

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources

Application – Application for Extension of Time

POA – Point of Appropriation

PFO – Proposed Final Order

cfs – cubic feet per second

gpm – gallons per minute

FOF – Findings of Fact

ODEQ – Oregon Department of Environmental Quality

BLS – Below Land Surface

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 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 groundwater 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.

FINDINGS OF FACT

Background

1. On September 20, 1993, Kenneth D. Casper submitted an Application for a Permit to Appropriate Groundwater to the Department. The Department assigned the Application G-13512.
2. On July 8, 1994, the Department received a copy of a letter from United States Department of the Interior, Bureau of Land Management (BLM) stating Notice of Operations, 5 acres or less, serial number OR-035-94-31, was received in the BLM office on July 9, 1994, and allowed [mining] operations to begin immediately.
3. On June 25, 1996, Permit G-12525 was issued by the Department. The permit authorized the use of up to 1.0 cfs of water from two wells, being 0.5 cfs from each well in the Reeds Creek Basin, within the Powder Basin for mining. The permit specified actual construction of the well to begin by June 25, 1997, construction of the water system was to be completed by October 1, 1998, and complete application of water was to be made on or before October 1, 1999.
4. On September 23, 1996, the Department received a copy of Notice of Operations, Disturbance of 5 acres or less, serial number OR-035-94N-36, amending OR 035-94-31 issued by the United States Department of the Interior, Bureau of Land Management.
5. On September 23, 1996, the Department received notification of a Water Pollution Control Facility (WPCF) General Permit 600 issued by the Oregon Department of Environmental Quality (ODEQ).
6. On November 1, 2002, the Department issued a letter by certified mail, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit G-12525 would begin.
7. On June 14, 2004, the Department received the first Application for Extension of Time requesting the time to complete construction be extended from October 1, 1998 to October 1, 2007, and the time to accomplish full beneficial use of the water be extended from October 1, 1999 to October 1, 2008.
8. On July 14, 2005, the Department issued a Final Order authorizing the time to complete construction to be extended from October 1, 1998 to October 1, 2007, and the time to apply water to full beneficial use to be extended from October 1, 1999 to October 1, 2008 under Permit G-12525.
9. On November 21, 2011 a partial assignment from Kenneth Casper to Sullivan Z Ranch and the Bureau of Land Management – Vale District was recorded in the records of the

Water Resources Department.

10. On November 30, 2011, the Department received authorization from Dan Sullivan, manager of Sullivan Z Ranch, Inc., authorizing Jan Alexander to act as agent for Permit G-12525.
11. On December 8, 2011, the Department received the second Application for Extension of Time for Permit G-12525. The extension requested the time to complete construction be extended to October 1, 2013 and the time to apply water to full beneficial use to October 1, 2014.
12. On May 18, 2012, the Department issued a Final Order authorizing the time to complete construction be extended to October 1, 2013, and the time to apply water to full beneficial use be extended to October 1, 2014.
13. On June 8, 2012, Sullivan Z Ranch submitted an Application for a Permit Amendment, requesting to change the Point of Appropriation (POA), and an additional POA, and change a portion of the Place of Use.
14. On December 10, 2012 the Department approved Permit Amendment T-11440 (Special Order Volume 88, Page 794) authorizing a change in the points of appropriation, an additional point of appropriation, and a change in place of use under Permit G-12525.
15. On December 10, 2012, superseding Permit G-16978 was issued by the Department to describe an amendment for a change in points of appropriation, and a change in place of use proposed under Permit Amendment Application T-11440 (Special Order Volume 88, Page 794), to describe extensions of time for complete application of water approved July 14, 2005 and May 18, 2012, and an assignment to new permittees approved November 21, 2011. The superseding permit authorizes the use of up to 1.0 cfs of water from three wells in the Reeds Creek Basin, within the Powder Basin for mining. The permit specified actual construction of the well to begin within one year from permit issuance, construction of the water system was to be completed by October 1, 2013, and complete application of water was to be made on or before October 1, 2014. Permit G-12525 is superseded, and hereafter will simply be referred to as Permit G-16978.
16. On December 11, 2013, the Department received the third Application for Extension of Time. The Application requested the time to complete construction be extended from October 1, 2013 to October 1, 2016, and the time to apply water to full beneficial use be extended from October 1, 2014 to October 1, 2016. As of December 12, 2013, the permit holder stated in their third application the remaining work to be completed consisted of completing construction of the water system, which included drilling Well 3, and installing a pump and meter; and apply water to beneficial use.

17. On March 28, 2014, the Department issued a Final Order authorizing the time to complete construction be extended to October 1, 2014, and the time to apply water to full beneficial use be extended to October 1, 2014.
18. On October 3, 2016, on behalf of the permit holder, Jan Alexander, agent for Dan Sullivan of Sullivan Z Ranch, Inc., submitted the fourth "Application for Extension of Time" 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-16978 be extended from October 1, 2016 to October 1, 2018.
19. Notification of the Application for Extension of Time for Permit G-16978 was published in the Department's Public Notice dated October 11, 2016. 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 537.230², 537.248³, 537.630⁴ and/or 539.010(5)⁵.

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

20. On October 3, 2016, 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)]

21. Actual construction of New Well 2 (BAKE 52184), authorized under superseding Permit G-16978 began prior to the October 1, 2013 deadline specified in the permit. According to Sullivan Z Ranch, Inc., construction of New Well 2 (BAKE 52184) began November 9, 2011.

According to the well log received by the Department on December 7, 2011, Well 2 (BAKE 52184) construction began October 19, 2011. The Department has determined that the prosecution of the construction of the authorized well began prior to October 1, 2013.

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.

²ORS 537.230 applies to surface water permits only.

³ORS 537.248 applies to reservoir permits only.

⁴ORS 537.630 applies to groundwater permits only.

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

22. As of October 3, 2016, Sullivan Z Ranch, Inc. states the remaining work to be completed consists of completing construction of the water system; installing a pump and flow meter for Well 3 (BAKE 52494); installing a 600 foot pipeline to New Well 2 (BAKE 52184) so water from Well 3 (BAKE 52494) can be added to the water from New Well 2 (BAKE 52184) and pumped up to the High Bar mining site; meeting all permit conditions; and applying water to full beneficial use.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2018, to complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit G-16978 is both reasonable and necessary.

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)]

23. Based on Findings of Fact (FOF) 7 and 8, work was accomplished under Permit G-12525 during the original development time frame, being June 25, 1996 to October 1, 1999.
24. Based on FOF 11 and 12, work was accomplished during the first extension period, being October 1, 1999 to October 1, 2008.
25. Based on FOF 16 and 17, work was accomplished during the second extension period, being October 1, 2008 to October 1, 2014 under Permit G-16978.
26. Work accomplished during the third extension period, being October 1, 2014 to October 1, 2016 under Permit G-16978, consisted of completing construction of Well 3 (BAKE 52494), and installing a pump and flow meter on Well 3 (BAKE 52494).

The Department has determined that work has been accomplished during the most recent extension period, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

27. The Application states a maximum rate of 412 gpm (0.92 cfs) of water has been appropriated, being 12 gpm (0.03 cfs) from New Well 1 (BAKE 52188), 200 gpm (0.45

cfs) from New Well 2 (BAKE 52184), and 200 gpm (0.44 cfs) from Well 3 (BAKE 52494) for mining.

28. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2016.
29. According to the Application, delay of full beneficial use of water under Permit G-16978 was due, in part, to:

“a severe cost over-run drilling Well 3 (BAKE 52494), which High Bar Mining did not foresee. Well 3 (BAKE 52494) had to be drilled much deeper than anticipated (drilled to 610 feet). High Bar Mining had not included the additional cost of drilling Well 3 (BAKE 52494) in the 2016 budget. Production of gold was less this season than it would have been with Well 3 (BAKE 52494) in use, but High Bar Mining could not make payroll and pay operating expenses, and invest the additional monies needed to put the water from Well 3 (BAKE 52494) to beneficial use. This cost has been included in the next budget cycle, and the company anticipates full use of all three wells by October 1, 2018.”

Therefore, the permit holder needs more time in which to satisfy all permit conditions and obtain the full quantity of water allowed under the permit.

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

30. 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 on Well 3 (BAKE 52494), and (2) the required March static water level measurements for Well 3 (BAKE 52494) have not been received by the Department.
31. The Application states New Well 1 (BAKE 52188) and New Well 2 (BAKE 52184) had meters installed in 2011 and 2013.
32. Department records show the initial static water level measurement for New Well 1 (BAKE 52188) was taken outside the required month on November 29, 2011.
33. Department records show annual static water level measurements for New Well 1 (BAKE 52188) were submitted in March 2015 and March 2016.
34. Department records show the initial static water level measurement for New Well 2 (BAKE 52184) was taken outside the required month on November 2, 2011.

35. Department records show annual static water level measurements for New Well 2 (BAKE 52184) were submitted in March 2015 and March 2016.
36. Permit G-16978 required the following condition [For New Wells 1 and 2], "Ground water for use under this permit shall be produced from a depth greater than 100 feet below land surface from both wells."
37. According to the well log, New Well 1 (BAKE 52188) was constructed to a depth of 405 feet BLS, sealed to 118 feet BLS with cement, and cased to 118 feet BLS with a liner from 65 feet to 105 feet BLS. The well log identifies a water bearing zone between 270 feet and 405 feet BLS.
38. According to the well log, New Well 2 (BAKE 52184) was constructed to a depth of 440 feet Below Land Surface (BLS), sealed to 110 feet BLS with cement, and cased to 220 feet BLS. The well log identifies a water bearing zone between 265 feet and 398 feet BLS.
39. Permit G-16978 required the following condition, "The water user shall install and maintain adequate treatment facilities meeting current DEQ requirements to remove sediment before returning the water to the stream."
40. On October 10, 2016, the Department received electronic mail correspondence from ODEQ stating the permit holder has been issued a Water Pollution Control Facility 600 General Permit, which does not allow wastewater discharge into surface water.

The Department has determined that this extension will allow: 1) installation of a meter on Well 3 (BAKE 52494) to satisfy compliance of the condition of "Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director," and 2) submittal of annual static water level measurements to satisfy compliance of the condition "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 by April 15 of each year" "Following the first year of water use, the user shall submit seven consecutive annual reports of static water level measurements," in an effort to make proof of beneficial use of the water as required by Permit G-16978.

The Department has determined that this extension will allow the permit holder to satisfy all permit conditions, to complete construction, obtain the full rate of water allowed under the permit, and apply the water to full beneficial use.

Beneficial use of water under this permit, therefore, has not yet been demonstrated. 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.

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

41. The Application states the permit holder has invested about \$362,101, which is approximately 91 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$35,000 investment is needed for the completion of this project.

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

42. The Department has found good faith of the appropriator under Permit G-16978.

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:

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)].

43. 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-16978; 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.
44. During a current review of Permit G-16978, the Department determined the following:
- a. The points of appropriation for Permit G-16978, located within the Pine Creek Basin, are not located within a limited or critical groundwater area;
 - b. Pine Creek is not located within or above any state or federal scenic waterway;
 - c. 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 located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife; and

- d. The points of appropriation are not in an area listed by the Department of Environmental Quality as a water quality limited stream.

Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].

45. According to the Application, Sullivan Z Ranch provides family wage jobs for their employees and supports the local economy.

Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].

46. No other factors relevant to the determination of the market and present demand for water and power have been identified.
47. 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 1 of the "Conditions" section of this PFO, was determined to be necessary due to a lapse of 20 years since the issuance of originating Permit G-12525 was issued, and this being the fourth extension of time request.

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

48. 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)]

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

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

50. No unforeseen events have been identified.

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

51. The Application did not state if a denial of the extension would result in undue hardship.

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 construction timeline requirements to begin actual construction as required by ORS 537.630, OAR 690-315-0040(1)(b), and OAR 690-315-0040(5).
4. Based on Finding of Facts 21 through 42, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2018, 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 complete construction and 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 47 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), a "Last Extension Condition" in order to ensure future diligence is exercised in the development and perfection of Permit G-16978.

continued on the following page

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 complete construction of the water system under Permit G-16978 from October 1, 2016 to October 1, 2018.

Extend the time to apply water to beneficial use under Permit G-16978 from October 1, 2016 to October 1, 2018.

Subject to the following conditions:

CONDITIONS

1. **Last Extension Condition**

This is to be the last extension of time granted for Permit G-16978. Any future extensions of time requests shall be denied.

DATED: November 22, 2016


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.*

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 **January 6, 2016**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.

2. A written protest shall include:
 - a. The name, address and telephone number of the petitioner;
 - b. A description of the petitioner's interest in the proposed final order and if the protestant claims to represent the public interest, a precise statement of the public interest represented;
 - c. A detailed description of how the action proposed in the proposed final order would adversely affect or aggrieve the petitioner's interest;
 - d. A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;
 - e. Any citation of legal authority supporting the petitioner, if known;
 - f. Proof of service of the protest upon the water right permit holder, if petitioner is other than the water right permit holder; and
 - g. The applicant or non-applicant protest fee required under ORS 536.050.
3. Within 60 days after the close of the period for requesting a contested case hearing, the Director shall:
 - a. Issue a final order on the extension request; or
 - b. Schedule a contested case hearing if a protest has been submitted, and:
 - 1) Upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or
 - 2) The applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests.

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

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- If you have questions about statements contained in this document, please contact Corey A Courchane at (503)986-0825.
 - If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at 503-986-0820.
 - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0900.
 - 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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