

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

Application for Extension of Time

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| In the Matter of the Application for an Extension of Time |) | PROPOSED |
| for Permit G-17787, Water Right Application G-16081, in |) | FINAL |
| the name of Keith Ketch De Kanter |) | ORDER |

Permit Information

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| Application: | G-16081 |
| Permit: | G-17787 |
| Basin: | 2B – Middle Willamette / Watermaster District 20 |
| Date of Priority: | September 9, 2003 |
| Source of Water: | Well 1, Well 2, Well 3, Well 4, and Well 5, in Willamette River Basin |
| Purpose or Use: | Nursery use on 19.6 acres |
| Maximum Rate: | 0.489 cubic foot 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, 2018, to October 1, 2023¹.
- 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 1 – CLAC 69797
Well 3 – CLAC 70380
Well 4 – CLAC 73475
Well 5 – CLAC 73470
cfs - cubic foot per second
gom - gallons per minute

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 May 12, 2004, Permit G-15628 was issued by the Department. The permit authorizes the use of up to 0.489 cfs of water from Well 1, Well 2, and Well 3, in Willamette River Basin for nursery use on 19.6 acres. The permit specified complete application of water was to be made on or before October 1, 2008.
2. Two prior permit extensions have been granted for Permit G-15628. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2013, to October 1, 2018.
3. On November 18, 2014, an assignment from Virginia Francis to Keith Ketch de Kanter was recorded in the records of the Water Resources Department.
4. On July 21, 2017, the Department approved Permit Amendment T-12409 (Special Order Volume 105, Page 368) authorizing two additional points of appropriation. A superseding Permit G-17787 was issued by the Department on July 21, 2017, to reflect the changes.
5. On October 16, 2018, the permit holder, Keith Ketch De Kanter, 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-17787 be extended from October 1, 2018, to October 1, 2023.
6. On October 23, 2018, notification of the Application for Permit G-17787 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 16, 2018, 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. According to the well log received by the Department on June 17, 2013, construction of CLAC 69797 (Well 1) began June 10, 2013.

Based on Finding of Fact (FOF) 8, the Department has determined that the prosecution of the construction of the well began within the time authorized under the permit.

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, 2013, to October 1, 2018, the following was accomplished:
- constructed and abandoned CLAC 73470 (Well 5);
 - constructed CLAC 73475 (Well 4);
 - installed electrical service to Well 4; and
 - installed a pump, and meter at Well 4.

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 conditions.

10. The Department has considered the permit holder’s compliance with conditions, and did not identify any concerns for CLAC 70380 (Well 3) and Well 4.

Based on FOF 10, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-17787 for Well 3, and Well 4.

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.

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

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

11. A maximum rate of 60.0 gallons per minute (gpm) [0.134 cfs] of water has been appropriated from the Well 3 for nursery use on 4.9 acres.

Based on FOF 10, and 11, the Department has determined that beneficial use of water has been demonstrated from Well 3 on 4.9 acres under this permit as all permit conditions were satisfied by October 1, 2018.

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

12. An approximate total of \$68,974 has been invested. The costs included items associated with well dowsing, permit amendment application filing and extension of time application filing, which are not “actual construction” under this permit and therefore are not counted towards development. After deducting these costs, the approximate total investment for “actual construction” to date is approximately \$65,374 which is about 55 percent of the total projected cost for complete development of this project. An additional \$54,000 investment is needed to complete this project, which includes constructing Well 2, expanding the irrigation system, and construction of greenhouses.

Based on FOF 12, 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-17787.

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.

13. 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-17787; 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).

14. The points of appropriation for Permit G-17787, located within the Willamette River Basin, are not located within a limited or critical groundwater area.
15. Willamette River is not located within or above any state or federal scenic waterway.
16. The points of appropriation are 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.

17. Willamette River 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.

18. An approximate total of \$65,374 has been invested in the project.

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

Other economic interests dependent on completion of the project.

19. Other economic interests dependent on the completion of the project have been identified, in that without the additional time to develop the water system, the nursery may close, and the staff would lose their employment.

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

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

20. No other factors relevant to the determination of the market and present demand for water and power have been identified.
21. 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 1 of the "Limitations and Conditions" section of this PFO to meet this condition.

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

22. The 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)]

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

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

24. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-17787.

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

25. A denial of the extension would result in undue hardship, in that the permit holders have spent a considerable amount of resources to develop the water use only to construct multiple wells which did not produce adequate water.

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

26. The Application provides evidence of good faith of the appropriator under Permit G-17787.

Based on FOF 8, through 12, and 18, 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.

27. As of October 16, 2018, the remaining work to be completed consists of completing construction of the water system, which includes construction of Well 2; meeting all permit conditions, which include installation of a meter, annual water use reporting, and annual March static water level measurements; 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, 2023, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-17787 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(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 the nineteen years allowed for development of this permit upon the approval of this Extension of Time.

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 8 through 26, full application of water to beneficial use can be accomplished by October 1, 2023, 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, 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, but the extension must be conditioned to ensure this is the last extension granted in order to ensure future diligence; OAR 690-315-0050(5).

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-17787 from October 1, 2018, to October 1, 2023.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. Last Extension Condition

This may be the last extension of time granted for Permit G-17787. Any future extensions of time request shall be denied, unless the Department has determined diligence is shown during this extension period. To show diligence, the permit holder must demonstrate, at minimum, one of the following benchmarks has been achieved on or before October 1, 2023, being the date for complete application of water to the beneficial use. In addition to the requirements of this condition, for future extension requests, all normal extension standards and rules will be evaluated. ORS 539.010(5); OAR 690-315-0040.

Benchmark 1:

To demonstrate diligence under Benchmark 1, the permit holder must submit a map prepared by a Certified Water Rights Examiner which illustrates development to the beneficial use on an additional 7.5 acres of land as authorized under the terms and conditions of the permit or any subsequent permit amendment to change the place of use. The 7.5 acres of land must be in addition to the 4.9 acres that have been previously developed as illustrated in the map attached to the Application for

Extension of Time submitted to the Department on October 16, 2018. A copy of this map is included in this proposed final order, and is referenced as Attachment "A".

Benchmark 2:

To demonstrate diligence under Benchmark 2, the permit holder must submit a report, certified by a Certified Water Rights Examiner, which demonstrates that beneficial use of a minimum of 180.0 gpm [0.401 cfs] of water has been achieved as authorized under the terms and conditions of the permit or any subsequent permit amendment. The report must include documentation of the maximum rate of water put to beneficial use from each point of appropriation, the volume of water put to beneficial use from each point of appropriation, the nature of the use from each point of appropriation, and documentation of compliance with permit conditions from each point of appropriation.

DATED: December 11, 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 **January 27, 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 Jeffrey D. Pierceall at 986-0802.
 - 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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