

**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-15571, Water Right Application G-16008, in	)	FINAL
the name of Black Walnut, LLC and BroadPeak BW, LLC	)	ORDER

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Permit Information

Application:	G-16008
Permit:	G-15571
Basin:	2B – Middle Willamette / Watermaster District 16
Date of Priority:	May 13, 2003
Source of Water:	a well in Hess Creek Basin
Purpose or Use:	agriculture use; irrigation use on 40.0 acres
Maximum Rate:	0.078 cubic foot per second (cfs), being 0.022 cfs for agriculture use and 0.56 cfs for irrigation use on 40.0 acres

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***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, 2008, to October 1, 2024<sup>1</sup>.

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.

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<sup>1</sup>Pursuant 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**

Agent – Roger N. Smith Associates, Inc  
Application – Application for Extension of Time  
Department – Oregon Department of Water Resources  
FOF – Finding of Fact  
PFO – Proposed Final Order  
Well – YAMH 53052  
cfs - cubic foot per second  
gpm - 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.

## **FINDINGS OF FACT**

1. On March 11, 2004, Permit G-15571 was issued by the Department. The permit authorizes the use of up to 0.078 cfs of water from a well in Hess Creek Basin being 0.022 cfs for agriculture use and 0.56 cfs for irrigation use on 40.0 acres. The permit specified complete application of water was to be made on or before October 1, 2008.
2. On March 20, 2017, a partial assignment by proof from Karen and Neal Utz to Black Walnut, LLC, was recorded in the records of the Water Resources Department.
3. On March 20, 2017, a partial assignment by proof from Karen and Neal Utz to BroadPeak BW, LLC, was recorded in the records of the Water Resources Department.
4. On February 12, 2019, John D. Hull, CFO/CEO of Black Walnut, LLC and BroadPeak BW, 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-15571 be extended from October 1, 2008, to October 1, 2024.

5. On February 26, 2019, notification of the Application for Permit G-15571 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 February 12, 2019, 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 August 8, 2002, construction of YAMH 53052 (Well) began July 11, 2002.

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 October 1, 2008.

**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.<sup>2</sup>*

9. Construction of the well and installation of a flow meter was completed prior to permit issuance.
10. Work was accomplished during the original development time frame under Permit G-15571 includes installation of irrigation equipment on 10.0 acres of land.
11. Since October 1, 2008, the permit holder has accomplished the following:
  - installed ultra-violet treatment lamp in pump-house; and
  - installed irrigation to an additional 3.0 acres

Based on FOF 7, through 10, the Department has determined that work has been accomplished prior to permit issuance and within the time allowed in the permit, 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.*

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

Based on FOF 12, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-15571.

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

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

13. A maximum rate of 10.0 gallon per minute (gpm) (0.022 cfs) of water has been appropriated from the Well for irrigation of 13.0 acres.

Based on FOF 12, and 13, the Department has determined that beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2008.

**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 \$31,460 has been invested. The costs included items associated with maintenance costs of a system and the purchase and planting of crops, which are not

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<sup>2</sup> "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.

“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 \$267,750 which is about 76.994967649 percent of the total projected cost for complete development of this project. An additional \$80,000 investment is needed to complete this project, which includes installing new irrigation equipment in areas not previously irrigated; installing a 5,000 above ground tank and mainline; and a possible permit amendment.

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-15571.

### **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-15571; 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-15571, located within Hess Creek Basin, is not located within a limited or critical groundwater area.
17. Hess Creek is not located within or above any state or federal scenic waterway.
18. The point of appropriation is not located 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. Hess 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 \$267,750 has been invested in the project.

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

Other economic interests dependent on completion of the project.

21. Other economic interests dependent on the completion of the project include employees of the vineyard and bed and breakfast.

**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 grapes produced on the fully

irrigated 40.0 acres will generate annual sales between \$300,000, and \$420,000. The on-site bed and breakfast generates additional income for the winery.

**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. Unforeseen events that contributed to the extended length of time needed to fully develop and perfect Permit G-15571, have not been identified.

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

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 winery is located at the headwaters of Hess Creek, which result in minimal flows in the creek.

**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-15571.

Based on FOF 7, through 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 February 6, 2019, the remaining work to be completed consists of completing construction of the water system, which includes installing irrigation equipment on an additional 27.0 acres; 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, 2024, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15571 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 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, 2024, 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.

### 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-15571 from October 1, 2008, to October 1, 2024.

DATED: April 9, 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 24, 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  
Salem, OR 97301-1266  
Fax: 503-986-0901
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Mailing List for Extension PFO Copies

PFO Date: April 9, 2019

Copies Mailed

Application: G-16008

By: \_\_\_\_\_

Permit: G-15571

On: \_\_\_\_\_

Original mailed to Applicant:

Black Walnut, LLC and BroadPeak BW, LLC  
47 State St., Suite 200  
Lake Oswego, OR 97034

Copies sent to:

1. WRD - App. File G-16008/ Permit G-15571
2. Agent or CWRE representing the Permit Holder

Fee paid as specified under ORS 536.050 to receive copy:

3. None

Receiving via e-mail (10 AM Tuesday of signature date)  
(DONE BY EXTENSION SPECIALIST)

4. WRD - Watermaster District 16, Joel Plahn

CASEWORKER: JDP