

**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	)	PROPOSED
Permit G-13526, Water Right Application G-14657, in the	)	FINAL ORDER
name of John E. Janes and Michelle D. Janes	)	TO DENY

Permit Information

Application:	G-14657
Permit:	G-13526
Basin:	13 – Goose and Summer Lakes / Watermaster District 12
Date of Priority:	December 30, 1997
Source of Water:	a well in Cottonwood Creek Basin
Purpose or Use:	irrigation of 173.9 acres and supplemental irrigation of 6.1 acres
Maximum Rate:	2.25 cubic feet per second (cfs), being 2.17 cfs for irrigation and 0.08 cfs for supplemental irrigation

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.630 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315.

In Summary, the Department proposes to:

- Deny an extension of time to apply water to full beneficial use from October 1, 2020, to October 1, 2025.

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
Old Well – LAKE 2260
Well – LAKE 51479

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 November 4, 1998, Permit G-13526 was issued by the Department. The permit authorizes the use of up to 2.25 cfs of water from a well in Cottonwood Creek Basin for irrigation of 173.9 acres and supplemental irrigation of 6.1 acres. The permit specified actual construction of the well to begin by September 24, 1999, and complete application of water was to be made on or before October 1, 2002.
2. On September 1, 2004, Permit Amendment T-9573 was approved (Special Order Volume 61, Page 308), authorizing a change in point of appropriation under Permit G-13526.
3. On June 25, 2005, an assignment by proof from Randall W. Hyde to Anita A. Hyde was recorded in the records of the Water Resources Department.
4. On May 10, 2006, an assignment from Anita A. Hyde to Richard and Barbra Robison was recorded in the records of the Water Resources Department.

5. Three prior permit extensions have been granted for Permit G-13526. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2005, to October 1, 2020.
6. On June 5, 2023, Richard Robison 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-13526 be extended from October 1, 2020 to October 1, 2025.
7. On June 27, 2023, notification of the Application for Extension of Time for G-13526 was published in the Department's Public Notice. No public comments were received regarding the extension application.
8. On July 31, 2023, an assignment from Richard and Barbra Robison to John E. Janes and Michelle D. Janes was recorded in the records of the Water Resources Department.

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)]

9. On June 5, 2023, 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)]

10. Actual construction of the well began prior to the September 24, 1999 deadline specified in the permit.
11. According to the well log received by the Department on September 5, 1980, construction of LAKE 2260 (Old Well) began October 28, 1979.

Based on Finding of Fact (FOF) 10 and 11, the Department has determined that the prosecution of the construction of the well began prior to September 24, 1999.

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 and previous extension.¹

12. Construction of Old Well began prior to permit issuance.
13. Work was accomplished during the original development time frame under Permit G-13526 is as follows²:
 - Installed Well Pump and engine;
 - installed 4,000 feet of mainline;
 - installed three "Big Gun, and 2.25 miles of Wheel Lines; and
 - a flow meter was installed
14. During the extension period, being from October 1, 2002, to October 1, 2005, Permit Amendment T-9573 was approved, authorizing a change in point of appropriation, and Construction of LAKE 51479 (Well), was completed.
15. During the most recent extension period, being from October 1, 2005, to October 1, 2020, no additional work was accomplished.

Based on FOF 15, 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 previous extension of time. The Department cannot find good cause or reasonable diligence towards the complete application of water to a beneficial use under G-13526.

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

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

16. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the required March static water level measurements have not been received by the Department, and (2) the Progress Report, Due October 1, 2019, has not been received by the Department.

¹ "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.

² According to the Application for Extension of Time, submitted September 26, 2003.

Based on FOF 16, the Department has determined that the permit holder has not demonstrated compliance with following conditions as required by Permit G-13526:

- “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.” and
- “The permit holder must submit a completed Progress Report Form to the Department by October 1, 2019.”

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

The amount of beneficial use made of the water during the permit or previous extension conditions.

17. According to the Application, a maximum rate of 0.67 cfs of water has been appropriated Well for irrigation of 100.0 acres. The previous Application for Extension of Time, submitted August 5, 2015, identifies a maximum rate of 0.67 cfs of water has been appropriated Well for irrigation of 100.0 acres.
18. There is no explanation why full beneficial use of water under G-13526 has been delayed.

Based on FOF 16, the Department has determined that Beneficial use of water, in compliance with the conditions of the permit, has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2020.

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

19. According to the Application submitted on June 5, 2023, approximately \$42,300, has been invested. The Application identifies \$6,500 has been invested during the most recent extension period, however this investment was for maintenance and repair, and does not count towards the development of the water system authorized by Permit G-13526.
20. No financial investment has been made in the development of the authorized water system during the most recent extension of time period.

The Department has determined that though an investment has been made, the permit holder has not made an investment in the development of the permitted use during the most recent extension period, which does not provide 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 that no work has been accomplished towards completion of the water system during the most recent extension period; 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-13526.

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-13526; 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-13526, located within the Cottonwood Creek Basin, is not located within a limited or critical groundwater area.
23. Cottonwood Creek is not located within or above any state or federal scenic waterway.
24. The points of appropriation is 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. Cottonwood Creek is located within an area ranked "high" for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife.

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

Economic interests dependent on completion of the project.

26. An unknown investment has been made in the development of the water system. No investment towards the development of the water system was made during the most recent extension of time period.

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

Other economic interests dependent on completion of the project.

27. The Application identifies the farmer the land is leased to as another economic interest.

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

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

28. 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)]

29. The use and income from the permitted water development will not likely result in reasonable returns upon the investment made to date., because the permit holder has not demonstrated compliance with the conditions of the permit.

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. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-13526.

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

32. The Application asserts, a denial of the extension would result in undue hardship in that the land is leased.

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

33. The Application does not provide evidence of good faith of the appropriator under Permit G-13526.

Based on Findings of Fact 15, 16, 17, and 20, 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.

34. As of June 5, 2023, the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, which include having March static water level measurements taken; and applying water to full beneficial use.

Good Cause [OAR 690-315-0040(1)(d)]

The Department must find that there is "good cause" to approve the extension. In making a "good cause" finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).

The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and fair and reasonable return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the permit holder had no control, whether denial of the extension will result in undue hardship to the applicant and whether there are no other reasonable alternatives for meeting water use needs, any other factors relevant to a determination of good cause, and has determined that the applicant has not shown that good cause exists for an extension of time to apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

CONCLUSIONS OF LAW

1. The permit holder has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The permit holder has not complied with the time allowed for construction work under the permit as required by OAR 690-315-0040.
3. The Application established that there has been not been reasonable diligence toward

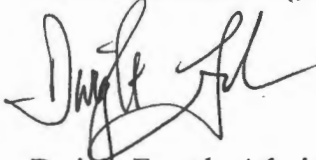
developing the project during the most recent extension of time period, being 2005, to 2020. The permit holder has not shown that good cause exists for an extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

PROPOSED ORDER

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

Deny the time to apply water to beneficial use under Permit G-13526 from October 1, 2020, to October 1, 2025.

DATED: October 24, 2023



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 8, 2023**, 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.

Within 60 days after the close of the period for requesting a contested case hearing, the Director shall either issue a final order on the extension request, or schedule a contested case hearing if a protest has been submitted, and, upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or, the applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests. The hearing will be conducted as provided in Oregon Revised Statutes (ORS) Chapter 183, and Oregon Administrative Rules (OAR) 137-003-0501 to 137-003-0700.

If the applicant does not request a hearing within 30 days after the close of the protest period, or if the request for a hearing is withdrawn, or the Department or the administrative law judge is notified that the protestant will not appear, or the protestant fails to appear, at a scheduled hearing, the Director may issue a Final Order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default.

A party may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 137-003-0555, an agency representative may represent a partnership, corporation, association, governmental subdivision or public or private organization if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

Notice Regarding Servicemembers: Active-duty service members have a right to stay 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 800-452-8260, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

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- If you have questions about statements contained in this document, please contact Jeffrey D. Pierceall 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 Will Davidson at 503-507-2749.
 - 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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