

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-17129, Water Right Application G-14898, in the)	PROPOSED
name of Shane Deruwe)	FINAL ORDER
		TO DENY

Permit Information

Application:	G-14898
Permit:	G-17129
Basin:	7 – Umatilla / Watermaster District 23
Date of Priority:	January 5, 1999
Source of Water:	five wells in Raymond Gulch Basin
Purpose or Use:	irrigation of 211.3 acres
Maximum Rate:	2.64 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 apply water to full beneficial use from October 30, 2023, to October 1, 2032.

<u>ACRONYM QUICK REFERENCE</u>	<u>Wells</u>
Application – Application for Extension of Time	Well A – UMAT 53833
Department – Oregon Department of Water Resources	Well B – UMAT 54343
FOF – Finding of Fact	Well C – UMAT 54887
PFO – Proposed Final Order	Well D – UMAT 56219
cfs – cubic feet per second	Well E – UMAT 58571

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 August 13, 1999, Permit G-13717 was issued by the Department. The permit authorized the use of up to 2.64 cfs of water from two wells in Raymond Gulch Basin for irrigation of 211.3 acres. The permit specified actual construction of the well to begin by August 13, 2000, and complete application of water was to be made on or before October 1, 2003.
2. Multiple Permit Amendments have been authorized since issuance of the permit. The most recent being Permit Amendment T-11680, resulting in issuance of Permit G-17129 on February 20, 2014. Permit G-17129 authorizes the use of up to 2.64 cfs from five wells in Raymond Gulch Basin for irrigation of 211.3 acres.
3. Two prior permit extensions have been granted for Permit G-17129. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2014, to October 30, 2023.

4. On May 11, 2023, the permit holder 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-17129 be extended from October 30, 2023 to October 1, 2032.
5. On May 23, 2023, notification of the Application for Extension of Time for G-17129 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)]

6. On May 11, 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)]

7. Actual construction of a well began prior to permit issuance.
8. According to the well log received by the Department on June 6, 2000, construction of UMAT 53833 (Well A) began April 12, 2000.

Based on Finding of Fact (FOF) 7 and 8, the Department has determined that the prosecution of the construction of the well began prior to August 13, 2000.

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

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

Reasonable Diligence of the Appropriator [OAR 690-315-0040(2)(a)]

In order to make a finding of "good cause" to approve the extension, the Department shall consider whether the applicant has demonstrated "reasonable diligence" in previous performance under the permit. OAR 690-315-0040(2)(a). In determining "reasonable diligence", the Department shall consider, but is not limited to, the following factors: a) The amount of construction completed within the time allowed in the permit or previous extension; b) The amount of beneficial use made of the water during the permit or previous extension time limits; c) Water right holder conformance with the permit or previous extension conditions; and d) Financial investments made toward developing the beneficial use of water.

Amount of Construction OAR 690-315-0040(3)(a)

The amount of construction completed within the time allowed in the permit or previous extension.¹

9. During the most recent extension period, being from October 1, 2014, to October 1, 2023, UMAT 58571 (Well E) was constructed, and four center pivots were installed.

The Application provides evidence of work accomplished towards the development of the water system. However, the amount of work accomplished in the ten years provided in the previous extension, is not sufficient to determine reasonable diligence has been demonstrated in the development of the water use.

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

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

10. The Department has considered the permit holder's compliance with conditions, and has identified the following concern; the Progress Report due October 1, 2018, has not been received by the Department.

Based on FOF 10, the Department has determined that the permit holder has not demonstrated compliance with following conditions as required by Permit G-17129:

- "The permit holder must submit a completed Progress Report Form to the Department by October 1, 2018."

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.

11. A maximum rate of 1.114 cfs (500 gallons per minute) of water has been appropriated, being 0.33 cfs (150 gallons per minute) from UMAT 54887 (Well C), 0.33 cfs (150 gallons per minute) from UMAT 56219 (Well D), and 0.44 cfs (200 gallons per minute) from Well E for irrigation of 210 acres. No additional acres have been developed since at least 2014.
12. Delay of full beneficial use of water under Permit G-17129 was due, in part, insufficient yield from the wells.

Beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2023.

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

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.

13. An investment of approximately \$620,872, which is approximately 61 percent of the total projected cost for complete development of this project, has been made. An additional \$400,000 investment is estimated for the completion of this project.

Based on FOF 13, 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 provides evidence that work has been accomplished towards completion of the water system; the permit holder has demonstrated compliance with permit conditions, and; beneficial use of water has been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit G-17129.

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.

14. 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-17129; 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).

15. The points of appropriation for Permit G-17129, located within the Raymond Gulch Basin, is located within a Serious Water Management Problem Area (SWMPA), within the Walla Walla subbasin, which in part, classifies the use of ground water within the basin for statutory exempt uses.
16. Raymond Gulch is not located within or above any state or federal scenic waterway.
17. The points 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.

18. Raymond Gulch 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.

19. An approximate total of \$620,872 has been invested in the project.

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

Other economic interests dependent on completion of the project.

20. 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.

21. Ground water within this SWMPA has been classified for exempt uses only.

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

22. 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)]

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

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

24. The Application identifies the COVID-19 pandemic as an unforeseen event.

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

25. The Application indicates that a denial of the extension would result in an undue hardship because the rate of water developed is insufficient to irrigate the entire place of use.

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

26. The Application provides evidence of good faith of the appropriator under Permit G-17129.

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.

27. As of May 11, 2023, the remaining work to be completed consists of reconstructing old wells and constructing new wells to obtain the full authorized rate, meeting all permit conditions, 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).

Permit G-17129 (originally G-13717) was issued August 13, 1999, over 24 years prior to the second extension of time expiring on October 30, 2023. Between the date the permit was issued and 2008, the permit holder diligently constructed four of the five wells authorized by the permit. In 2014, the permit holder applied for, and received approval of a permit amendment to add an additional the fifth well to the permit. After the permit amendment was approved, the permit holder submitted an application for extension of time from October 1, 2014, to October 30, 2023, to complete construction of the well. Construction of the fifth well did not begin until February 2021, nearly seven years after the construction of the well was authorized. Though construction of the fifth well did occur during the most recent extension period, the Department must also consider the fact that this permit was issued 24 years ago, and little diligence in developing the permit was demonstrated between 2008, and 2021. The request to allow until October 1, 2032, is not reasonable when considering nearly 13 years had passed between the construction of the fifth authorized well.

In addition to the Department finding minimal diligence during the most recent extension of time, the Department must also consider the establishment of the SWMPA during the most recent extension, and the use of ground water within the SWMPA being restricted to statutory exempt uses. Allowing for additional development under a 24 year old permit after the establishment the SWMPA is not reasonable.

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

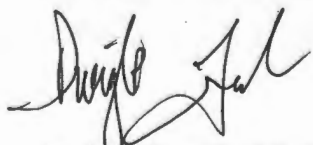
1. The permit holder has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The permit holder has complied with the time allowed for construction work under the permit pursuant to ORS 537.630 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. The Application established that there has been minimal construction, minimal financial investment or reasonable diligence toward developing the project during the most recent extension of time period, being October 1, 2014, to October 30, 2023. The permit holder 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).

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-17129 from October 30, 2023, to October 1, 2032.

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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