



Oregon

Kate Brown, Governor

April 6, 2021

Water Resources Department

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Silver Creek Ranches, LLC

Wayne Evans

70194 Silver Creek Rd.

Riley, OR 97758

REFERENCE: Extension of Time; Permit G-13455

Deat Permit Holder:

Enclosed in a Proposed Final Order for an Extension of Time for Permit G-13455, proposing to extend the permit from October 1, 2002, to March 31, 2022. This Extension of Time is conditioned to require the submittal of a Permit Amendment within six month from the issuance of the Final Order to request authorization of well HARN 50194. This condition was determined necessary to allow for the Department to make a finding that construction of a well authorized under this permit began within the time required by Oregon Revised Statute 537.630.

If an Application for Permit Amendment is not submitted within the time specified in the Final Order, the Department must withdraw the finding that construction of the well began within the time authorized, resulting in a termination of the Extension of Time. Additionally, if well HARN 50194 is unable to be authorized by a Permit Amendment, the Extension of Time will be terminated.

If approved, you will be required to demonstrate compliance with the terms and conditions of the new permit, including the submittal of a March Static Water Level Measurement and submittal of Annual Water Use Reports. For this reason, the Department has determined an Extension of Time to March 31, 2022, is necessary to pursue a Permit Amendment and demonstrate compliance with conditions.



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-13455, Water Right Application G-14516, in)	FINAL
the name of Silver Creek Ranches, LLC; Wayne Evans)	ORDER

Permit Information

Application:	G-14516
Permit:	G-13455
Basin:	12 – Malheur Lake / Watermaster District 10
Date of Priority:	May 12, 1997
Source of Water:	a well in Silver Creek Basin
Purpose or Use:	Irrigation of 109.0 acres and supplemental irrigation of 74.0 acres
Maximum Rate:	2.29 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, 2002, to March 31, 2022¹.
- 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
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.

FINDINGS OF FACT

1. On August 12, 1998, Permit G-13455 was issued pursuant to ORS 537.625, by the Department. The permit authorizes the use of up to 2.29 cfs of water, being 1.36 cfs for irrigation of 109.0 acres, and 0.93 cfs for supplemental irrigation of 74.0 acres from a well in Silver Creek Basin. The permit specified actual construction of the well to begin by May 28, 1999, and complete application of water to the use was to be made on or before October 1, 2002.
2. On May 6, 2020, the permit holder, Wayne Evans, 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-13455 be extended from October 1, 2002, to October 1, 2020. This is not the first permit extension requested for Permit G-13455².

3. On May 26, 2020, notification of the Application for Permit G-13455 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 May 6, 2020, 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. The Application states that construction of HARN 50194 began April 15, 1997.
6. The Application states that HARN 50194 is not drilled in the location authorized in Permit G-13455.
7. On September 2, 2020, the Department Ground Water section completed a review identifying the HARN 50194 appropriates water from the same source as authorized by Permit G-13455. Because the ground water review identifies the well has been constructed to appropriate water from the authorized source aquifer, a finding that the construction of the well began within the time authorized as required by ORS 537.630 may be made, so long as; the Extension of Time is conditioned to require the submittal of an Application for Permit Amendment within six months from the date of issuance of the Final Order approving the Extension of Time, requesting the well identified in the Application for Extension of Time be authorized under the permit.
8. According to the well log received by the Department on August 21, 1997, construction of HARN 50194 began April 15, (1997).
9. The Application identifies construction of HARN 2007 began June 18, 1993.
10. According to the well log received by the Department on September 30, 1993, construction of HARN 2007 began June 18, 1993.

² An Application for Extension of Time was previously submitted on April 27, 2017, which the Department issued a Proposed Final Order to Deny the Extension of Time due to failure to begin construction of the authorized well. The Application for Extension of Time was withdrawn prior to the issuance of a Final Order.

11. According to the Application for a Permit to Use Ground Water, submitted May 12, 1997, identifies; “This well has not been drilled.” It further explains the construction of the well will be completed April 1997.³

Based on Finding of Fact (FOF) 5, through 9, the Department has determined that construction of a well which appropriates water from the authorized source, has been constructed prior to May 28, 1999.

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.⁴

12. Work was accomplished during the original development time frame under Permit G-13455 is as follows:
- installed center pivot and wheel lines;
 - installed mainline, and risers; and
 - installed two 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.

³ The Application for a Permit to Use Ground Water was signed by the Permit Holder on February 17, 1997. Though this application was not received until May 12, 1997, at the time the application was signed, the well requested by the application and authorized by the permit had not yet been constructed.

⁴ “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.

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

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

13. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the record does not show that a meter or other suitable measuring device has been installed, (2) the required March static water level measurements have not been received by the Department, and (3) annual reports of the amount of water used each month have not been received by the Department from a currently authorized well. 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.
14. The permit holder has identified that a meter has been installed and has submitted annual water use reports for HARN 50194. March static water level measurements have been submitted for years 2005 and 2020.

The Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-13455 because no currently authorized well has been utilized under this permit.

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

The amount of beneficial use made of the water during the permit time limits.

15. The Application identifies a maximum rate of 2.29 cfs of water has been appropriated from HARN 50194 for irrigation of 232.9 acres.
16. A review of a Claim of Beneficial Use submitted to the Department on November 8, 2018, identified a maximum rate of 2.29 cfs of water has been appropriated from HARN 50194, being 1.24 cfs for irrigation of 99.0 acres, and 1.05 cfs for supplemental irrigation of 84.0 acres.

The Department has determined that beneficial use of water in compliance with the terms and conditions of Permit G-13455 has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2002.

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

17. An approximate total of \$221,690 has been invested. The costs included items associated with construction of two wells not currently authorized by the permit, and the submittal of static water level measurements 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 \$144,890 which is about 100 percent of the total projected cost for complete development of this project. No additional investment is needed to complete this project.

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.

18. 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-13455; 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).

19. The point of appropriation for Permit G-13455, located within the Silver Creek Basin, and is located in the Greater Harney Valley Groundwater Area of Concern (GHVGAC) which was established to ensure that groundwater in the GHVGAC is appropriated within the capacity of the resource and that new appropriations of groundwater assure the

maintenance of reasonably stable groundwater levels and prevent depletion of the groundwater resource. Current data, comprising substantial evidence, indicate that groundwater levels are declining in areas of the GHVGAC. Additional allocation of groundwater within the GHVGAC may exacerbate these declines. A comparison between estimated annual recharge and previously allocated groundwater volumes indicates that groundwater is fully allocated in some areas of the basin. 690-512-0020(1)

20. Silver Creek is not located within or above any state or federal scenic waterway.
21. The point of appropriation is 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.

22. Silver Creek is located within an area ranked “highest” 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.

23. An approximate total of \$144,890 has been invested in the project.

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

Other economic interests dependent on completion of the project.

24. 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.

25. 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)]

26. 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)]

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

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

28. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-13455, in that 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)]

29. The permit holder leases the property. A loss of the water right would result in the loss of income from the leased property.

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

30. The Application provides evidence of good faith of the appropriator under Permit G-13455.

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.

31. As of May 6, 2020, work on the water system is complete. The permit holder must submit an Application for Permit Amendment to request authorization of HARN 50194.

Given the need for a Permit Amendment, the Department has determined that the permit holder's request to have until October 1, 2020, to complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit G-13455 is not reasonable. The Department has determined an Extension of Time to March 31, 2022, to allow sufficient time to process a Permit Amendment, and if approved, demonstrate compliance with permit conditions, 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. Based on Findings of Facts 6, 7, 8, 15 and 16, the Department determined the need to place a “Permit Amendment Condition” on this extension of time in order to ensure diligence is exercised in the development and perfection of water use permit. This condition, specified under Item 1 of the “Conditions” section of this PFO, was determined to be necessary because of the use of an unauthorized point of appropriation and place of use has occurred under this permit.
2. 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 Findings of Facts 20, the Department determined the need to place a “Development Limitation” on this extension of time in order to ensure diligence is exercised in the development and perfection of water use permit. This condition, specified under Item 2 of the “Conditions” section of this PFO, was determined to be necessary because of the use of an unauthorized point of appropriation and place of use has occurred under this permit.

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 Extension of Time is being issued contingent on the submittal of a Permit Amendment which results in the authorization of HARN 50194 as a point of appropriation under the permit.
3. Based on Finding of Facts 5, through 30, full application of water to beneficial use can be accomplished by March 31, 2022, 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 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 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-13455 from October 1, 2002, to March 31, 2020.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. Permit Amendment Condition

The water user shall submit an Application for Permit Amendment requesting authorization of HARN 50194 as a point of appropriation under this permit within six months from the date of issuance of the Final Order on the Extension of Time.

If the required Permit Amendment is not submitted within the time required above, the extension of time will be terminated.

If authorization of HARN 50194 is not granted, the Extension of Time will be terminated.

2. Development Limitation

Development of Permit G-13455, and any subsequent permit issued resulting from a Permit Amendment is limited to a maximum rate of appropriation of 2.29 cfs of water from HARN 50194, being 1.24 cfs for irrigation of 99.0 acres, and 1.05 cfs for supplemental irrigation of 84.0 acres, as identified in the Claim of Beneficial Use submitted on November 8, 2018.

DATED: April 6, 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 written protest to the proposed final order. The written protest must be received by the Water Resources Department no later than **May 21, 2021**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.

