

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-15191, Water Right Application G-15547, in)	FINAL
the name of Myron Kunzi and Kuenzi Turf and Nursery)	ORDER

Permit Information

Application:	G-15547
Permit:	G-15191
Basin:	2B – Middle Willamette / Watermaster District 16
Date of Priority:	June 27, 2001
Source of Water:	five wells in Little Pudding River Basin
Purpose or Use:	nursery use on 260.8 acres
Maximum Rate:	2.57 cubic feet 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, 2006, to October 1, 2026¹.
- 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

Agent – Doann Hamilton; Greg Kapillas
Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
Well 1 – MARI 20055
Well 2 – MARI 17377
Well 3 – MARI 17185/17201/50696
Well 4 – MARI 7773
Well 5 – MARI 9244
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(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 4, 2002, Permit G-15191 was issued by the Department. The permit authorizes the use of up to 2.57 cfs of water from five wells in Little Pudding River Basin for nursery use on 260.8 acres. The permit specified complete application of water was to be made on or before October 1, 2006.

2. On February 16, 2021, the permit holder, Kuenzi Turf and Nursery, 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-15191 be extended from October 1, 2006, to October 1, 2026. This is the first permit extension requested for Permit G-15191.
3. On March 2, 2021, notification of the Application for Permit G-15191 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)]

4. On February 16, 2021, 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)]

5. Construction of wells began prior to permit issuance.
6. According to the well logs received by the Department construction is as follows:
 - MARI 7773 (Well 4) began November 1, 1966;
 - MARI 9244 (Well 5) began August 16, 1990;
 - MARI 17185/17201/50696 (Well 3) began February 5, 1991;
 - MARI 17377² (Well 2) began July 28, 1991; and
 - MARI 20055 (Well 1) September 12, 1995;

Based on Finding of Fact (FOF) 5, and 6, the Department has determined that the prosecution of the construction of the well began prior to October 1, 2006.

Good Cause [OAR 690-315-0040(1)(d)]

The Department must find that there is “good cause” to approve the extension. In making a “good cause” finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).

² The Application identifies MARI 17377 as being constructed in a location not authorized by the permit, though this well is identified in the original Application for a Permit to Use Ground Water submitted on June 27, 2001.

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.³

7. Construction of the wells was complete prior to permit issuance.
8. Additional work accomplished prior to permit issuance includes:
 - installed pumps in Well 1, Well 2, Well 3, Well 4, and Well 5;
 - installed meters on Well 1, Well 2, and Well 3; and
 - connected Well 1, Well 2, and Well 3 to the irrigation system
9. Work was accomplished during the original development time frame under Permit G-15191 is as follows:
 - installed a meter on Well 4; and
 - installed mainlines and hydrants to the irrigation system.

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 conditions.

10. The Application identified Well 5 has not had a meter installed, however, Well 5 will not be utilized under this permit.
11. The Department has considered the permit holder’s compliance with conditions, and did not identify any concerns.

Based on FOF 10, and 11, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-15191 for Well 1, Well 2, Well 3, Well 4, and Well 5.

³ “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 permit time.

12. A maximum rate of 1,125 gallons per minute (gpm) (2.5 cfs) of water has been appropriated, being 400 gpm (0.89 cfs) from Well 1; 300 gpm (0.67 cfs) from Well 2; 75 gpm (0.17 cfs) from Well 3; and 350 gpm (0.78 cfs) from Well 4 for nursery use on 258.4 acres.

Beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2006.

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

13. An investment of approximately \$110,350, has been made which is about 51 percent of the total projected cost for complete development of this project. An additional \$105,000 investment is needed for the completion of this project.

Based on FOF 13, 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-15191.

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.

14. 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-15191; 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).

15. The points of appropriation for Permit G-15191, located within the Pudding River Basin, are not located within a limited or critical groundwater area.
16. Pudding River is not located within or above any state or federal scenic waterway.
17. 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.

18. Pudding River 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.

19. An approximate total of \$92,350 has been invested in the project.

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

Other economic interests dependent on completion of the project.

20. 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.

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. The water user was unaware the location of Well 2 is not the location authorized by the permit, and would need to be corrected by a Permit Amendment to ensure it would be included on a perfected water right certificate. Additionally, the low production of Well 5 also contributed to the inability to appropriate the full rate under the permit.

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

25. The farm has been in operation since prior to permit issuance. The use of Well 2, and the need to develop the remaining rate authorized under the permit is integral to the overall operation.

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-15191.

Based on FOF 5, 6, 7, 8, 9, 11, 12, 13, and 19, 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 February 16, 2021, 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.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2026, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15191 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(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 1 of the "Limitations and Conditions" section of this PFO to meet this condition.

CONCLUSIONS OF LAW

1. The applicant has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The applicant has complied with the construction timeline requirements to begin construction as required by ORS 537.630, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. Based on Finding of Facts 5, through 26, full application of water to beneficial use can be accomplished by October 1, 2026, 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.
5. The applicant has demonstrated good cause for the extension.

6. For extensions exceeding five years, the Department shall establish progress checkpoints to determine if diligence is being exercised 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-15191 from October 1, 2006, to October 1, 2026.

Subject to the following conditions:

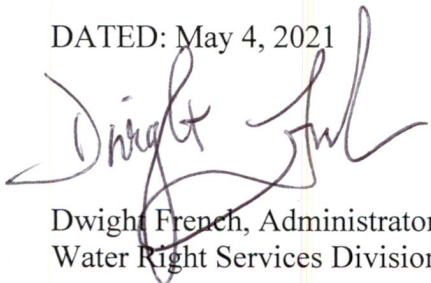
LIMITATIONS AND CONDITIONS

1. Checkpoint Condition

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2024**. *A form will be enclosed with your Final Order.*

- (a) At each checkpoint, the permit holder shall submit and the Department shall review evidence of the permit holder's diligence towards completion of the project and compliance with terms and conditions of the permit and extension. If, after this review, the Department determines the permit holder has not been diligent in developing and perfecting the water use permit, or complied with all terms and conditions, the Department shall modify or further condition the permit or extension to ensure future compliance, or begin cancellation proceedings on the undeveloped portion of the permit pursuant to ORS 537.260 or 537.410, or require submission of a final proof survey pursuant to ORS 537.250;
- (b) The Department shall provide notice of receipt of progress reports in its weekly notice and shall allow a 30 day comment period for each report. The Department shall provide notice of its determination to anyone who submitted comments.

DATED: May 4, 2021



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

