

**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 G-13415, Water Right Application G-14583, in) PROPOSED FINAL ORDER
the name of Ronald D. and Mary Anne Puhl, trustees of The)
Ronald and Mary Anne Puhl Trust

Permit Information

Application: G-14583
Permit: G-13415
Basin: 17 – South Coast / Watermaster District 19
Date of Priority: July 14, 1997
Source of Water: Three wells in Crooked Creek Basin
Purpose or Use: Cranberry operations on 62.0 acres
Maximum Rate: 1.0 cubic foot per second (cfs), being 0.33 cfs from each well

***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, 2012, to October 1, 2028¹.
- 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(4), 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 foot per second
Well 1 – COOS 51229
Well 2 – COOS 51228
Well 3 – COOS 51227

AUTHORITY

Generally, see ORS 537.630 and OAR Chapter 690 Division 315.

ORS 537.630(1) 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) contain 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.

OAR 690-315-0050(6) requires the Department, for extensions exceeding five years, to establish checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between checkpoints will not exceed five year periods.

FINDINGS OF FACT

1. On June 8, 1998, Permit G-13415 was issued by the Department. The permit authorizes the use of up to 1.0 cfs, being 0.33 cfs from each well, of water from three wells in Crooked Creek Basin for cranberry operations on 62.0 acres. The permit specified actual construction of the well to begin by April 30, 1999, and complete application of water was to be made on or before October 1, 2002.
2. One prior permit extension has been granted for Permit G-13415. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2002, to October 1, 2012.
3. On May 28, 2004, an assignment from Dave Brooks to Ronald D. Puhl and Mary Anne Puhl, trustees of the Ronald and Mary Anne Puhl Trust was recorded in the records of the Water Resources Department.
4. On January 5, 2017, the permit holder, Mary Anne Puhl, trustees of The Ronald and Mary Anne Puhl Trust, submitted an "Application for Extension of Time" (Application) to the Department, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-13415 be extended from October 1, 2012, to October 1, 2028.
5. On January 10, 2017, notification of the Application for Permit G-13415 was published in the Department's Public Notice. No public comments were received regarding the Application.
6. On February 3, and March 6, 2017, the permit holder submitted additional information to supplement their Application. The additional information provided was to make findings on the market and present demands and provide information on work accomplished.

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)

7. On January 5, 2017, 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)

8. Actual construction of the well began prior to the April 30, 1999, deadline specified in the permit. According to the permit holder, construction of the wells began December 12, 1998.
9. According to well logs received by the Department on January 20, 1999, construction of COOS 51229 (Well 1) began December 13, 1998, COOS 51228 (Well 2) began December 12, 1998, and COOS 51227 (Well 3) began December 11, 1998.

Based on Finding of Fact (FOF) 8 and 9 the Department has determined that the prosecution of the construction of the well began prior to April 30, 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 previous extension.²)

10. During the most recent extension period, being from October 1, 2002, to October 1, 2012, excavation of the reservoir (system bulge) began. The permit holder states that "excavation for the holding pond for Permit G-13415 during the summer of 2008" was done "in conjunction with refurbishment of the 2.8 acre bog B-32 on the adjacent cranberry farm" owned by the permit holder.

Based on FOF 10, 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.

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.

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

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

11. The Department has considered the permit holder's compliance with conditions, and has identified compliance with the condition requiring submittal of a water level monitoring plan.
12. On October 6, 2004, the Department approved the water level monitoring plan.

Based on FOF 11 and 12, the Department has determined, that the permit holder has demonstrated compliance with the permit condition to submit a plan to monitor and report the impact of water use as required by Permit G-13415.

13. The Department has considered the permit holder's compliance with conditions, and has identified the following concern: the record does not show that a meter or other suitable measuring device has been installed. 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.

Based on FOF 13, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-13415:

- "Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the director"

In order to legally perfect the use of water under this permit, the permit holder must demonstrate that all conditions of the permit have been satisfied.

Beneficial Use of Water OAR 690-315-0040(3)(b): *the amount of beneficial use made of the water during the permit or previous extension conditions.*

14. The Application states no water has been appropriated from Well 1, Well 2 or Well 3 for cranberry operations.
15. According to the permit holder, delay of beneficial use of water under Permit G-13415 was due, in part, the need to refurbish existing cranberry bogs under other water rights held by the permittee, and financial issues caused by several years of weather related low yields and cranberry price falling in 2009. Additionally, the company's only other substantial liquid asset lost its value which made it difficult to secure financing to complete construction.

Based on FOF 13 and 14, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because no water has been used and not all permit conditions were satisfied by October 1, 2012.

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

16. The Application states the permit holder has invested about \$18,300, which is approximately 1 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$1,240,000 investment is needed for the completion of this project.

Based on FOF 16, 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.*

The amount of water available to satisfy other affected water rights and scenic waterway flows OAR 690-315-0040(4)(a)

17. 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-13415;

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.

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

18. The points of appropriation for Permit G-13415, located within the China Creek Basin, are not located within a limited or critical groundwater area
19. China Creek is not located within or above any state or federal scenic waterway.
20. The points of appropriation are not in an area listed by the Department of Environmental Quality as a water quality limited stream.

The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife OAR 690-315-0040(4)(c)

21. China Creek is located within an area ranked “moderate” 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.

Economic interests dependent on completion of the project OAR 690-315-0040(4)(d)

22. The Application states an approximate total of \$18,300 has been invested in the project.

Other economic interests dependent on completion of the project OAR 690-315-0040(4)(e)

23. The Application identified economic interests beyond those of the permit holder in that the company is providing full time employment to two employees and with added production intends to hire three or four additional full-time employees. Additionally the company hires ten additional seasonal employees each year.

Other factors relevant to the determination of the market and present demand for water and power OAR 690-315-0040(4)(f)

24. 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)

25. The Application states that when the cranberry vines being planted reach full production they will yield roughly 30,000 pounds per acre in an average year with a return of fifty cents to one dollar per pound.

Other Governmental Requirements OAR 690-315-0040(2)(g)

26. The Application did not identify any delay in the development of this project that was caused by any other governmental requirements.

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

27. The Application did not identify unforeseen events.

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

28. The Application states a denial of the extension would result in undue hardship in that the expansion of production to these additional 62.0 acres will make the difference of having the "economy of scale" to meet the demand of customers or possibly going out of business.

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

29. The Application provides evidence of good faith of the appropriator under Permit G-13415.

Based on FOF 8 through 12, 16, 22 and 29, 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.

30. As of January 5, 2017, the Application states the remaining work to be completed consists of completing construction of the water system which includes construction of cranberry bogs; meeting all permit conditions which include installation of a meter and submittal of static water level measurements; 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, 2028, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-13415 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 marginal 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. The Department determined the need to place a "Last Extension Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary due to marginal diligence in physical work performed towards the development of the water system during the most recent extension of time period, no water being appropriated, non-compliance with permit conditions and this being the second extension.
2. OAR 690-315-0050(6) requires a checkpoint condition on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. A "Checkpoint Condition" is specified under Item 2 of the "Conditions" section of this PFO to meet this condition.

CONCLUSIONS OF LAW

1. The applicant has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The applicant has complied with the construction timeline requirements to begin 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 8 through 29, full application of water to beneficial use can be accomplished by October 1, 2028, 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 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, but the extension must be conditioned to ensure this is the last extension granted in order to ensure future diligence; OAR 690-315-0050(5).

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-13415 from October 1, 2012, to October 1, 2028.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Last Extension Condition**
This is to be the last extension of time granted for Permit G-13415. Any future extensions of time requests shall be denied.
2. **Checkpoint Condition**
The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2022 and 2027. A form will be enclosed with your Final Order.**
 - (a) At each checkpoint, the permit holder shall submit and the Department shall review evidence of the permit holder's diligence towards completion of the project and compliance with terms and conditions of the permit and extension. If, after this review, the Department determines the permit holder has not been diligent in developing and perfecting the water use permit, or complied with all terms and conditions, the Department shall modify or further condition the permit or extension to ensure future compliance, or begin cancellation proceedings on the undeveloped portion of the permit pursuant to ORS 537.260 or 537.410, or require submission of a final proof survey pursuant to ORS 537.250;
 - (b) The Department shall provide notice of receipt of progress reports in its weekly notice and shall allow a 30 day comment period for each report. The Department shall provide notice of its determination to anyone who submitted comments.

DATED: March 28, 2017


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(1) 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 12, 2017**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.
2. A written protest shall include:
 - a. The name, address and telephone number of the petitioner;
 - b. A description of the petitioner'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;
 - c. A detailed description of how the action proposed in the proposed final order would adversely affect or aggrieve the petitioner's interest;
 - d. A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;
 - e. Any citation of legal authority supporting the petitioner, if known;
 - f. Proof of service of the protest upon the water right permit holder, if petitioner is other than the water right permit holder; and
 - g. The applicant or non-applicant protest fee required under ORS 536.050.
3. Within 60 days after the close of the period for requesting a contested case hearing, the Director shall:
 - a. Issue a final order on the extension request; or
 - b. Schedule a contested case hearing if a protest has been submitted, and:
 - 1) Upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or
 - 2) The applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests.

