

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-13144, Water Right Application G-14408, in	)	PROPOSED FINAL
the name of Joe Westerman - Managing member of Lusted	)	ORDER
Road Farms, LLC	)	

Permit Information

Application:	G-14408
Permit:	G-13144
Basin:	2C – Lower Willamette / Watermaster District 20
Date of Priority:	November 13, 1996
Source of Water:	A well in Lusted Creek Basin
Purpose or Use:	Irrigation of 35.6 acres and agricultural use
Maximum Rate:	0.445 cubic foot per second (cfs)

Please read this Proposed Final Order in its entirety.

In Summary, the Department proposes to:

- Grant an extension of time to apply water to full beneficial use from October 1, 2011, to October 1, 2022¹.

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

gpm – gallons per minute

Well – MULT 56024

FOF – Finding of Fact

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 June 18, 1997, Permit G-13144 was issued by the Department. The permit authorizes the use of up to 0.445 cfs of water from a well in Lusted Creek Basin for irrigation of 35.6 acres and agricultural use. The permit specified actual construction of the well to begin by June 18, 1998, and complete application of water was to be made on or before October 1, 2001.
2. On January 4, 2018, an assignment from Haytham and Jumana Elzayn to Joe Westerman, Managing member of Lusted Road Farms, LLC, was recorded in the records of the Water Resources Department.

3. One prior permit extension has been granted for Permit G-13144. The most recent extension request resulted in the completion dates for full application of water being extended from October 1, 2001, to October 1, 2011.
4. On December 22, 2017, the permit holder, Joe Westerman - Managing member of Lusted Road Farms, LLC, 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-13144 be extended from October 1, 2011, to October 1, 2022.
5. On January 16, 2018, notification of the Application for Permit G-13144 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)]

6. On December 22, 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)]

7. Actual construction of the well began prior to the June 18, 1998 deadline specified in the permit.
8. According to the well log received by the Department on July 16, 1998, construction of MULT 56024 (Well) began June 16, 1998.

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 June 18, 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

9. During the most recent extension period, being from October 1, 2001, to October 1, 2011, the following was accomplished:
 - Expanded irrigation system to irrigate an additional 12.0 acres; and
 - Installed shut-off valves.
10. Since October 1, 2011, the applicant states the following was accomplished:
 - Installed tees in the irrigation lines; and
 - Installed a 10 HP pump.

Based on FOF 9, 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.

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

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

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-13144.

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

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

12. A maximum rate of 40 gallons per minute (0.09 cfs) of water has been appropriated from the Well for irrigation of 35.6 acres and agricultural use.
13. Delay of full beneficial use of water under Permit G-13144 was due, in part, to an insufficient yield of water from the permitted well. The permit holder needs more time in which to gain approval for the construction of an additional point of appropriation to obtain the full quantity of water allowed under the permit.

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.

Based on FOF 11 and 12, the Department has determined that beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2011.

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

14. An investment of approximately \$74,904, which is approximately 54 percent of the total projected cost for complete development of this project. An additional \$65,000 investment is needed for the completion of this project.

Based on FOF 14, 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, a financial investment has been made, and; beneficial use of water has been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit G-13144.

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.

15. 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-13144;

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).

16. The point of appropriation for Permit G-13144, located within the Sandy River Basin, is not located within a limited or critical groundwater area.
17. Sandy River is located above the Sandy River Scenic Water Way.
18. The point 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.

19. Sandy River 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.

20. An approximate total of \$74,904 has been invested in the project.

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

Other economic interests dependent on completion of the project.

21. Perfection of the water right will allow for the hiring of employees and purchasing of additional equipment.

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

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

22. 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)]

23. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date. The use of the water will enable the permit holder to utilize the productive ground, and recoup the investment in 3 to 5 years.

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. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-13144.

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

26. 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 is unable to properly irrigate his land with an insufficient amount of water.

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

27. The Application provides evidence of good faith of the appropriator under Permit G-13144.

Based on FOF 7 through 12, 14, and 20, 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.

28. As of December 22, 2017, the remaining work to be completed consists of requesting approval of a Permit Amendment to add an additional point of appropriation, constructing a second well and incorporating it into the existing irrigation system; 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, 2022, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-13144 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).

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 7 through 27, full application of water to beneficial use can be accomplished by October 1, 2022, 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. 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-13144 from October 1, 2011, to October 1, 2022.

DATED: February 20, 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 **April 6, 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>

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