

**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-17017, Water Right Application G-13790, in) PROPOSED FINAL
the name of Tim L. and Janice L. Kerns; and) ORDER
Northwest Farm Credit Services, FLCA)

Permit Information

Application: G-13790
Permit: G-17017
Basin: 9 – Powder / Watermaster District 8
Date of Priority: August 12, 1994
Source of Water: Twelve wells within Willow Creek Basin
Purpose or Use: Supplemental irrigation use on 287.0 acres
Maximum Rate: 3.25 cubic feet per second (cfs)

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

In Summary, the Department proposes to:

- Grant an extension of time to apply water to full beneficial use from October 1, 2017, to October 1, 2037¹.

- Make the extension subject to certain conditions set forth below.

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

¹Pursuant to ORS 537.630(5), upon the completion of beneficial use of water allowed under the permit, the permittee shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permittee shall submit a map of the survey and a new or revised claim of beneficial use as deemed appropriate by the Department.

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources
Application – Application for Extension of Time
PFO – Proposed Final Order
cfs – cubic feet per second
FOF – Finding of Fact

WELL ID QUICK REFERENCE

Boys Place No. 1 – BAKE 1897/51895
Bank Place No. 2 – BAKE 52261/52293
Well No. 1 (Home Place No. 3) – BAKE 50455/50701/52406
Well No. 2 (Company Farm No. 4) – BAKE 50624
Well No. 2 (Sackos Place No. 5) – BAKE 52507
Well No. 3 (Boys Place No. 2) – BAKE 50955

AUTHORITY

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

ORS 537.630(4) provides in pertinent part that the Oregon Water Resources Department (Department) for good cause shown shall order and allow an extension of time within which irrigation or other works shall be completed or the right perfected. In determining the extension, the Department shall give due weight to the considerations described under ORS 539.010(5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right.

ORS 539.010(5) instructs the Director to consider: the cost of the appropriation and application of the water to a beneficial purpose; the good faith of the appropriator; the market for water or power to be supplied; the present demands therefor; and the income or use that may be required to provide fair and reasonable returns upon the investment.

OAR 690-315-0040 provides that in order to approve an application for an extension of time to complete construction or apply water to full beneficial use, the Department shall make the findings in OAR 690-315-0040(1) including a finding that there is “good cause” to approve the extension. OAR 690-315-0040(2)-(4) contains the factors that the Department must consider to make findings that support a “good cause” determination.

OAR 690-315-0050(6) requires the Department, for extensions exceeding five years, to establish checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between checkpoints will not exceed five year periods.

FINDINGS OF FACT

1. On June 27, 1997, Permit G-13158 was issued by the Department. The permit authorized the use of up to 3.25 cfs of water from Well #2 within Willow Creek Basin for supplemental irrigation use on 287.0 acres. The permit specified actual construction of the well was to begin within one year from permit issuance, being June 27, 1998, and complete application of water was to be made on or before October 1, 2001.
2. One prior permit extension has been granted for Permit G-13158. The most recent extension request resulted in the completion date for full application of water being extended from October 1, 2001, to October 1, 2017.
3. On May 14, 2013, an assignment from Tim L. Kerns and Janice L. Kerns to Northwest Farm Credit Services, FLCA and Tim L. Kerns and Janice L. Kerns was recorded in the records of the Water Resources Department.
4. On August 12, 2013, the Department approved Permit Amendment T-8262 (Special Order Volume 91, Page 172) authorizing a change in the points of appropriation under Permit G-13158. Superseding Permit G-17017 was issued to describe an amendment for a change in points of appropriation to use 12 wells within Willow Creek Basin for supplemental irrigation of 287.0 acres.
5. On October 2, 2017, the permit holder, Tim L. Kerns, 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-17017 be extended from October 1, 2017, to October 1, 2037.
6. On October 10, 2017, notification of the Application for Permit G-17017 was published in the Department's Public Notice. No public comments were received regarding the Application.

Review Criteria [OAR 690-315-0040]

In order to approve an Application for an Extension of Time to complete construction and/or apply water to full beneficial use pursuant to ORS 537.230 or 537.630, or to begin construction, pursuant to ORS 537.248, the Department must make the findings in OAR 690-315-0040(1)(a) – (d).

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

7. On October 2, 2017, 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)]

8. Actual construction of the well began prior to the June 27, 1998 deadline specified in the permit.

9. According to the well log received by the Department on August 21, 1992, construction of BAKE 1897 (Boys Place No. 1) began May 27, 1992.

Based on Finding of Fact (FOF) 8 and 9, the Department has determined that the prosecution of the construction of the well began prior to June 27, 1998.

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

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

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

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

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

The amount of construction completed within the time allowed in the previous extension.²

10. During the most recent extension period, being from October 1, 2001, to October 1, 2017, the following was accomplished:
- Constructed BAKE 50955 (Boys Place No. 2), and installed a pump and flow meter;
 - Deepened BAKE 1897/51895 (Boys Place No. 1);
 - Constructed BAKE 52261/52293 (Bank Place No. 2), and installed a pump, power, pipeline, and a flow meter;
 - Deepened BAKE 50455/50701/52406 (Home Place No. 3), and replaced pump;
 - Constructed BAKE 52507 (Sackos Place No. 5); and
 - Installed the water delivery system, which consisted of piping and underground power to well locations.

Based on FOF 10, the Department has determined that work has been accomplished during the last extension period, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

² “Actual Construction” is defined in OAR 690-315-0020(3)(d)(A) and (B) as physical work performed toward completion of the water system which demonstrates the water right permit holder’s good faith and intention to complete the project with reasonable diligence. Actual construction does not include planning a diversion system, formulating a business plan, securing financing, letting contracts, purchasing but not installing equipment, surveying, clearing land or planting crops.

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

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

Boys Place No. 1, Home Place No. 3, Company Farm No. 4, Boys Place No. 2, and Bank Place No. 2

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

Based on FOF 11, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-17017.

Sackos Place No. 5, Ward 40 No.7, Ward 40 No. 2, Well No. 10, 11, 12, and 13

12. 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, and (2) annual reports of the amount of water used each month have not been received by the Department. The Department recognizes that it is the intent of the permit holder to comply with all permit conditions at the time the conditions become applicable, as Ward 40 No.7, Ward 40 No. 2, Well No. 10, 11, 12, and 13 have not been constructed as of October 2, 2017.

Based on FOF 12, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-17017:

- "Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring devices for measuring and recording the quantity of water diverted from the well and stream which is being used to transport water to the place of use approved by the Director. The permittee shall maintain the meter or measuring device in good working order, shall keep a complete record of the amount of water used each month and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as may be required by the Director."

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

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

13. A maximum combined rate of 3.25 cfs of water has been appropriated, being a maximum of 2.25 cfs each from Boys Place No. 1, Bank Place No. 2, Home Place No. 3, Company Farm No. 4, or Boys Place No. 2, for supplemental irrigation of 287.0 acres.
14. According to the permit holder, delay of full beneficial use of water under Permit G-17017 was due, in part, to:
 - Sackos Place No. 5 filling up with sand; and
 - A tremendous amount of resources have been spent on developing the first six wells; and

- Medical issues have created a financial hardship.

The permit holder needs more time in which to develop the remaining six wells allowed under the permit.

Based on FOF 11 and 13, the Department has determined, that beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied on Boys Place No. 1, Home Place No. 3, Company Farm No. 4, Boys Place No. 2, and Bank Place No. 2, by October 1, 2017.

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

15. The permit holder has invested about \$1,225,400, which is approximately 52 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$1,126,000 investment is needed for the completion of this project.

Based on FOF 15, the Department has determined that the permit holder had made an investment, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

The Application provides evidence 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 from Boys Place No. 1, Home Place No. 3, Company Farm No. 4, Boys Place No. 2, and Bank Place No. 2; and a financial investment has been made. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit G-17017.

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.

16. 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-17017; 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).

17. The points of appropriation for Permit G-17017, located within the Willow Creek Basin, are not located within a limited or critical groundwater area.
18. Willow Creek is not located within or above any state or federal scenic waterway.
19. The points of appropriation are not in an area listed by the Department of Environmental Quality as a water quality limited stream.

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

The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife.

20. Willow Creek is located within an area ranked “moderate” 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.

21. An approximate total of \$1,225,400 has been invested in the project.

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

Other economic interests dependent on completion of the project.

22. Once all wells are in production, the permit holder will add more value to the local economy through the purchase of more equipment, parts, and supplies, and adding additional labor, as well as increasing property values.

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

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

23. 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)]

24. The permit holder states they will be more productive with their commodities and delivery systems that have already been installed.

Other Governmental Requirements [OAR 690-315-0040(2)(g)]

25. The delay in the timely application of water to full beneficial use was caused by additional government requirements. The permit holder worked with multiple government entities, including County Road Department for easements, Soil and Water Conservation District, Powder Valley Control District, Oregon Department of State Lands Water Ways, Natural Resource and Conservation Service, and Oregon Trail Electric Co-op, in order to ensure laws and policies were followed.

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

26. Unforeseen events extended the length of time (10 years) needed to fully develop and perfect Permit G-17017, in that the permit holders were faced with poor well performance and serious health issues that restricted their ability to complete development of the project in a timely manner.

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

27. A denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs. The permit holder's ability to grow high value crops is dependent on reliable late supplemental water.

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

28. The Application provides evidence of good faith of the appropriator under Permit G-17017.

Based on FOF 8 through 11, 13, 15, and 21, the Department has determined that the applicant has shown good faith and reasonable diligence.

Duration of Extension [OAR 690-315-0040(1)(c)]

Under OAR 690-315-0040(1)(c), in order to approve an extension of time for water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

29. As of October 2, 2017, the Application states the remaining work to be completed consists of completing construction of the water system, which includes re-conditioning of Sackos Place No. 5, constructing Ward 40 No.7, Ward 40 No. 2, Well No. 10, 11, 12, and 13, and installing the water delivery system to each well; meeting all permit conditions, which include installing a meter and submitting annual water use reports for each additional well developed; 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, 2037, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-17017 is both reasonable and necessary.

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

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

The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and fair and reasonable return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the permit holder had no control, whether denial of the extension will result in undue hardship to the applicant and whether there are no other reasonable alternatives for meeting water use needs, any other factors relevant to a determination of good cause, and has determined that the applicant has shown that good cause exists for an extension of time to apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

LIMITATIONS AND CONDITIONS

1. OAR 690-315-0050(6) requires a checkpoint condition on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. A "Checkpoint Condition" is specified under Item 1 of the "Conditions" section of this PFO to meet this condition.

CONCLUSIONS OF LAW

1. The applicant has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The applicant has complied with the construction timeline requirements to begin actual construction as required by ORS 537.630, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. Based on Finding of Facts 8 through 28, full application of water to beneficial use can be accomplished by October 1, 2037, as required by OAR 690-315-0040(1)(c).

4. The applicant can complete the project within the time period requested for the extension on the project, but the extension is conditioned to ensure future diligence and/or mitigate the effects of the subsequent development on competing demands on the resource and is granted only for the reasonable time necessary to complete water development and apply water to beneficial use. OAR 690-315-0050(5).
5. The applicant has demonstrated good cause for the extension. OAR 690-315-0050(5).

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 apply water to beneficial use under Permit G-17017 from October 1, 2017, to October 1, 2037.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2022, 2027, 2032, and 2036. *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: January 23, 2018


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 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 9, 2018**, 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>

-
- 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
Fax: 503-986-0901 Salem, OR 97301-1266
-