

**Oregon Water Resources Department
Water Right Services Division**

Application for Extension of Time

In the Matter of the Application for an Extension of Time)	PROPOSED
for Permit G-15053, Water Right Application G-15087, in)	FINAL
the name of K-Cubed, LLC)	ORDER

Permit Information

Application:	G-15087
Permit:	G-15053
Basin:	14 – Klamath / Watermaster District 17
Date of Priority:	February 4, 2000
Source of Water:	Three wells in Cabin Creek Basin
Purpose or Use:	Irrigation of 678.8 acres, supplemental irrigation of 218.0 acres, and supplemental irrigation to make up a deficiency in rate for 199.2 acres
Maximum Rate:	Not to exceed a maximum cumulative rate of 11.94 cubic feet per second (cfs), being 4.4 cfs from each well, further limited to 8.48 cfs for irrigation, 2.72 cfs for supplemental irrigation and 0.74 cfs for supplemental irrigation to make up a deficiency in rate

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, 2016, to October 1, 2036¹.
- 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

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
Well 2 – KLAM 53049
cfs - cubic feet per second

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.

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

1. On April 16, 2002, Permit G-15053 was issued by the Department. The permit authorizes the use of a maximum cumulative rate of 11.94 cfs of water from three wells in Cabin Creek Basin, being 4.4 cfs from each well, further limited to 8.48 cfs for irrigation of 678.8 acres, 2.72 cfs for supplemental irrigation of 218.0 acres, and 0.74 cfs for supplemental irrigation to make up a deficiency in rate for 199.2 acres. The permit specified complete application of water was to be made on or before October 1, 2006.

2. On March 6, 2017, an assignment from Kennedy Land Co, LLC to K-Cubed, LLC was recorded in the records of the Water Resources Department.
3. One prior permit extension has been granted for Permit G-15053. The extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2006, to October 1, 2016.
4. On June 20, 2017, the permit holder, K-Cubed, 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-15053 be extended from October 1, 2016, to October 1, 2036.
5. On June 27, 2017, notification of the Application for Permit G-15053 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 June 20, 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. Construction of the well began prior to permit issuance.
8. According to the well log received by the Department on November 6, 2001, construction of KLAM 53049 (Well 2) began August 15, 2001.

Based on Finding of Fact (FOF) 7 and 8, the Department has determined that the prosecution of the construction of the well began prior October 1, 2006.

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, 2006, to October 1, 2016, three-thousand feet of irrigation pipe was installed.

The Application provides evidence of progress of physical work made towards completion of the water system, enough to qualify as the minimum necessary for the Department to find good cause and reasonable diligence towards 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.

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

Based on FOF 10, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-15053.

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

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

11. The Department's record shows that water use began from Well 2 in 2005.
12. A maximum rate of 2.7 cfs of water has been appropriated from Well 2, being 2.7 cfs for irrigation of 678.0 acres, 2.7 cfs for supplemental irrigation of 217.0 acres, and 0.74 cfs for supplemental irrigation to make up a deficiency in rate for 199.2 acres.
13. No water has been appropriated from Well 1 or Well 3, as the wells have not yet been constructed.

Based on FOF 11, 12, and 13, the Department has determined that beneficial use of water has been demonstrated under this permit from Well 2, as all permit conditions were satisfied by October 1, 2016.

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

14. An approximate total of \$193,304 has been invested. The costs included items associated with repair and maintenance, and costs for static water level measurement which are not "actual construction" under this permit and therefore are not counted towards

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.

development. After deducting these costs, the approximate total investment for “actual construction” to date is approximately \$166,448 which is approximately 49 percent of the total projected cost for complete development of this project. An additional \$170,000 investment is needed to complete this project, which includes construction of Well 1 and Well 3, installation of meters on Well 1 and Well 3, and installation of equipment to connect the wells to the irrigation system.

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-15053.

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-15053; 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 points of appropriation for Permit G-15053, located within the Cabin Creek Basin, are not located within a limited or critical groundwater area.
17. Cabin Creek is groundwater connected to Klamath Scenic Waterway.
18. 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.

19. Cabin Creek is located within an area ranked “low” for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife.

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

Economic interests dependent on completion of the project.

20. An approximate total of \$166,448 has been invested in the project.

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

Other economic interests dependent on completion of the project.

21. The substantial agricultural products produced on the property contribute to the county tax base.
22. A portion of the irrigated land is leased to cattle producers for grazing their herds.

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

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

23. Permit G-15053 contains, in part, the condition; “Following the first year of water use, the user shall submit seven consecutive annual reports of static water level measurements. The first of these seven annual measurements will establish the reference level against which future annual measurements will be compared. Based on an analysis of the data collected, the Director may require that the user obtain and report additional annual static water level measurements beyond the seven year minimum reporting period.”

24. On May 11, 2018, the Department's Groundwater Section determined that the reference level for determining water level declines 83.08 feet below land surface as measured at Well 2 (KLAM 53049). A "Reference Level" determination is specified under Item 1 of "Limitations and Conditions" section of this PFO to specify this determination.
25. On May 11, 2018, the Department Groundwater Section determined that Well 2 experienced approximately 5.0 feet of decline between 2005 and 2012. With the significant portion of Permit G-15053 left to be developed, and the potential for additional decline, beyond the limits set in the permit, as a result of the additional development, additional annual static water level measurements are necessary.
26. OAR 690-315-0050(5) states that extension orders may include, but are not limited to, any condition or provision needed to mitigate the effects of the subsequent development on competing demands on the resource. "Annual Static Water Level Measurement Condition" is specified under Item 2 of the "Limitations and Conditions" section of this PFO to address the need for additional static water level measurements.
27. 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 "Limitations and Conditions" section of this PFO to meet this condition.

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

28. Retaining the irrigation rights will keep the current value of the land which will increase over time, which will provide a reasonable return on the investment.

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

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

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

30. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-15053, have been identified.

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

31. A denial of the extension would result in undue hardship, in that the value of the land would be reduced, and there are no other reasonable alternatives that exist for meeting water use needs.

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

32. The Application provides evidence of good faith of the appropriator under Permit G-15053.

Based on FOF 6 through 13, 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.

33. As of June 20, 2017, the remaining work to be completed consists of completing construction of Well 1, Well 2, and the water system; meeting all permit conditions, which include installation of meters at each point of appropriation, and submitting annual static water level measurements and annual water use reports; 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, 2036, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15053 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. Permit G-15053 requires that the first annual static water level measurement following the first year of water use will determine the reference level by which all subsequent measurement will be compared. Based on FOF 11, 23 and 24, the Department has determined the reference level for Well 2. The Reference Level is specified under item 1 of the "LIMITATIONS AND CONDITIONS" section of this PFO.
2. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to mitigate the effects of the subsequent development on competing demands on the resource. Based on Findings of Facts 24 and 25, the Department determined the need to place a "Annual Static Water Level Measurement

Condition” on this extension of time in order to monitor the effect of subsequent development of Permit G-15053. This condition, specified under Item 2 of the “LIMITATIONS AND CONDITIONS” section of this PFO, was determined to be necessary because of the use of an unauthorized point of appropriation; place of use has occurred under this permit.

3. 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 3 of the “LIMITATIONS AND 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 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 6 through 32, full application of water to beneficial use can be accomplished by October 1, 2036, 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 mitigate the effects of the subsequent development on competing demands on the. OAR 690-315-0050(5).
5. The applicant has demonstrated good cause for the extension.
6. For extensions exceeding five years, the Department shall establish progress checkpoints to determine if diligence is being excised in the development and perfection of the water use permit. Intervals between progress check points will not exceed five years periods, as required by OAR 690-315-0050(6).

continued on 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-15053 from October 1, 2016, to October 1, 2036.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Reference Level**

The Reference Level by which all subsequent measurements shall be compared to is 83.08 feet below land surface as measured at KLAM 15053.

2. **Annual Static Water Level Condition**

The Department requires the water user to obtain, from a qualified individual (see below), and report annual static water levels for each well on the permit. The static water level shall be measured in the month of March. Reports shall be submitted to the Department within 30 days of measurement.

The permittee shall report an initial March static water-level measurement once well construction is complete and annual measurements thereafter. Annual measurements are required whether or not the well is used. The Director may establish the reference level based on an analysis of other water-level data. The Director may require the user to obtain and report additional water levels each year if more data are needed to evaluate the aquifer system.

All measurements shall be made by a certified water rights examiner, registered professional geologist, registered professional engineer, licensed well constructor or pump installer licensed by the Construction Contractors Board. Measurements shall be submitted on forms provided by, or specified by, the Department. Measurements shall be made with equipment that is accurate to at least the standards specified in OAR 690-217-0045. The Department requires the individual performing the measurement to:

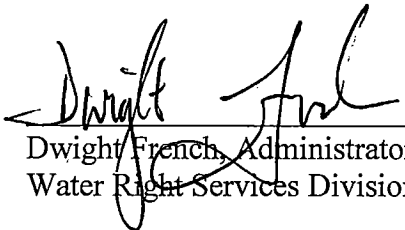
- A. Associate each measurement with an owner's well name or number and a Department well log ID or Well tag ID; and
- B. Report water levels to at least the nearest tenth of a foot as depth-to-water below ground surface; and
- C. Specify the method of measurement; and
- D. Certify the accuracy of all measurements and calculations reported to the Department.

3. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2023, 2028, and 2033**. *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: May 29, 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 **July 15, 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;

