

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-17019, Water Right Application G-16534, in the)
name of Janice L. Kerns and Tim L. Kerns, Northwest Farm)
Credit Services, FLCA

**PROPOSED
FINAL ORDER
TO DENY**

Permit Information

Application: G-16534
Permit: G-17019
Basin: 9 – Powder / Watermaster District 8
Date of Priority: September 13, 2005
Source of Water: twelve wells in Willow Creek Basin
Purpose or Use: Irrigation use on 251.4 Acres
Maximum Rate: 2.0 cubic feet per second (cfs)

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.

In Summary, the Department proposes to:

- Deny an extension of time to complete construction of the water system from October 1, 2018, to October 1, 2037.

- Deny an extension of time to apply water to full beneficial use from October 1, 2018, to October 1, 2037.

ACRONYM QUICK REFERENCE

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

WELL REFERENCE

Boys Place 1 Well – BAKE 1897/51895
Home Place Well - BAKE 50455/50701
Company Farm Well - BAKE 50624/50913
Boys Place 2 Well - BAKE 50955
Bank Place Well - BAKE 52261/52293
Sackos Well - BAKE 52507

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 July 5, 2007, Permit G-16199 was issued by the Department. The permit authorized the use of up to 2.0 cfs of water from a well in Willow Creek Basin for irrigation use on 251.4 acres. The permit specified completion of construction, and application of water was to be made on or before October 1, 2012. One prior permit extension has been granted for Permit G-16199. The extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2011, to October 1, 2018.
2. On August 12, 2013, the Department approved Permit Amendment T-8262 (Special Order Volume 91, Page 172) authorizing eleven additional points of appropriation under Permit G-16199. Superseding Permit G-17019 was issued by the Department on August 12, 2013, to reflect the changes.

3. On December 11, 2017, the permit holder submitted an “Application for Extension of Time” (Application) to the Department, requesting both the time to complete construction of the water system and the time to apply water to full beneficial use under the terms and conditions of Permit G-17019 be extended from October 1, 2018, to October 1, 2037.
4. On December 26, 2017, notification of the Application for Extension of Time for G-17019 was published in the Department’s Public Notice. No public comments were received regarding the extension application.
5. On May 31, 2019, a partial assignment from Tim L. and Janice L Kerns to Northwest Farm Credit Services, FLCA was recorded in the records of the Water Resources Department.

Review Criteria [OAR 690-315-0040]

In order to approve an Application for an Extension of Time to complete construction and/or apply water to full beneficial use pursuant to ORS 537.230 or 537.630, or to begin construction, pursuant to ORS 537.248, the Department must make the findings in OAR 690-315-0040(1)(a) – (d).

Complete Extension of Time Application [OAR 690-315-0040(1)(a)]

6. On December 11, 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 August 21, 1992, construction of BAKE 1897 (Boys Place 1 Well) began May 27, 1992.

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, 2011.

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 or previous extension.¹

9. Prior to permit issuance, the following was accomplished:
 - BAKE 50455 (Home Place Well) was constructed and deepened under BAKE 50701;
 - BAKE 50624 (Company Farm Well) was constructed and was deepened under BAKE 50913;
 - BAKE 50955 (Boys Place 2 Well) was constructed; and
 - developed the water system

10. Work was accomplished during the original development time frame under Permit G-17019 is as follows:
 - deepened Boys Place 1 Well under BAKE 51895; and
 - continued to develop the water system.

11. During the most recent extension period, being from October 1, 2011, to October 1, 2018, the following was accomplished:
 - BAKE 52261 (Bank Place Well) was constructed and altered under BAKE 52293;
 - BAKE 52507 (Sackos Well) was constructed;
 - deepened Company Farm Well under BAKE 52327; and
 - continued to develop the water system.

The Application provides evidence of progress of physical work made towards completion of the water system.

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

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

12. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) none of the six wells constructed for use under Permit G-17019 have been constructed to meet the condition of being continuously cased and continuously sealed to a minimum depth of 110 feet below land surface, and (2) the progress report that was due to be submitted to the Department by October 1, 2016, has not been submitted.

¹ "Actual Construction" is defined in OAR 690-315-0020(3)(d)(A)and(B) as physical work performed toward completion of the water system which demonstrates the water right permit holder's good faith and intention to complete the project with reasonable diligence. Actual construction does not include planning a diversion system, formulating a business plan, securing financing, letting contracts, purchasing but not installing equipment, surveying, clearing land or planting crops.

Based on FOF 12, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-17019:

- “The well shall be continuously cased and continuously sealed to a minimum depth of 110 feet below land surface. The well may not be completed in such a manner that it allows ground water to be developed from shallower sands and gravels”; and
- “The permit holder must submit a completed Progress Report Form to the Department by October 1, 2016.”

Failure to comply with permit conditions constitutes illegal use of water. Beneficial use of water under this permit, therefore, has not yet been demonstrated. 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 or previous extension conditions.

13. The application identifies differing rates of use under this permit, ranging from 2.0 cfs to a potential combined rate of 11.25 cfs, being 2.25 cfs from each Bank Place Well, Home Place Well, Company Farm Well, Boys Place 2 Well, and Boys Place 1 Well, for irrigation of 251.4 acres.

Based on FOF 12, 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)]

14. An invested for approximately \$1,225,400, has been made, which is approximately 52 percent of the total projected cost for complete development of this project. An additional \$1,126,000 investment is needed for the completion of this project. The investment includes the costs associated with development of other permits held by the Applicants as the twelve wells authorized under Permit G-17019, are also authorized under five other water right permits held by the applicants.

Based on FOF 14, the Department has determined that the permit holder had made an investment.

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 noncompliance with permit conditions; and

beneficial use of water has not been demonstrated. The Department has determined the applicant has not demonstrated reasonable diligence in previous performance under Permit G-17019.

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-17019; 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-17019, located within the Willow Creek Basin, are not located within a limited or critical groundwater area.
17. Willow Creek is not located within or above any state or federal 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. Willow Creek is located within an area ranked “moderate” for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife.

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

Economic interests dependent on completion of the project.

20. An approximate total of \$1,225,400 has been invested in the project.

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

Other economic interests dependent on completion of the project.

21. The Application did not identify economic interests other than those of the applicant’s that may be dependent on completion of the project.

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.

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

24. The project involves multiple governmental entities, which include Department of State Lands, and county roads department, each with their own unique set of requirements.

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

25. The permit holders were faced with serious health issues that restricted their ability to complete development of the project in a timely manner.

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

26. The use of supplemental well water directly affects the applicant’s ability to grow high value crops late in the irrigation season. The applicants hold adjudicated surface water rights, as well as multiple additional ground water permits.

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

27. The Application does not provide evidence of good faith of the appropriator under Permit G-17019.

Based on Findings of Fact 12, the Department finds that the Applicant has not demonstrated good faith in the development of Permit G-17019, consistent with the conditions contained therein.

Duration of Extension [OAR 690-315-0040(1)(c)]

Under OAR 690-315-0040(1)(c), in order to approve an extension of time for water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

28. As of December 11, 2017, the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, which include continuously casing and continuously sealing the wells to a minimum depth of 110 feet below land surface; and applying water to full beneficial use.

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 not shown that good cause exists for an extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

CONCLUSIONS OF LAW

1. The permit holder 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 permit holder has not complied with the time allowed for construction work under the permit pursuant to ORS 537.630 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. The Application established that there has been non-compliance with permit conditions. The permit holder has not shown that good cause exists for an extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

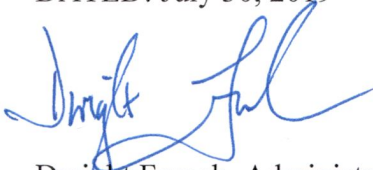
PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department proposes to issue an order to:

Deny the time to complete construction of the water system under Permit G-17019 from October 1, 2018, to October 1, 2037.

Deny the time to apply water to beneficial use under Permit G-17019 from October 1, 2018, to October 1, 2037.

DATED: July 30, 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 **September 13, 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:

