as required by ORS 537.630(2), during the five years since permit issuance, being from February 7, 2013, to February 7, 2018.

The Department recognizes that the permit holder faced challenges in gaining final approval of the Master Plan to develop a destination resort. However, because the permit holder was not precluded from prosecution of construction of the well or other means of securing the ground water resource, as required by ORS 537.630(2), the Department finds that other government requirements did not prevent prosecution of construction of the well.

Events which Delayed Development under the Permit [OAR 690-315-0080(3)(g)]

46. According to the Application, delay of development under Permit G-17036 was due, in part, to legal challenges stemming from land use issues and foreclosure, funding availability, and the economic recession of 2008.

SUMMARY OF FINDINGS

In order for the Department to approve an Application for an Extension of Time, the Department must make six distinct findings: (1) the application is complete; (2) the applicant began construction; (3) the time requested is reasonable; (4) the applicant can complete the project within the time requested; (5) there is good cause; AND (6) for municipal use permits, fish persistence will be maintained upon development of the “undeveloped portion”. The Application identifies a number of issues that have delayed the ability to fully build out of the resort and make beneficial use of the water authorized by the permit. Though this could result in a finding of “Good Cause” to allow for an Extension of Time, this is only one of the six findings that must be made to approve an extension of time for a quasi-municipal water use permit. The Department has determined that construction of an authorized well under Permit G-17036, did not begin within the five years required by the permit and by ORS 537.630(2), and therefore cannot make a finding that construction began as required by ORS 537.630(2).

CONCLUSIONS OF LAW

1. The applicant is entitled to apply for an extension of time to complete construction and completely apply water to the full beneficial use pursuant to ORS 537.630.
2. The applicant has submitted a complete extension application form and the fee specified under ORS 536.050(1)(k), as required by OAR 690-315-0080(1)(a).
3. The applicant did not comply with begin construction timeline requirements pursuant to ORS 537.630(2) as required by OAR 690-315-0080(1)(b).

4. The time requested to complete construction and apply water to full beneficial use is not reasonable, as required by OAR 690-315-0080(1)(c).
5. Completion of construction and full application of water to beneficial use cannot be completed by October 1, 2035, pursuant to OAR 690-315-0080(1)(d), because the permit holder did not begin construction as required by ORS 537.630(2) and OAR 690-315-0080(1)(b).
6. 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 the fair return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the water right permit holder had no control, and the Department has determined that the permit holder has not shown good cause for an extension of time to apply the water to full beneficial use pursuant to OAR 690-315-0080(1)(e) because the permit holder did not prosecute the construction of the well within five years of permit issuance as required by ORS 537.630(2)

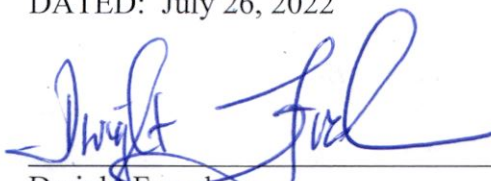
PROPOSED ORDER

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

Deny the extension of time to complete construction under Permit G-17036 from February 7, 2018, to October 1, 2035.

Deny the extension of time to apply the water to beneficial use under Permit G-17036 from February 7, 2018, to October 1, 2035.

DATED: July 26, 2022



Dwight French
Water Right Services Division Administrator

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 **September 9, 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;
 - 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 Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>

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- If you have any questions about statements contained in this document, please contact Jeffrey D. Pierce at 503-979-3213.

 - 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 503-986-0801.

 - Address any correspondence to: Water Right Services Division
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Fax: 503-986-0901
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