

**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-13867, Water Right Application G-15062) PROPOSED FINAL ORDER
in the name of Vic Jansen)

Permit Information

Application File G-15062 Permit G-13867

Basin: 7 – Umatilla / Watermaster District 21

Date of Priority: November 2, 1999

Authorized Use of Water

Source of Water: Ten Wells within the Willow Creek Basin

Purpose of Use: Agricultural Use

Maximum Rate: 2.0 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

Please read this Proposed Final Order in its entirety as it contains additional conditions not included in the original permit.

This Proposed Final Order applies only to Permit G-13867, water right Application G-15062.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to apply water to full beneficial use from October 1, 2015 to October 1, 2024.
- Make the extension subject to certain conditions set forth below.

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources
PFO – Proposed Final Order

Units of Measure

cfs – cubic feet per second
gpm – gallons per minute

AUTHORITY

Generally, see **ORS 537.630** and **OAR Chapter 690 Division 315**.

ORS 537.630(1) provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, order an extension of time within which: irrigation or other works shall be completed; the well or other means of developing and securing ground water 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) 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 690-315-0040 provides in pertinent part that the Water Resources Department shall make findings to determine if an extension of time may be approved to complete construction and/or apply water to full beneficial use.

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

Background

1. Permit G-13867 was granted by the Department on December 15, 2000. The permit authorizes the use of up to 2.0 cfs of water from ten wells, within the Willow Creek Basin, for agricultural use. Pursuant to ORS 537.630(1), complete application of water under Permit G-13867 was to be made on or before December 15, 2005.
2. One prior permit extension has been granted for Permit G-13867. The most recent extension request resulted in the completion dates for construction and full application of water being extended from December 15, 2005 to October 1, 2015.
3. The permit holder submitted an "Application for Extension of Time" to the Department on December 11, 2013, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-13867 be extended from October 1, 2015 to October 1, 2040.
4. Notification of the Application for Extension of Time for Permit G-13867 was published in the Department's Public Notice dated December 24, 2013. No public comments were received regarding the extension application.

Review Criteria [OAR 690-315-0040]

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 690-315-0040. This determination shall consider the applicable requirements of ORS 537.230¹, 537.248², 537.630³ and/or 539.010(5)⁴.

Complete Extension of Time Application [OAR 690-315-0040(1)(a)]

5. On December 11, 2013, the Department received a completed Application for Extension of Time 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)]

6. Senate Bill 300 (1999 legislation) eliminated the requirement that holders of new surface water and ground water permits start construction on water projects within one year after the Department issues the permit. Senate Bill 300 applies to any application for a permit

¹ORS 537.230 applies to surface water permits only.

²ORS 537.248 applies to reservoir permits only.

³ORS 537.630 applies to ground water permits only.

⁴ORS 539.010(5) applies to surface water and ground water permits.

filed after October 23, 1999, including this application.

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.

7. As of December 11, 2013, the remaining work to be accomplished consists of construction of nine wells, construction of the water distribution system, and complete application of water to beneficial use.
8. The well log for the drilled well (GILL 50322) demonstrated a yield of 4000 gallons per minute over a 48 hour period. It seems reasonable that this well could supply the 2.0 cfs needed under this permit; the extension application does not make it clear why it is necessary to drill the nine additional wells for full beneficial use of water under this permit.
9. The applicant has provided information that they currently do not have a market for milk from a dairy operation, and were advised by the Northwest Dairy Association (NDA) that NDA's current production exceeds their processing capacity, such that no new base is being allocated.
10. The Department has determined that the permit holder's request to have until October 1, 2040, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-13867 is an excessive amount of time. Given that the permit was issued in the year 2000, and to date no beneficial use of water has been made, and there has been no further actual construction since the first well was completed in 2009, the Department finds that is reasonable to restrict an extension to October 1, 2024. If time beyond October 1, 2024 is required to make full beneficial use of water under the terms and conditions of Permit G-13867, the permit holder is advised to apply for a new water right.

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

The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0040(2).

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

The Department's determination of reasonable diligence shall consider the requirements set forth under OAR 690-315-0040(3)(a-d). In accordance with OAR 690-315-0040(3), the Department shall consider, but is not limited to, the following factors when determining whether the applicant has demonstrated reasonable diligence in previous performance under the permit:

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

11. Work was accomplished within the time allowed in the permit or previous extension as follows:
 - a. During the original development timeframe allowed under Permit G-13867, being

from December 15, 2000, to December 15, 2005, the following was accomplished: a water use monitoring plan was prepared by the permit holder and approved by the Department; a drill rig, support truck and drilling supplies were purchased; the drill rig was moved onto the well site; and construction began on one of the ten permitted wells.

- b. From October 1, 2005 to December 11, 2013, the permit holder purchased an additional drill rig and drilling equipment, completed a pump test, and completed construction of the first well.

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

- 12. The following beneficial use of water was made during the permit or previous extension time limits:

- a. Since the issuance of Permit G-13867 on December 15, 2000, no water has been appropriated from the well for beneficial use under the permit.

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

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

- a. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns.

Financial Investments [OAR 690-315-0040(3)(d)]

- 14. Financial investments made toward developing the beneficial water use.

- a. As of December 11, 2013, the permit holder has invested approximately \$2,712,747 which is approximately 35 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$5,000,000 investment is needed for the completion of this project.

Cost to Appropriate and Apply Water to a Beneficial Purpose [OAR 690-315-0040(2)(b)]

- 15. As of December 11, 2013, the permit holder has invested approximately \$2,712,747 which is approximately 35 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$5,000,000 investment is needed for the completion of this project.

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

- 16. The Department has found good faith of the appropriator under Permit G-13867.

The Market and Present Demands for Water [OAR 690-315-0040(2)(d-e)]

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:

17. 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 690-315-0040(4)(a-c)].
 - a. 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-13867; furthermore, water availability for other affected water rights and scenic waterway flows after the permit was issued is determined at such time that such application for a new water right is submitted. The points of appropriation for Permit G-13867, located within the Willow Creek Basin, are not located within a limited or critical ground water area. Willow Creek is not located within or above any state or federal scenic waterway, however it 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 not 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.
 - b. The permitted points of appropriation (ten wells), authorized under Permit G-13867, are adjacent to the western boundary of the area classified as the Ella Butte Ground Water Limited Area and share the same aquifers utilized by senior permitted wells within this classified area. Since 2000, water levels have declined approximately 50 feet at nearby wells in the Ella Butte Ground Water Limited Area. The declines correspond to an over-appropriation of ground water and lead to a determination by the Department that water is not available to satisfy current demands on the aquifers without conditions placed on this Proposed Final Order for an Extension of Time. Full appropriation of water to beneficial use under Permit G-13867 without these conditions will exacerbate the loss the ground water storage and negatively impact senior users. Therefore, to mitigate the effects of the subsequent development on competing demands on the resource, as authorized in OAR 690-315-0050(5) this extension order shall include conditions which are specified under Item 1 of the "Conditions" section of this Proposed Final Order for an Extension of Time.

18. Economic investment in the project to date [OAR 690-315-0040(4)(d)].
 - a. As of December 11, 2013, the permit holder has invested approximately \$2,712,747.
19. Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].
 - a. None have been identified.
20. Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].
 - a. Because there is no current market for the permit holder to sell milk, the dairy operations are delayed such that there is no immediate present demand for use of the water under this permit as explained in the extension application.
21. 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. 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 2 of the "Conditions" section of this PFO, was determined to be necessary due to no beneficial use of water under the terms and conditions of the permit since the issuance of the permit on December 15, 2000.
22. 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 3 of the "Conditions" section of this PFO to meet this condition.

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

23. 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)]

24. Delay in the development of this project was not caused by any other governmental requirements.

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

25. Unforeseen events extended the length of time needed to fully develop and perfect Permit G-13867, namely, financial constraints, negotiations with the local power supply company to develop a cost and schedule for bringing power to the property, and limited opportunities with processors for new milk contracts.

CONCLUSIONS OF LAW

1. The applicant is entitled to apply for an extension of time to complete construction and/or completely apply water to the full beneficial use pursuant to ORS 537.630(1).
2. 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).
3. The applicant complied with begin actual construction timeline requirements pursuant to ORS 537.630 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. The time requested, being to October 1, 2040, is excessive. Full application of water to beneficial use can be accomplished by October 1, 2024⁵, as required by OAR 690-315-0040(1)(c).
5. 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 October 1, 2024 to apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).
6. As authorized in OAR 690-315-0050(5) and as described in Finding 15(b) above, the Department has established, as specified under Item 1 of the “Conditions” section of this Proposed Final Order for an Extension of Time, conditions to mitigate the effects of the subsequent development under Permit G-13867 on competing demands on the resource.
7. As authorized in OAR 690-315-0050(5) and as described in Finding 19 above, the Department has established, as specified in the “Conditions” section of this PFO (Item 2), a “Last Extension Condition” in order to ensure future diligence is exercised in the development and perfection of Permit G-13867.
8. As required by OAR 690-315-0050(6) and as described in Finding 20 above, the Department has established, as specified in the “Conditions” section of this PFO (Item 3), a progress checkpoint in order to ensure future diligence is exercised in the development and perfection of Permit G-13867.

⁵Pursuant to ORS 537.630(4), 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.

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-13867 from October 1, 2015 to October 1, 2024.

Subject to the following conditions:

CONDITIONS

1. Well Construction Conditions

- a) The wells shall be continuously cased and continuously sealed to a minimum depth of 800 feet below land surface. The final depth of the casing and seal will depend on the depth at which the top of the Grande Ronde Basalt is identified.
- b) The wells shall be completed in such a manner to avoid commingling of basalt aquifers below the casing and seal.
- c) The permit holder shall furnish to the Department a copy of a video log of each well constructed prior to installation of any permanent pumping equipment.
- d) An approved water-level monitoring and reporting plan, dated December 11, 2001, is on file with the Department. The wells shall have an access port with a minimum diameter of $\frac{3}{4}$ inch. The access shall be adequate to determine the water level at any time. The permit holder may install a functioning airline with a pressure gauge in addition to the access port. The airline shall be calibrated and yield accurate data. The airline shall not enter the well through the access port. The airline shall be adequate to determine the water level at any time.

2. Last Extension Condition

This is to be the last extension of time granted for Permit G-13867. Any future extensions of time requests will be denied.

3. Checkpoint Condition

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2019**. *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.

DATED: February 4, 2014


Dwight W. French, Administrator,
Water Right Services Division

*If you have any questions,
please check the information
box on the last page for the
appropriate names and
phone numbers.*

Proposed Final Order Hearing Rights

1. Under the provisions of OAR 690-315-0100(1) 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 **March 21, 2014**, 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.

-
- If you have any questions about statements contained in this document, please contact Ann Reece at (503) 986-0834.
 - 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 503-986-0819.
 - 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
725 Summer St NE, Suite A
Salem, OR 97301-1266
- Fax: 503-986-0901
-