

**Oregon Water Resources Department**  
**Water Right Services Division**

**Application for Extension of Time**

In the Matter of the Application for an Extension of Time  
for Permit S-54236, Water Right Application S-86311  
in the name of Daniel Loshbaugh

) PROPOSED  
) FINAL  
) ORDER DENIAL

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**Permit Information**

Application:	S-86311
Permit:	S-54236
Basin:	South Coast / Watermaster District 14
Date of Priority:	May 17, 2005
Source of Water:	a reservoir, constructed under Permit R-11511 and enlarged under Permit R-14247
Purpose of Use:	cranberry use on 4.0 acres
Maximum Volume:	8.0 acre-feet (AF)

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***Please read this Proposed Final Order in its entirety.***

*In summary, the Department proposes to:*

- Deny an extension of time to complete construction of the water system from October 1, 2015, to October 1, 2029.
- Deny an extension of time to apply water to full beneficial use from October 10, 2015, to October 1, 2029.

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.230 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315

### **ACRONYM QUICK REFERENCE**

Department – Oregon Water Resources Department

PFO – Proposed Final Order

AF - acre-feet

### **AUTHORITY**

**Generally, see ORS 537.230 and OAR Chapter 690 Division 315.**

**ORS 537.230(2)** provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, order 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) contain the factors that the Department must consider to make findings that support a “good cause” determination.

### **FINDINGS OF FACT**

1. On December 1, 2005, Permit S-54236 was issued by the Department. The permit authorizes the use of up to 8.0 AF from a reservoir, constructed under Permit R-11511 and enlarged under Permit R-14247, for cranberry use on 4.0 acres. The permit specified construction of the water system was to be completed by October 1, 2010, and complete application of water was to be made on or before October 10, 2010.
2. One prior permit extension has been granted for Permit S-54236. The most recent extension resulted in the completion dates for construction being extended to October 1, 2015 and full application of water being extended to October 1, 2015.
3. On March 18, 2024, the permit holder, Daniel Loshbaugh, submitted an “Application for Extension of Time” to the Department, requesting the time to complete construction of the water system extended from October 1, 2015, to October 1, 2029 and the time to apply water to full beneficial use under the terms of Permit S-54236 be extended from October 10, 2015, to October 1, 2029.

4. Notification of the Application for Extension of Time for Permit S-54236 was published in the Department's Public Notice dated March 26, 2024. No public comments were received.

#### **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 March 18, 2024, the Department received a completed Application for Extension of Time 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. According to the Application, construction of the water system began prior to October 10, 2010.

Based on FOF 6, the Department has determined the permit holder has satisfied the condition requiring beginning of construction of the water works.

#### **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 and previous extension.<sup>1</sup>*

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<sup>1</sup> "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.

7. Construction of the water system began prior to the deadline specified in the permit.
8. Work was completed during the original development time frame under Permit S-54236, includes construction of cranberry bogs.
9. During the most recent extension period, being from October 1, 2010, to October 1, 2015, no additional work was accomplished.
10. Since October 1, 2015, no additional work has been accomplished.

The Application does not provide evidence of progress made towards completion of the water development and application of water to full beneficial use as allowed in the time period specified in previous extension. Therefore, the Department cannot find reasonable diligence towards the complete application of water to beneficial use under work has been accomplished within the time allowed in Permit S-54236.

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

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

11. The Department has considered the permit holder's compliance with conditions, and did not identify concerns.

The Department has determined that compliance with permit conditions has been satisfied.

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

*The amount of beneficial use made of the water during the permit and previous extension conditions.*

12. The Application identifies maximum volume of 4.0 AF of water has been diverted for cranberry use on 4.0 acres.
13. An Application for Extension of Time for Permit R-14247, submitted March 18, 2024, indicates that no water has been stored under that permit. Water used under this permit has exclusively been from a reservoir constructed under Permit R-11511.

The Department has determined that beneficial use of water has been demonstrated under this permit.

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

14. An invested approximately \$65,5000, which is about 98 percent of the total projected cost for complete development of this project. An additional \$13,000 investment is needed to develop the 8.0 AF of storage authorized under Permit R-14247.
15. No investment has been made in the development of the authorized use since 2006.

Based on FOF 15, the Department finds that there has been no investment towards the development of Permit S-54236 during the most recent extension of time period, being from October 1, 2010, to October 1, 2015, or since.

**Reasonable Diligence of the Appropriator [OAR 690-315-0040(2)(a)]**

The application does not provide evidence of work accomplished towards completion of the water system during the most recent extension of time period; the permit holder has demonstrated compliance with permit conditions, and; beneficial use of water has been demonstrated. The Department has determined the applicant has not demonstrated reasonable diligence in previous performance under Permit S-54236.

**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.**

16. 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 S-54236; 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.
17. A current water availability analysis has determined that 8.0 acres feet authorized for use under this permit is not available because no water has been stored under Permit R-14247.

**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).

18. The point of diversion is not located within a Withdrawn Area.
19. The reservoir, constructed under Permit R-11511 and enlarged under Permit R-14247 is not located within or above a state or federal scenic waterway.
20. The point of diversion is not in a location 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.

21. Price 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.

22. An approximate total of \$65,500 has been invested in the project.
23. No additional investment has been made since 2006.

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

Other economic interests dependent on completion of the project.

24. No other economic interests dependent on completion of the project have 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 that was caused by other governmental requirements were not identified.

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

28. The Application identifies the recession of 2008 and falling cranberry prices as unforeseen events.

**Denial of an Extension Would Result in Undue Hardship [OAR 690-315-0040(2)(i)]**

29. The Application asserts that a denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs.

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

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

Based on Findings of Fact 9, 10, 13, 15, and 23, above, the Department finds that the Applicant has not demonstrated good faith.

**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 March 18, 2024, the permit holder states the remaining work to be completed consists of constructing a reservoir and applying water to full beneficial use.

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

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

The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and fair and reasonable return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the permit holder had no control, whether denial of the extension will result in undue hardship to the applicant and whether there are no other reasonable alternatives for meeting water use needs, any other factors relevant to a determination of good cause, and has determined that the applicant has not shown that good cause exists for an extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).



## CONCLUSIONS OF LAW

1. The 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 did not comply with begin construction timeline requirements pursuant to ORS 537.230 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. The application established that there has been no construction, no financial investment or reasonable diligence towards development. The permit holder has not shown that good cause exists for an extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

## PROPOSED ORDER

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

Deny the time to complete construction of the water system under Permit S-54236 from October 1, 2015, to October 1, 2029.

Deny the time to apply water to beneficial use under Permit S-54236 from October 10, 2015, to October 1, 2029.

DATED: May 7, 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 **June 21, 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>.

