

**Oregon Water Resources Department
Water Right Services Division**

Application for Extension of Time

In the Matter of the Application for an Extension of Time)	PROPOSED
for Permit G-17708, Water Right Application G-15315, in)	FINAL
the name of Lee Sukraw, and Cheyne Brothers, LLC)	ORDER

Permit Information

Application:	G-15315
Permit:	G-17708
Basin:	14 – Klamath / Watermaster District 17
Date of Priority:	March 9, 2001
Source of Water:	nine wells in Klamath River Basin
Purpose or Use:	Irrigation use on supplemental irrigation of 1166.59 acres
Maximum Rate:	14.58 cubic feet per second (cfs)

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 1, 2022, to October 1, 2027¹.
- 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

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
Well 1 – KLAM 60546
Well 4 – KLAM 61160
Well 5 – KLAM 14559
Well 7 – KLAM 53732
Well 8 – KLAM 53872
Well 9 – KLAM 59347
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.

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 March 13, 2003, Permit G-13560 was issued by the Department. The permit authorized the use of up to 14.58 cfs of water from eight wells in Klamath River Basin for supplemental irrigation of 1166.59 acres. The permit specified complete application of water was to be made on or before October 1, 2007.
2. Two prior permit extension has been granted for Permit G-13560. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2007, to October 1, 2017.
3. On October 21, 2016, the Department approved Permit Amendment T-12319 (Special Order Volume 103, Page 329) authorizing an additional point of appropriation under Permit G-15360. Superseding Permit G-17641 was issued by the Department on October 21, 2016, to reflect the changes.
4. On December 7, 2016, a correcting order was issued (Special Order Volume 103, Page 552) and Superseding Permit G-17708 was issued by the Department to correctly describe an amendment for an additional point of appropriation, and to describe an extension of time for complete application of water approved September 15, 2009. The permit authorizes the use of up to 14.58 cfs of water from nine wells in Klamath River Basin for supplemental irrigation of 1166.59 acres. The permit specified complete application of water was to be made on or before October 1, 2007, and by extension of Time Final Order dated September 15, 2009, the deadline for complete application of water to use was extended to October 1, 2017.
5. On May 11, 2022, a partial assignment from Lee Sukraw to Cheyne Brothers, LLC, was recorded in the record of the Water Resources Department.
6. On August 15, 2022, the permit holder, Lee Sukraw 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-17708 be extended from October 1, 2022, to October 1, 2032.
7. On August 23, 2022, notification of the Application for Permit G-17708 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 August 15, 2022, 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 November 10, 1965, construction of KLAM 14559 (Well 5) began September 16, 1965.

Based on Finding of Fact (FOF) 8 and 9, the Department has determined that the prosecution of the construction of Well 5 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 previous extension.²

11. During the most recent extension period, being from October 1, 2017, to October 1, 2022, KLAM 61036 (Well 1) began, and KLAM 61160 (Well 4) was completed.

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 cause and reasonable diligence towards complete application of water to a beneficial use.

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.

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

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

KLAM 53732 (Well 7) and KLAM 53142 (Well 8)

12. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns for Well 7 and Well 8.

Based on FOF 12, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-17708 for Well 7 and Well 8.

KLAM 14559 (Well 5).

13. The Department has considered the permit holder's compliance with conditions, and has identified the following concern: annual reports of the amount of water used each month from Well 5 have not been received by the Department.

Based on FOF 13, the Department has determined the permit holder has not demonstrated compliance with the following condition for Well 5:

- "The permittee shall maintain the meter or measuring device in good working order, shall keep a complete record of the amount of water used each month and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as may be required by the Director"

Well 9

14. The Department has considered the permit holder's compliance with conditions, and has identified the following concern: the required March static water level measurements of Well 9 have not been received by the Department.

Based on FOF 14, the Department has determined the permit holder has not demonstrated compliance with the following condition for Well 9:

- "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 static water level shall be measured in the month of March. Reports shall be submitted to the Department within 30 days of measurement."

KLAM 60546 (Well 1), Well 2, Well 3, KLAM 61160 (Well 4), and Well 6

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

16. As of August 15, 2022, Well 1, Well 2, Well 3, and Well 6 have not been completed.

Based on FOF 15, the Department has determined that the permit holder has not demonstrated compliance with any permit conditions as required by Permit G-17708 for Well 1, Well 2, Well 3, Well 4, and Well 6. 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.

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.

17. A maximum rate of 23.73 cfs of water has been appropriated from wells for irrigation of 1,166.59 acres. This exceeds the amount of water for irrigation use authorized under this permit. The authorized amount of water for irrigation use is 14.58 cfs.
18. Though previous Applications for Extension of Time have identified Well 7 and Well 8 have been constructed in their authorized location, the current Application identifies that none of the constructed wells are located at an authorized location.
19. Delay of full beneficial use of water under Permit G-17708 was due, in part, to insufficient yield of water from the wells located within or near the authorized place of use

Beneficial use of water has been demonstrated under this permit for Well 7, and Well 8 as all permit conditions were satisfied by October 1, 2022.

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

20. An approximate total of \$889,102 has been invested. The costs included items associated with construction of "Test Wells" which have not been identified as being authorized under the permit and therefore are not considered 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 \$793,374 which is about 58 percent of the total projected cost for complete development of this project. An additional \$570,000 investment is needed to complete this project, this excludes the projected cost of filing a Permit Amendment, which would not be necessary if authorized wells were constructed in their authorized locations.

Based on FOF 20, 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 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 for all wells, and; beneficial use has not been demonstrated from all wells. 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.

21. 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-17708; 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).

22. The points of appropriation for Permit G-17708, located within the Klamath River Basin, are located within a limited or critical groundwater area.
23. Klamath River is located above Klamath Scenic Waterway.

24. 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.

25. Klamath River 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.

26. An approximate total of \$793,374 has been invested in the project.

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

Other economic interests dependent on completion of the project.

27. 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.

28. 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 2 of the “Limitations and Conditions” section of this PFO to meet this condition.

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. The Application asserts that the underlying geology is difficult to construct wells that produce sufficient water.

Though the permit holder has had difficulty constructing a well of sufficient yield, the Department does not consider this an unforeseen event as it is a risk taken on by all permit holders when requesting to develop a groundwater right.

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

32. A denial of the extension would not result in undue hardship as the full rate has been developed from the original wells under the permit. A denial of this extension would not result in a loss of the water right developed.

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-17708.

Based on FOF 9, 10, 11, 20, and 26, 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 August 15, 2022, the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, and applying water to full beneficial use.

Given the amount of time already provided to develop the permit, the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2032, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-17708 is not reasonable. With the approval of this extension of time to October 1, 2027, the permit holder will have been provided nearly 25 years to develop a supplemental water right. Given the amount of time being provided and the amount of work left to be accomplished, the Department has determined an extension of time to October 1, 2027, is reasonable only if the extension of time is conditioned to be the last allowed under 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 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).

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, and/or mitigate the effects of the subsequent development on competing demands on the resource. Based on Findings of Facts 18, the Department determined the need to place a “Permit Amendment Condition” on this extension of time because none of the wells being utilized are located in their authorized location, and in order to ensure diligence is exercised in the development and perfection of water use permit. This condition, specified under Item 1 of the “Conditions” section of this PFO.
2. 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 2 of the “Limitations and Conditions” section of this PFO to meet this condition.
3. 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 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 3 of the “Conditions” section of this PFO, was determined to be necessary due the amount of time being provided by this and previous extensions of time, being 24 years, to develop the permit.

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 34, full application of water to beneficial use can be accomplished by October 1, 2027, 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 an apply water to beneficial use. OAR 690-315-0050(5).

3. **Last Extension Condition**

This may be the last extension of time granted for Permit G-17708. Any future extensions of time request will be denied, except to allow for the completion of the review of the Permit Amendment required under condition #1 of this extension of time. Any request for extension of time to allow additional development beyond October 1, 2027, or to demonstrate compliance with permit conditions after October 1, 2027, shall be denied. ORS 539.010(5); OAR 690-315-0040.

DATED: November 1, 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.*

Protests

Pursuant to OAR 690-315-0060(1), 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. Protests must be received by the Water Resources Department no later than **December 16, 2022**, at this address: Oregon Water Resources Department, Water Right Services Division, 725 Summer St NE, Suite A, Salem, OR 97301-1266. Protests may not be submitted by electronic mail. OAR 690-002-0025(3).

Protests must be in writing and include all of the following:

- The name, address, and telephone number of the protestant
- A detailed description of the protestant'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
- A detailed description of how the action proposed in the proposed final order would impair or be detrimental to the protestant's interest
- A detailed description of how the proposed final order is in error or deficient, and how to correct the alleged error or deficiency
- If the applicant protests, a statement of whether a hearing is requested
- Citation of legal authority supporting the protestant, if known
- Proof of service of the protest on the water right permit holder, if protestant is other than the water right permit holder, and
- If you are the applicant, the protest fee of \$480 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$950 required by ORS 536.050.

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-17708 from October 1, 2022, to October 1, 2027.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Permit Amendment Condition**
The permit holder shall submit an Application for Permit Amendment requesting a change in points of appropriation to accurately reflect the location of the wells. The Permit Amendment shall be submitted by no later than March 1, 2023. Failure to submit the Permit Amendment will result in the termination of this extension of time, and the date for complete application of water will revert to October 1, 2022.
2. **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.

