

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
Authorized Well 2 – MARI 16475
Authorized Well 3 – MARI 7894
cfs - cubic foot 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 February 16, 1994, Permit G-11666 was issued by the Department. The permit authorizes the use of up to 0.85 cfs, being 0.37 cfs from Wells 2 & 4 for the irrigation of 30 acres, with any deficiencies in supply to be made up from Well 3 and 0.48 cfs from Well 3 for the irrigation of 38 acres. The permit specified actual construction of the well to begin by February 16, 1995, construction of the water system was to be completed by October 1, 1995, and complete application of water was to be made on or before October 1, 1996.

2. On November 2, 2018, a partial assignment by proof from Myron Kuenzi, to JPLN Inc, was recorded in the records of the Water Resources Department.
3. On January 30, 2023, the permit holder, JLPN Inc., submitted an “Application for Extension of Time” (Application) to the Department, requesting both the time to complete construction of the water system from October 1, 1996, to October 1, 2026. and the time to apply water to full beneficial use under the terms and conditions of Permit G-11666 be extended from October 1, 1996, to October 1, 2026. This is the first permit extension requested for Permit G-11666.
4. On February 7, 2023, notification of the Application for Permit G-11666 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)]

5. On January 30, 2023, 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)]

6. Construction of MARI 16475 (Well 2) and MARI 7894 (Well 3) began prior to permit issuance.

Based on Finding of Fact (FOF) 7, the Department has determined that the prosecution of the construction of the well began prior to February 16, 1995.

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.²

7. Construction of the Well 2 and Well 3 were complete prior to permit issuance.
8. Work accomplished during the original development period includes installation of a meter on Well 3.
9. Since October 1, 1996, the following was accomplished:
 - Constructed MARI 55544 in a location not authorized by Permit G-11666; and
 - Installed multiple greenhouses.

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. For use of water from Well 3 (MARI 7894), the Department has considered the permit holder's compliance with conditions and did not identify any concerns.

Based on FOF 10, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-11666, for the use of water developed from Well 3 on the 29.7 acres of the place of use located north of State Street:

11. For use of water from Authorized Well 2, and Authorized Well 4 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, and (2) the required static water level measurements have not been received by the Department.

The Department has determined that compliance with conditions has not been demonstrated from well in a location other than authorized by the permit.

12. For use of water from MARI 7890, and MARI 7961 the Department has, the Department has determined that compliance with conditions of Permit G-11666 has not been demonstrated, however, these two points of appropriation are authorized for use under GR-1116, and Certificate 28014.

² "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.

13. A maximum rate of .0.83 cfs of water has been appropriated from the wells, being 0.613 cfs from Well 3 for irrigation of 29.7 acres, and 0.22 cfs from MARI 55544 for irrigation of 27.0 acres. This exceeds the amount of water for irrigation use authorized under this permit. The authorized amount of water for irrigation use is 0.85 cfs.

The Department has determined that beneficial use of 0.37 cfs for irrigation of 29.7 acres, as demonstrated by the Claim of Beneficial Use submitted October 26, 1993.

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

14. The Application identifies an approximately \$1,388,000 has been invested. The costs included items associated with planting crops, and construction of well that are not authorized by the permit, and therefore are not counted towards development. The Application also identifies an approximate investment necessary to complete the project as 33,000, which includes the costs of submitting a Application for Extension of Time, and the cost of an anticipated Permit Amendment. After deducting these costs, the approximate total investment for "actual construction" to date is approximately \$1,325,500 which includes cost likely also associated with the development and use of water under GR-1116, Certificate 28014, and Permit G-18696.

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 for all points of appropriation, and; beneficial use has not been demonstrated on the entire authorized place of use. 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.

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-11666; 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-11666, are located within the Pudding River Basin, are not located within a limited or critical groundwater area.
17. Pudding River 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. 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.

20. An approximate total of \$1,325,500 has been invested in the project. Some of the investment may also be attributed to development under other rights held by the applicant.

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

Other economic interests dependent on completion of the project.

21. The Application asserts that many manufacturers, suppliers and outside contractors are additional economic interests.

The Department does not consider these peripheral interests as dependent on the development of the permit.

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

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

25. The Application identifies applicants decision to pursue a nursery use permit for use of water from the deep basalts, for use on much of the same place of use as authorized by Permit G-11666.

The Department does not consider business decisions made by the permit holder as unforeseen events. The Application does not provide evidence of any unforeseen events.

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

26. The Application asserts a denial would result in an undue hardship in that the permit holder may lose the investment made in the development of the property to date. However, alternative sources of water are currently available for the portion of the place of use held by the Applicant, being use of water under GR-1116, Certificate 28014, and Permit G-18696.

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

27. The Application provides evidence of good faith of the appropriator under Permit G-11666.

Based on FOF 6, 7, 8, 9, 10, 13, and 20, the Department has determined that the applicant has shown good faith and reasonable diligence, sufficient enough to allow a limited extension of time.

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 January 30, 2023, the remaining work to be completed consists of applying for a Permit Amendment, and if approved 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 complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit G-11666 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 a limited extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

In considering the request for an extension of time, the Department reviewed the water use for a well that is in a location not authorized by the permit, and other water right registrations, certificates and permits that cover the same land as a portion of this permit to determine if good cause exists to allow for additional development under Permit G-11666 27-years after the completion date prescribed by the permit. The Department has determined that it is reasonable to allow for a limited extension of time to provide the permit holder with the ability to file a permit amendment to add MARI 55544 as an authorized point of appropriation to irrigate the 27.0 acres the Application identifies as having been irrigated from this well.

LIMITATIONS AND CONDITIONS

29. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to mitigate the effects of the subsequent development on competing demands on the resource. 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 1 of the "Conditions" section of this PFO, was determined to be necessary because of the use of an unauthorized point of appropriation; place of use has occurred under this permit.
30. 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 13, 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 2 of the "Conditions" section of this PFO, was determined to be necessary because of the use of an unauthorized point of appropriation; 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 applicant has complied with the construction timeline requirements to begin actual 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 6, through 28, completion of construction and 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, but the extension is conditioned to mitigate the effects of the subsequent development on competing demands on the resource. OAR 690-315-0050(5).
5. 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 is granted only for the reasonable time necessary to complete water development an apply water to beneficial use. OAR 690-315-0050(5)..
6. 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 complete construction of the water system under Permit G-11666 from October 1, 1995, to October 1, 2026.

Extend the time to apply water to beneficial use under Permit G-11666 from October 1, 1996, to October 1, 2026.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Development Limitation**

Use of water under this permit is limited to no more than for irrigation of 56.7 acres, being 0.37 cfs for irrigation of 29.7 acres located north of State Street, as identified in the Claim of Beneficial Use submitted, October 26, 1993, and 0.34 cfs of water from MARI 55544, for irrigation of the 27.0 acres illustrated in the map submitted April 20, 2023, as part of the Application for Extension of Time. These maps are attached to this order as Exhibit A.

2. **Permit Amendment Condition**

The permit holder shall submit a Permit Amendment Application requesting a change in point of appropriation from Well 2 and Well 4, to MARI 55544 for irrigation of the 27.0 acres of land previously developed, by no later than March 5, 2024. The Place of Use may not be changed until a certificate of water right for the 27.0 acres that have been developed south of State Street.

If a Permit Amendment Application is not submitted by March 5, 2024, no future extensions of time will be approved.

DATED: January 2, 2024



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.*

Protests

Pursuant to OAR 690-315-0060(1), 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. Protests must be received by the Water Resources Department no later than **February 16, 2024**, at this address: Oregon Water Resources Department, Water Right Services Division, 725 Summer St NE, Suite A, Salem, OR 97301-1266. Protests may not be submitted by electronic mail. OAR 690-002-0025(3).

Protests must be in writing and include all of the following:

- The name, address, and telephone number of the protestant
- A detailed description of the protestant'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
- A detailed description of how the action proposed in the proposed final order would impair or be detrimental to the protestant's interest
- A detailed description of how the proposed final order is in error or deficient, and how to correct the alleged error or deficiency
- If the applicant protests, a statement of whether a hearing is requested
- Citation of legal authority supporting the protestant, if known
- Proof of service of the protest on the water right permit holder, if protestant is other than the water right permit holder, and
- If you are the applicant, the protest fee of \$480 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$950 required by ORS 536.050.

Within 60 days after the close of the period for requesting a contested case hearing, the Director shall either issue a final order on the extension request, or schedule a contested case hearing if a protest has been submitted, and, upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or, the applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests. The hearing will be conducted as provided in Oregon Revised Statutes (ORS) Chapter 183, and Oregon Administrative Rules (OAR) 137-003-0501 to 137-003-0700.

If the applicant does not request a hearing within 30 days after the close of the protest period, or if the request for a hearing is withdrawn, or the Department or the administrative law judge is notified that the protestant will not appear, or the protestant fails to appear, at a scheduled hearing, the Director may issue a Final Order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default.

A party may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions or public or private organizations are represented by an attorney.

However, consistent with OAR 690-002-0020 and OAR 137-003-0555, an agency representative may represent a partnership, corporation, association, governmental subdivision or public or private organization if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

Notice Regarding Servicemembers: Active-duty service members have a right to stay proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-8260, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

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- If you have questions about statements contained in this document, please contact Jeffrey D. Pierceall at 503- 979-3213.
 - If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at (503) 979-9160.
 - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0900.
 - Address any correspondence to : Water Right Services Division
725 Summer St NE, Suite A
Salem, OR 97301-1266
Fax: 503-986-0901
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