

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-13738 (modified by Permit Amendment T-10494),)	PROPOSED
Water Right Application G-13804, in the name of Brent)	FINAL
Stumbaugh and Douglas J. Newman; and Elsie D. Newman		ORDER

Permit Information

Application:	G-13804
Permit:	G-13738 (modified by Permit Amendment T-10494)
Basin:	9 – Powder / Watermaster District 8
Date of Priority:	August 31, 1994
Source of Water:	three wells in Big Muddy Creek Basin
Purpose or Use:	supplemental irrigation of 401.33 acres
Maximum Rate:	4.50 cubic feet per second (cfs), being no more than 2.25 cfs from each well

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, 2028¹.
- 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
Stumbaugh Well 1 – BAKE 50735/52328
Stumbaugh Well 2 – BAKE 51936/52182/52242
Neuman Well 1 – BAKE 52583
Neuman Well 2 – not constructed
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 September 3, 1999, Permit G-13738 was issued by the Department, consistent with the terms of a settlement agreement. The permit authorizes the use of up to 4.50 cfs of

water from two wells in Big Muddy Creek Basin, being 2.25 cfs from each well for supplemental irrigation of 401.33 acres. The permit specified actual construction of the well to begin by September 30, 2000, and complete application of water was to be made on or before October 1, 2003.

2. On June 1, 2006, a partial assignment from Eugene W. Gramzow to Brent Stumbaugh was recorded in the records of the Water Resources Department.
3. On May 27, 2008, the Department approved Permit Amendment T-10494 (Special Order Volume 74, Page 1013 authorizing an additional point of appropriation for supplemental irrigation of the 241.33 acres located in Section 27, Township 7S, Range 38E (Stumbaugh Property) under Permit G-13738 (modified by Permit Amendment T-10494) which is hereafter referred to simply as Permit G-13738. The original point of appropriation identified as Well 1 and the additional point of appropriation are limited to no more than a combined rate of 2.25 cfs of water.
4. Three prior permit extensions have been granted for Permit G-13738. The most recent extension request resulted in the completion date for full application of water being extended from October 1, 2012, to October 1, 2018.
5. On March 23, 2017, permit holder Doug and Elsie Newman, submitted an Application for Permit Amendment for Permit G-13738, requesting an additional point of appropriation for supplemental irrigation of the 160.0 acres located in sections 23, and 26, Township 7S, Range 38E (Newman Property). The Permit Amendment Application was assigned file T-12618, and is currently under review by the Department.
6. On October 26, 2018, the permit holder, Brent Stumbaugh, 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-13738 be extended from October 1, 2012, to October 1, 2023.
7. On November 13, 2018, notification of the Application for Permit G-13738 was published in the Department’s Public Notice. No public comments were received regarding the Application.
8. On January 31, 2019, Doug Newman submitted additional information to supplement the Application submitted by Brent Stumbaugh. The additional information was to identify work accomplished on the Newman Property that was not included in the original 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)]

9. On October 26, 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)]

10. Actual construction of the well began prior to the September 30, 2000, deadline specified in the permit.
11. According to the well log received by the Department on May 26, 2000, construction of BAKE 50735 began January 5, 2000.

Based on Finding of Fact (FOF) 10 and 11, the Department has determined that the prosecution of the construction of the well began prior to September 30, 2000.

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 permit and previous extensions.²

12. Construction of the well began prior to the September 30, 2000, deadline specified in the permit.
13. During the previous extension periods, being from October 1, 2003, to October 1, 2012, the following was accomplished:

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.

- BAKE 51936 was constructed
 - altered BAKE 51936 under BAKE 52182; and
 - began alteration of BAKE 51963/52182 under BAKE 52242 (Stumbaugh Well 2).
14. During the most recent extension period, being from October 1, 2012, to October 1, 2018, the following was accomplished:
- altered BAKE 50735 under BAKE 52328 (Stumbaugh Well 1)
 - constructed BAKE 52583 (Newman Well 2)³;
 - established electrical power at the site; and
 - installed pumps.

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 or previous extension conditions.

15. The Department has considered the permit holder's compliance with conditions, and has identified the following concern: (1) the record does not show that a meter or other suitable measuring device has been installed, and (2) the required March static water level measurements have not been received by the Department for Newman Well 2. 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.

Based on FOF 15, the Department has determined that the permit holder has not demonstrated compliance with all permit conditions as required by Permit G-13738.

Failure to comply with permit conditions constitutes illegal use of water. In order to legally perfect the use of water under this permit, the permit holder must demonstrate that all conditions of the permit have been satisfied.

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

The amount of beneficial use made of the water during the permit time limits and previous extension conditions.

16. No water has been appropriated from under Permit G-13738.
17. Delay of full beneficial use of water under Permit G-13738 was due, in part, to insufficient yield of water from the permitted wells, and delay in the review of Permit Amendment T-12618. The permit holder needs additional time in which to gain approval

³ BAKE 52583 is currently not authorized under Permit G-13738, and was constructed after the submittal of Permit Amendment T-12618 requesting authorization of an additional point of appropriation. Permit Amendment T-12618 is currently pending.

for the construction of additional points of appropriation to obtain the full quantity of water allowed under the permit.

Based on FOF 15, and 16, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because not 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)]

18. An approximate total of \$363,350 has been invested. The costs included items associated with pump tests and permit amendments, 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 \$243,790 which is about 47 percent of the total projected cost for complete development of this project. An additional \$276,550 investment is needed to complete this project, which includes constructing two additional points of appropriation if authorized under Permit Amendment T-12618, and developing all 401.33 acres for supplemental irrigation.

Based on FOF 18, 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 of progress towards completion of the water system; a financial investment has been made; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use has not been demonstrated. The Department has determined the applicant has demonstrated the minimum necessary for the Department to find reasonable diligence towards complete application of water to a beneficial use.

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.

19. 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-13738; 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).

20. The points of appropriation for Permit G-13738, located within the Big Muddy Creek Basin, are not located within a limited or critical groundwater area.
21. Big Muddy Creek is not located within or above any state or federal scenic waterway.
22. 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.

23. Big Muddy Creek is located within an area ranked “high” 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.

24. An approximate total of \$243,790 has been invested in the project.

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

Other economic interests dependent on completion of the project.

25. Other economic interests dependent on completion of the project have not been identified.

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

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

26. No other factors relevant to the determination of the market and present demand for water and power have been identified.
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 2 of the “Limitations and Conditions” section of this PFO to meet this condition.

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

28. 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)]

29. The delay in the timely completion of the development of the project and/or timely application of water to full beneficial use was in part caused by the delay in the review of Permit Amendment T-12618.

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-13738.

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, and that there are no other reasonable alternatives exist for meeting water use needs. A significant investment has been made in the construction and alteration of wells in attempts to locate sufficient quantity of water for use under this permit. The investment in the construction of the Newman Well would be lost without the approval of the extension of time to allow for the completion of the review of Permit Amendment T-12618.

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-13738.

Based on FOF 10, 11, 12, 13, 14, 18, and 24, 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 October 26, 2018, the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, and applying water to full beneficial use.
34. It is the intention of the permit holders to pursue the Split-a-Permit process upon completion of the review of Permit Amendment T-12618, to allow for independent development of the water right on the individual permit holders properties.

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-13738 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. Based on FOF 4, 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 because no beneficial use of water use under the terms and conditions of the permit has been-made since the permit issuance.

2. 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 2 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 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 10, through 32, completion of construction and 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. 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 an 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).
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).

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-13738 from October 1, 2018, to October 1, 2028.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Water Use Condition**

If no water is applied to beneficial use under the terms and conditions of Permit G-13738, or any permit originating from Permit G-13738, on or before October 1, 2028, this may be the be the last extension of time granted for Permit G-13738 Any future extensions of time request may be denied, unless the permit holder can provide the Department with evidence that beneficial use of the water is shown during this extension period. In addition, all normal extension standards and rules will be evaluated. ORS 539.010(5); OAR 690-315-0040.

2. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2023. 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: March 5, 2019


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 **May 10, 2019**, 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 503-986-0802.
 - 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
Fax: 503-986-0901 Salem, OR 97301-1266
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