

Attachment A

OAR 734-051-3015, applies to private connections, with a right of access, in existence on January 1, 2014 for which the department has no record of issuing a Permit to Operate or documentation recognizing the connection as a grandfathered approach. When the department issues a Permit to Operate for a connection that had a presumption of written permission on January 1, 2014, then OAR 734-051-3015 no longer applies to the approach and the approach is managed under the terms and conditions of the Permit to Operate.

Senate Bill (SB) 408 established that a connection in existence on January 1, 2014 is “presumed” to have the department’s written permission if it exists where there is a right of access. The presumption of written permission is valid for the January 1, 2014 use of the approach unless the department establishes a factual basis for rebutting the presumption. The statute puts the burden on the department to rebut all of the criteria upon which the presumption is based. In most cases, the presumption is very difficult to rebut and the department has decided that it will generally not do so in order to adhere to the intent of the legislation. However, there are some circumstances where the department may decide to rebut the presumption.

If the department determines that a change of use has occurred after January 1, 2014, based on OAR 734-051-3020, for a connection with a presumption of written permission, then a new approach application is required. If the application is approved, then a Permit to Operate is issued after satisfactory completion of all requirements. A Permit to Operate may also be issued when a change of use has not occurred. This may be done to document the approved use of the approach for future change of use analyses, to satisfy a request for written permission by a property owner or local government, or as part of the project delivery process in accordance with Project Delivery Leadership Team Operational Notice PD03.

This attachment provides guidance for how to interpret and apply each section of OAR 734-051-3015(1) through (7).

Section 1 – Applicability

This section establishes several basic requirements that must be met for this rule to apply. Section 2 establishes additional requirements that must be met.

Section 1 says that all of the following conditions have to be met for OAR 734-051-3015 to apply:

- The connection must have been in existence on January 1, 2014. This means that the rule does not apply to connections that were constructed after this date.
- The department has not issued a Permit to Operate for the connection. It is important to note that permits recorded in the UPermit database are considered equivalent to a Permit to Operate even though they were not issued under Division 51 rules.
- The department has not issued documentation recognizing the approach as grandfathered under OAR 734-051-1070(30).

Under Section 1, approaches for which the department has issued a Permit to Operate or grandfathered documentation are not subject to this rule. Therefore, in determining whether OAR 734-051-3015 applies to a connection, one needs to do the research to determine whether there is an UPermit, a CHAMPS permit, or grandfathered documentation that applies to the connection.

The location or other information in the permit or grandfathered documentation may not exactly match the condition on the ground for several reasons, including:

- Inaccurate location information in the permit or documentation;
- Changes made during ODOT projects that were not recorded in the permit record;
- Changes in technology used to establish the location (for example Geographical Positioning System vs. tape or wheel measure); or
- Changes made by current or past property owners.

If it is reasonable to assume that an existing permit or grandfathered documentation applies to a connection but there is a discrepancy in the permit data, it is acceptable to issue a new permit with the correct information or make a note in CHAMPS about the discrepancy for future reference. If there is a high degree of uncertainty, then the decision about whether to manage the connection under this rule may need to be settled through the Region escalation process¹.

Section 2 – Presumption of Written Permission

Subsections (a) and (b) establish the basis for a presumption of written permission. Subsection (a) applies to connections in existence before January 1, 2014 that were built or rebuilt as part of a highway project or for which the department intended to issue a Permit to Operate to the property owner for the connection. Subsection (b) applies to connections in existence before April 1, 2000.

Here is a very important point to understand about Subsections (a) and (b):

Neither the department nor the property owner is obligated to prove that the criteria for the presumption under either Subsection (a) or (b) are met.

The Department of Justice has provided a legal interpretation of ORS 374.308 that the legislature intended for the presumption of written permission to be valid without any factual documentation to support it. This means that it is not required to establish which of the criteria in Subsections (a) and (b) are the basis for a presumption of written permission.

Subsection (c) requires that the property served by the connection have a right of access.

Subsection (d) states that connections presumed to have written permission are subject to OAR 734-051-3020 *Change of Use of a Private Connection*.

¹ Each Region has developed an escalation process for difficult or controversial access management issues.

Subsection (e) states that an owner of real property with a connection presumed to have written permission is responsible for the cost and performance of maintaining the connection.

Subsection (f) allows the department to rebut the presumption of written permission.

Section 3 – Issuance of a Permit to Operate

Section 3 states that the department may issue a Permit to Operate for a connection that it does not rebut as having a presumption of written permission if a change of use has not occurred. Only an owner of real property abutting a state highway with a connection to a state highway that existed on January 1, 2014, an owner of real property that does not abut a state highway but has an easement to a connection to a state highway that existed on January 1, 2014, or the designated agent of such a property owner can request a Permit to Operate for an existing connection that is presumed to have the department's permission.

A Permit to Operate can be issued in CHAMPS for connections that are presumed to be permitted ("PTBP"). CHAMPS has the ability to issue a Permit to Operate while in the "Pending" status. This allows the permit process to skip the decision process associated with processing an application. The following outlines a procedure for issuing a Permit to Operate for a PTBP connection.

- Before creating a new CHAMPS record, first check to see if a CHAMPS record in "Inventory" status already exists for the subject connection. If a CHAMPS record in "Inventory" status already exists, change the status to "Pending."
- If no CHAMPS record already exists, create a new CHAMPS record and enter the "Applicant" and "Approach Location" data entry requirements on the Application Tab. Minimum "Approach Location" data requirements include: [Highway], [Route], [County], [MP], and [Hwy Side]. For the required field [Reason for Request] select "Presumed Permit." Note: We do not need a completed application form or a LUCS signed by the local jurisdiction to issue a Permit to Operate for PTBP connections; however, it is useful for a property owner to fill in some of the most basic information that needs to be entered in to CHAMPS, such as the highway name, mile point and tax lots served. In the [Application Signed by] field, enter "PTBP." Enter the current date in the [Date] field. In the [Land Use] field, enter the land use and size that most closely match the existing use on January 1, 2014. To determine a property's use on January 1, 2014, use the best information available at the time and work collaboratively with the applicant. Information from City/County records, as-constructed plans, field observations, digital video logs, aerial photos, and credible information provided by the property owner can help to establish the use of the connection on January 1, 2014. The RAME should be consulted when establishing prior use for presumed to be permitted connections. Finally, enter the turning movements allowed.
- Enter the [Tax Lot] information on the Property Tab.
- Enter the [Engineering Station] on the General Tab.

- Determine whether there is access control present (no abutter's right of access) by alerting Right-of-Way staff to perform the access control research from the Property Tab. An abutter's right of access is required before issuing a Permit to Operate for PTBP connections. If the property's highway frontage is access controlled, a Reservation of Access must exist to establish an abutter's right of access. If a Reservation of Access exists, check to make sure that a Permit to Operate for a PTBP connection would not conflict with any restrictions on the reservation. The seven requirements to request access control research are:
 - Right-of-Way Map Number
 - EA/Subjob (CHAMPS calculates this for most land uses, except "Other" and "Farm Field." Use another land use with the same ADT to allow CHAMPS to calculate and EA/Subjob for those two uses.)
 - Tax Lot Map Number (Township, Range and Section)
 - Tax Lot Number
 - Mile Point (and side of the highway: Left or Right)
 - Engineering Station (determined from corresponding Right-of-Way Map)
 - Current Tax Lot Map (copy)
- Select provisions on the Provision Tab. CHAMPS requires that at least one provision be selected. Select the provision "00374.315." This provision directs the property owner to keep the approach clean and in working condition. Additional provisions may be selected as appropriate for a given approach.
- Fill in the Specification Tab data, starting with the [Approach Type]. Width ([W]) is a required field and important to have filled because it appears on the permit. Recording the [Wearing Surface] is optional, but helpful for performing inventory and reconciliation work. The Turn Radii [R1] and [R2] for "Ditch Section" and "Curbed Radius" approach types are optional fields to fill, but they are helpful for assuring that an approach can operate safely. The [Allowed Movements] are required fields and important to have filled because they appear on the permit. The remaining fields, e.g., [Sub Base], [Base] and [Leveling Course] are optional.
- Enter data in the Findings Tab. Enter the [Peak Hour Trips (PkHr)], [Site ADT] and [Approach Truck ADT] volumes. Populating these fields is important to help establish a "change of use" baseline for the property. Select "Private" in the [Ownership] field. Public approaches are no longer required to obtain a Permit to Operate, so nearly all permits for PTBP connections will indicate "Private" on the permit. Other Findings Tab data can be entered if staff is evaluating the safety of the approach. RAMEs don't need to identify or take actions regarding deviations to Division 51 standards for PTBP connections. The [Calculate Action] button is not required to be pressed to issue a Permit to Operate for a PTBP connection. If the [Calculate Action] button is pressed, Findings Actions may be identified by CHAMPS that will require RAME action.

- Decide whether there are any reasons to rebut the presumption of written permission prior to issuance of the Permit to Operate for a PTBP connection.
- Issue Permit to Operate. Make sure the application [Status] on the General Tab is set to “Pending.” Press the red “check” icon to open the “Issue Permit” window. Select the “Issue Permit to Use” indicator. Press [Check Data] to begin a CHAMPS permitting data check. If CHAMPS finds data errors or omissions, a “Cannot issue permit” window will appear. Press [OK] and the “Issue Permit” window will show an “Issue Errors” report. CHAMPS will not issue a permit until these errors have been resolved. If there are no “Issue Errors,” an “OK to issue permit” window will appear. Press [Issue] and CHAMPS will issue a Permit to Operate with a transmittal letter and the [Status] is changed from “Pending” to “Aprvd (use).” An “Applicant Signature Box” window will appear. Select “Yes” if you would like to have the property owner acknowledge and agree to the provisions of the permit. Select “No” if the signature is not needed. A permit is automatically printed. A window opens asking if you would like to create a transmittal letter. This letter is CHAMPS Letter Template (23), “Notification of Satisfactory Construction and Transmittal of *Permit to Operate, Maintain and Use a State Highway Approach.*” This will be your only opportunity to create this letter. Do not click on [Preview] because you will lose the opportunity to create Letter (23). Select “Create” to create Letter (23). It is recommended that the transmittal letter be edited to delete references to “satisfactory construction” if the construction of the connection was not inspected for compliance with construction standards.
- Reprinting a Permit to Operate for a PTBP connection (Optional Step). Reprint the permit by opening the “Print Menu” window. You must be in the Application or General Tab to open the “Print Menu” window. Press “File” and “Print” to open the “Print Menu” window. Select “Permit to Use” and press “Print.”
- Searching for a Permit to Operate for a PTBP connection (Optional Step). To search for permits for PTBP connections, enter “Approach” in the [Permit Type] field on the Search Tab. Then, narrow your search by populating the [Permit Spec], [Office] and [Highway] fields (for example). Click on the [Search] button and CHAMPS will return a list of records that meet the search criteria. Click on the [Sort] button and CHAMPS will prompt, “Sort items by.” Select “apprch_req_reas_cd” from the dropdown choices and click the “OK” button. Scroll down the “Reason for Request” column until you find the records that say, “Presumed Permit.”

Section 4 – New Application Required for Change of Use

Connections deemed to have a presumption of written permission are subject to the requirements and procedures in OAR 734-051-3020 *Change of Use of a Private Connection*. If the department reviews and determines that the connection meets one or more of the criteria that constitute a change of use, the property owner is required to submit a new application for all approaches to the property. For the purpose of determining whether or not a change of use is occurring, the “prior use” is the use of the property on January 1, 2014.

When the department receives a land use notice and/or a request for a Permit to Operate for a PTBP connection, the department shall evaluate the change of use criteria in OAR 734-051-3020 to determine whether a change of use has occurred, or is proposed to occur, on the property after January 1, 2014. The RAMEs have in the past agreed to take an “all or nothing” approach to evaluating whether or not a change of use is occurring, wherein if staff checks one of the change of use thresholds in OAR 734-051-3020(2)(a) through (e), he or she shall also check the other four thresholds. In other words, if staff checks the three volume-based thresholds and none of them are exceeded, the change of use evaluation doesn’t stop there; staff must also check the minimum stopping sight distance and safety and operational criteria in OAR 734-051-4020(3) as well. That evaluation shall consist of filling in the relevant fields in the COU Tab in CHAMPS. Where it is determined that a change of use is not occurring, the COU Tab in CHAMPS shall suffice as the department’s findings for OAR 734-051-3020 and a Permit to Operate can be issued. Where it is determined that a change of use is occurring, in addition to filling in the COU Tab in CHAMPS, staff shall prepare written findings for OAR 734-051-3020 and a Permit to Operate shall not be issued because a new application is required.

Aerial photos and/or street views obtained through available in-house electronic means can be used to determine whether there is or is not a sight distance issue requiring an on-site measurement. Although a site visit may not be required to measure stopping sight distance, a site visit may be required to determine the width of an existing connection before issuing a Permit to Operate because CHAMPS and the permit include a field for the approved width of the connection. Where the existing width of a connection can be measured using in-house electronic means, such as with Google Maps or the department’s GIS inventory, that measurement can be used in place of a measurement made on site.

In addition, before issuing a Permit to Operate, access control research is required to determine whether or not an existing connection has a right of access. A connection that existed on January 1, 2014 is presumed to be permitted only where there is a right of access to the state highway.

This process is shown graphically in the attached “Presumed to be Permitted and Rebuttal Process” flowchart.

Section 5 – Removal of a Connection

If the department intends to remove a connection that it does **not** rebut as having a presumption of written permission, the department shall notify the property owner and the removal shall be subject to the post-decision review processes (Post-decision Collaborative Discussion, Access Management Dispute Review Board and Contested Case Hearing Processes) and administrative remedies (as set forth in OAR 734-051-6010 through 6070).

If the department intends to remove a connection and the presumption of written permission **is** rebuttable, the department shall notify the property owner and the removal shall **not** be subject to the post-decision review processes or administrative remedies.

This process is shown graphically in the bottom right corner of the attached “Presumed to be Permitted and Rebuttal Process” flowchart.

Section 6 – Connections Located on Open Frontage

Open frontage refers to a large open area along the highway right of way where the location for entry to or exit from an abutting property is not clearly defined. The entire length of open frontage shall not be presumed permitted. However, the department shall determine the location and dimensions of the connection within open frontage that it deems to have provided written permission in collaboration with the property owner(s) and, where possible, the property lessees and business operators. The department shall consider the land use served by the connection on January 1, 2014 and the current standards of the Oregon Highway Design Manual in making its decision. The department shall require the applicant to define the access by choosing an appropriate means, such as extruded curb or landscape strips, to establish the throat of the approach.

Section 7 – Department Rebuttal of a Presumption of Written Permission

Section 7 allows the department to rebut the presumption of written permission. The department typically will only rebut the presumption of written permission when considering a request for written permission for an existing private connection. The department will generally not actively search for existing connections to rebut the presumption of written permission.

As stated in the introduction, the presumption is very difficult to rebut and the department has decided that it will generally not do so in order to adhere to the intent of the legislation. However, there are some circumstances where the department may decide to rebut the presumption. The guidance to staff is that the department may rebut the presumption of written permission for the following reasons:

- The connection is to an Expressway and the property has alternate access that is, or can be made, reasonable;
- The connection is the second or subsequent connection in a rural area; or
- The connection is in a highway segment in which the department has safety or operational concerns that would be difficult to mitigate.

Rebuttals shall be approved through the Region escalation process and require documentation that none of the criteria for the presumption of written permission are met. The Region Manager shall decide if the rebuttal is valid and that the factual basis for the presumption of written permission does not exist.

When the department rebuts the presumption of written permission, it will do so in writing to whoever requests written permission for an existing connection and will cite, and provide copies of, the documentation on which the rebuttal is based. One way to document the rebuttal is to use CHAMPS Letter Template (83), “30-Day Notice to Remove Unpermitted Connection,” which instructs the property owner to remedy the situation within 30 days in one of three ways: 1) remove the connection; 2) submit an Application for State Highway Approach; or 3) provide proof that the connection has

been in existence since January 1, 2014. While the lack of proof was the justification for rebutting the connection, Letter Template 83 affords the property owner a final opportunity to present further documentation. The department's decision to rebut the presumption of written permission is not an appealable decision.

When a rebuttal is valid, the connection is subject to removal or reconstruction and the property owner is not entitled to file a claim for relief and the department shall not offer an administrative remedy (monetary compensation or non-monetary benefits that would address issues related to real property value, utility or uses).

This process is shown graphically in the bottom right corner of the attached "Presumed to be Permitted and Rebuttal Process" flowchart.

For connections that existed on January 1, 2014, and were constructed on or after April 1, 2000, the ***only*** documentation that a rebuttal will be based upon is department as-constructed plans for a highway project that show that the connection was not built or rebuilt as part of a highway project or that the department did not intend to issue a Permit to Operate to the property owner for the connection. "Built as part of a highway project" means that ODOT (or one of its contractors) constructed a new connection to a highway where no prior connection existed. "Rebuilt as part of a highway project" means that ODOT (or one of its contractors) reconstructed an existing connection to a highway at the same location and at the same approximate dimensions as the prior connection. Paving or repaving of a driveway apron during maintenance and rehabilitation projects constitutes "rebuilt as part of a highway project."

For connections that existed on January 1, 2014, and were constructed prior to April 1, 2000, the rebuttal can be based upon documentation ***in any form***.

The following are some of the available resources for determining if a connection existed prior to January 1, 2014 and/or April 1, 2000.

1. **Existing Documentation in ODOT Files:** There may be existing documentation in ODOT files confirming that the connection was constructed without the department's permission (for example, if the department denied an approach road application, but the applicant constructed the approach anyway), or that the connection was supposed to be closed as a condition of approval for an approach in another location.
2. **Statewide Geographic Information Systems (GIS) Approach Inventory:** The online statewide GIS approach inventory can be used to determine whether or not a connection existed on January 1, 2014. LIDAR scans and ArcGIS aerial photos are also good resources. There are 1995, 2000 and 2009 statewide orthophoto flights available, but the images for 1995 and 2000 are of poor quality (the images for 2009 are better). The District GIS approach inventory, LIDAR scans and ArcGIS aerial photos contain information on existing highway connections at a given point in time, and could indicate whether or not a connection existed on January 1, 2014, depending on when the data were collected. The website link is:

<http://gisintra.odot.state.or.us/gpsapproachinventory/>

3. ODOT Digital Video Log (DVL): The DVL going back to the year 2001 is available online on both the department's internet and intranet sites. It could be used to determine whether or not a connection existed on April 1, 2000. For determining whether or not a connection existed on January 1, 2014, one could use the year 2014 DVL and make that the department's standard for this purpose. It would give some connections a few months grace period but since one can't go back and create a DVL on January 1, 2014, it is possibly the best one can do. The website link is:
<http://rssa.odot.state.or.us/cf/dvl/index.cfm>
4. County Assessor Records: Assessor offices keep detailed records that often provide the year built for buildings. In many counties this information is available online so check the website first. If this information isn't online, call the assessor's office with the tax lot number, Township, Range and Section Map number. They can look in their hardcopy records for the date of the structure. Note that you may be obtaining the date of a reconstruction and not of the original dwelling. Also, check to see if the County Clerk archives contain original building permits prior to April 1, 2000 and old tax records. Note that the assessor's records document the existence of the structure, not the driveway; however, if the structure existed prior to January 1, 2014 it is reasonable to assume that a highway connection (driveway) to the structure existed as well.
5. ODOT Right-of-Way Maps and Construction Plans: Older maps may show old connections to the highways and building outlines and are available online to ODOT employees only through the ODOT "FileNet" application. Maps can be searched by mile point and date. Note that the State Archives stores the old right-of-way purchase hardcopy files and ODOT right-of-way "working maps" contain the file numbers to use in Archives research. The website link is:
<http://filenet/Workplace/WcmSignIn>
6. County Survey Records: Most County Surveyor records are available online and can be searched by Township, Range, and Section. View older surveys to see if buildings were shown.
7. Bureau of Land Management Surveys: The original Government Land Office (GLO) surveys dating from the 1850s show buildings as solid squares and cultivated areas. GLO surveys can be searched online by Township and Range and are available to view and print free of charge. The website link is:
<http://www.blm.gov/or/landrecords/survey/ySrvy1.php>
8. Oregon Water Resources Department (OWRD) Water Right Maps: Water right maps for "Domestic" uses show houses and other buildings as squares. Maps date from 1909 and are available for viewing and printing free of charge. Search the Water Right Information System (WRIS) using Township, Range, and Section. The website link is:
<http://www.wrd.state.or.us/OWRD/WR/wris.shtml>

9. United States Geological Survey (USGS) Quadrangle Maps: USGS Quadrangle Maps show houses as solid squares and barns and other outbuildings as open squares. Oregon Water Resources Department (OWRD) is a good resource for old Quadrangle Maps. The set of Quadrangle Maps is not complete but many are available. State employees can examine them at OWRD (725 Summer St. NE Suite A, Salem); Bob Harmon (503-986-0866) is the contact person and can scan the maps onto a flash drive free of charge.
10. ODOT Aerial Photographs: Aerials show both buildings and connections to the highways. ODOT has pre 2000 aerial photo coverage of some areas. These photos together with flight line indexes are in the Technical Leadership Center. Section corners are typically marked on the photos for orientation. Contact Lloyd Bledsoe, ODOT Engineering Documents Specialist, at 503-986-3792 for access to the aerials.
11. University of Oregon Aerial Photographs: The University of Oregon (U of O) has older aerials but it can be costly to obtain copies. Fees range from \$90 to \$190; research fees are \$75 per hour. Aerial Photography Research Services information, the Request Form and complete Fee information can be found at the link:
<http://libweb.uoregon.edu/map/maps/>

The U of O is also a source for USGS Quadrangle Maps. The website link is:

http://www.libweb.uoregon.edu/map/map_resources/index.html

Email them with questions at map@uoregon.edu or call 541-346-4565.

12. Oregon State Archives: This agency houses many important historical documents that show houses – USGS Quadrangle Maps, the Metsker’s Map series for each county published from 1927 to 1958, aerial photography etc. For a listing of all highway data at the State Archives, use the link:


<http://arcweb.sos.state.or.us/pages/records/state/odot/series/list.html>

For research and copying fees use:

<http://sos.oregon.gov/archives/Pages/tour-services.aspx>

13. Google Earth: Google Earth (Version 5.0 or newer) offers the ability to view historical imagery to see how places have changed over time. By default, Google Earth displays the most recent imagery but it is possible to select older photos (if available) by using the Historical Imagery tool.

To access historical imagery from Google Earth, do one of the following:

- Click **View > Historical Imagery**
- Click the Clock icon  in the toolbar above the [3D Viewer](#).
- Click on the year that appears in the bottom left of the [status bar](#) (Version 6.0).

Doing any one of three above will cause a timeline with a slider bar to appear near the top of the image.

The small vertical lines on the [timeline](#) indicate the dates of different imagery available for your location. The slider is automatically positioned at the far right of the timeline, showing that you are viewing more recent satellite imagery.

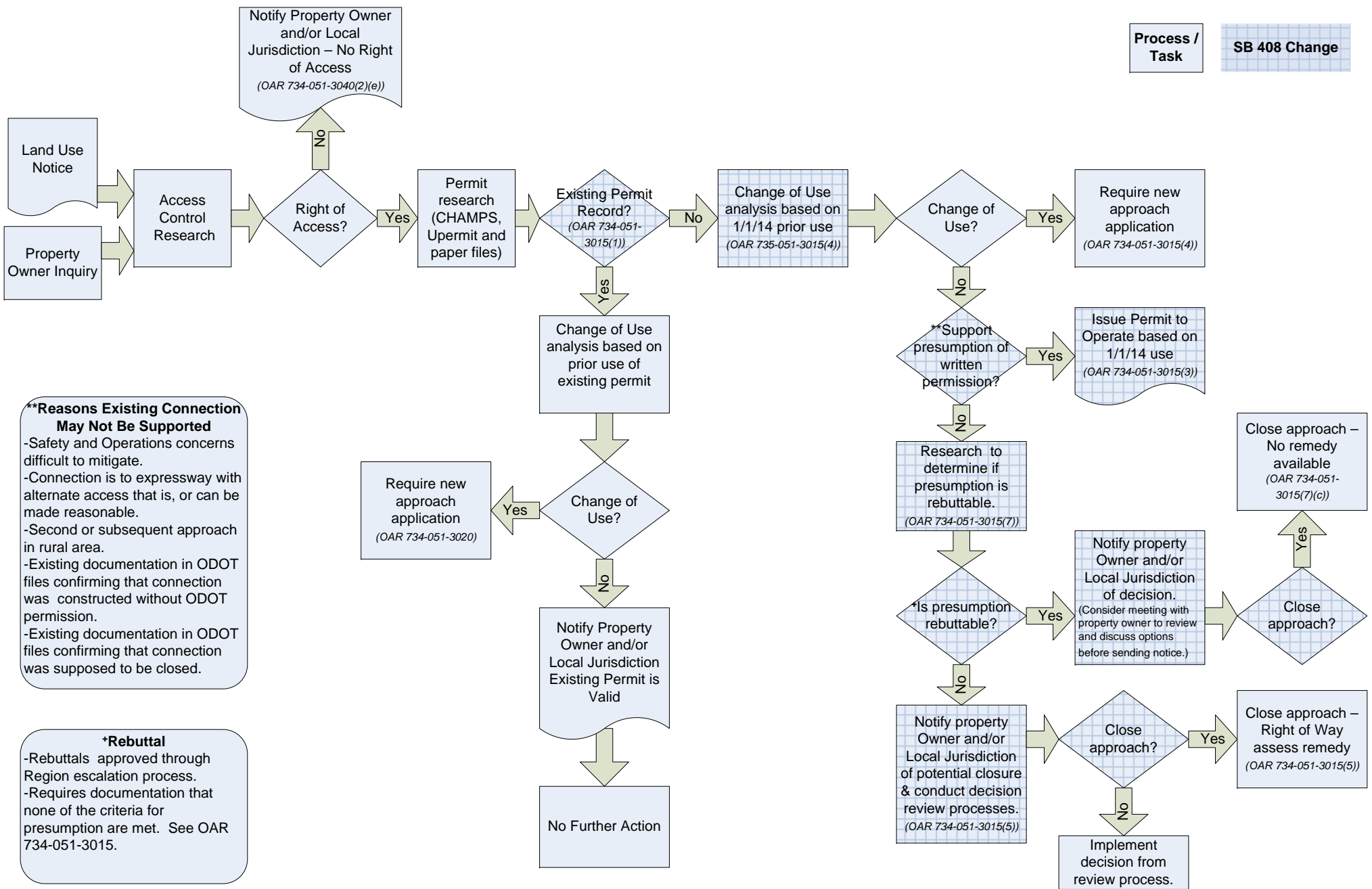
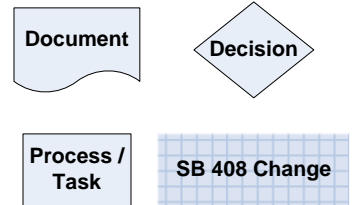
Move back or forward in time by doing the following:

- Click the Forward or Back buttons above the slider.
- Drag the slider along the timeline. Note that regardless of where you release your mouse on the timeline, the slider automatically moves to the closest date for which imagery is available.

Note: Older imagery may not be available, particularly in some rural areas.

Presumed to be Permitted And Rebuttal Process

Legend



****Reasons Existing Connection May Not Be Supported**

- Safety and Operations concerns difficult to mitigate.
- Connection is to expressway with alternate access that is, or can be made reasonable.
- Second or subsequent approach in rural area.
- Existing documentation in ODOT files confirming that connection was constructed without ODOT permission.
- Existing documentation in ODOT files confirming that connection was supposed to be closed.

***Rebuttal**

- Rebuttals approved through Region escalation process.
- Requires documentation that none of the criteria for presumption are met. See OAR 734-051-3015.