

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

**Application for Extension of Time**

In the Matter of the Application for an Extension of Time ) PROPOSED  
for Permit S-51700, Water Right Application S-71829 ) FINAL  
in the name of Mary Anne Puhl ) ORDER

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**Permit Information**

Application: S-71829  
Permit: S-51700  
Basin: South Coast / Watermaster District 19  
Date of Priority: September 10, 1991 for 0.50 cubic foot per second (cfs) and August 11, 1994 for 0.05 cfs; being September 10, 1991 for 0.2 cfs from Bull Creek and 0.30 cfs from Camp Creek and August 11, 1994 for 0.05 cfs from Bull Creek  
Source of Water: Bull Creek Reservoir 1, Bull Creek Reservoir 2, Eastside Recovery Pond, Sandpit Recovery Pond, Camp Creek Reservoir 2, Westside Recovery Pond 1, and Westside Recovery Pond 2 constructed under Application R-71828, Permit R-11579, Bull Creek and Camp Creek  
Purpose or Use: Cranberry use on 50.0 acres  
Maximum Rate/  
Volume: 0.55 cfs from live flow and 187.2 Acre-Foot (AF) stored water only

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***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 complete construction of the water system from October 1, 2001, to October 1, 2022.
- Grant an extension of time to apply water to full beneficial use from October 1, 2001, to October 1, 2022.<sup>1</sup>

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<sup>1</sup> Pursuant to ORS 537.230(4), upon the completion of beneficial use of water allowed under the permit, the permit holder 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 permit holder shall submit a map of the survey and the claim of beneficial use.

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**

AF – acre-feet  
Application – Application for Extension of Time  
BCR 1 – Bull Creek Reservoir 1  
BCR 2 – Bull Creek Reservoir 2  
CCR 2 – Camp Creek Reservoir 2  
cfs – cubic foot per second  
COBU – Claim of Beneficial Use  
Department – Oregon Water Resources Department  
ERP – Eastside Recovery Pond  
FOF – Finding of Fact  
ODFW – Oregon Department of Fish and Wildlife  
PFO – Proposed Final Order  
POD – point of diversion  
SRP – Sandpit Recovery Pond  
WRP 1 – Westside Recovery Pond 1  
WRP 2 – Westside Recovery Pond 2

**AUTHORITY**

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

**ORS 537.230(3)** 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) 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 November 8, 1995, Permit S-51700 was issued by the Department. The permit authorizes the use of up to 0.55 cfs of water from live flow and 187.2 AF of stored water only from the Bull Creek Reservoir 1, Bull Creek Reservoir 2, Eastside Recovery Pond, Sandpit Recovery Pond, Camp Creek Reservoir 2, Westside Recovery Pond 1, and Westside Recovery Pond 2 constructed under Application R-71828, Permit R-11579, Bull Creek and Camp Creek, tributaries of Elk River, for cranberry use on 50.0 acres. The permit specified actual construction was to begin by November 8, 1996 and construction of the water system was to be completed by October 1, 1997, and complete application of water was to be made on or before October 1, 1998.
2. Two prior permit extensions have been granted for S-51700. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 1999 to October 1, 2001.
3. On October 2, 2001, a Claim of Beneficial Use (COBU) was submitted to the Department for review. After reviewing the COBU, the Department determined that beneficial use had not been made, as the written certification from the engineer of record stating construction of Camp Creek Reservoir 2 (CCR 2) was completed, was not received by the Department by October 1, 2001.
4. On June 29, 2017, the permit holder, Mary Anne Puhl, submitted an "Application for Extension of Time" (Application) to the Department, requesting the time to complete construction of the water system be extended from October 1, 2001, to October 1, 2022, and the time to apply water to full beneficial use under the terms and conditions of Permit S-51700 be extended from October 1, 2001, to October 1, 2022.
5. On July 4, 2017, notification of the Application for Permit S-51700 was published in the Department's Public Notice. 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)]**

6. On June 29, 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)]**

7. Actual construction of the water system began prior to the November 8, 1996 deadline specified in the permit. According to the permit holder, construction of the water system began June 1, 1992, with the construction of Bull Creek Reservoir 1 (BCR 1), Bull Creek Reservoir 2 (BCR 2), Eastside Recovery Pond (ERP), Sandpit Recovery Pond (SRP), Westside Recovery Pond 1 (WRP 1), Westside Recovery Pond 2 (WRP 2), and Camp Creek Reservoir 2 (CCR 2), which are sources of water for this permit.
8. On November 5, 1996, the Department received "Form-A" – a Notice of Beginning of Construction, identifying that actual construction began November 18, 1995. The attachment to Form A stated that the Bull Creek water system had been completed, which included the construction of BCR 1, BCR 2, ERP, and SRP. The PVC pipe system to deliver the water to the cranberry bogs, including the gravity feed lines to the reservoirs and ponds, the pump houses and pumps, and the permanent stationary sprinklers in the bogs were completed. The additional point of diversion (POD) sump on Bull Creek, along with pump and pipe installation was completed.

Based on Finding of Fact (FOF) 7 and 8, 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 previous extension.<sup>2</sup>*

9. No additional work was accomplished during the most recent extension period, being from October 1, 1999, to October 1, 2001, as all work was completed.
10. On May 18, 1999, the Department received correspondence from the permit holder

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<sup>2</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.

stating, "the extension is needed to use water in a full cycle of irrigation, heat control, and flood harvest on all acres developed prior to the Claim of Beneficial Use."

11. According to the Notice of Completion of Construction "Form-B" submitted to the Department September 22, 1999, construction was complete March 30, 1999.
12. No other work has been accomplished since October 1, 2001, as all work towards the development of the water delivery system was completed.

Based on Finding of Facts (FOF) 9, 10, and 11, the Application provides evidence of progress of physical work made towards completion of the water system, 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 previous extension conditions.*

13. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns.
14. The COBU received by the Department on October 2, 2001, states a flow meter was installed on the PODs located on BCR 1, BCR 2, and Camp Creek.

Based on FOF 13 and 14, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit S-51700:

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

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

*The amount of beneficial use made of the water during the previous extension time limits.*

15. The Application states a maximum rate of 0.55 cfs of water has been diverted from Camp Creek and Bull Creek, and a maximum volume of 171.2 AF of water, being 7.7 AF from BCR 1; 18.3 AF from BCR 2; 15.1 AF from ERP; 7.8 AF from SRP; 95.8 AF from CCR 2; 10.5 AF from WRP 1; and 16.0 AF from WRP 2 has been diverted for cranberry use on 42.7 acres.
16. According to the permit holder delay of full beneficial use of water under Permit S-51700 was due, in part, to the following:
  - The permit holder was unaware the written certification from the engineer of record that construction of CCR 2 was completed, as required under Permit R-11579 (source of water for Permit S-51700), had not been submitted to the Department by October 1, 2001.

The permit holder needs more time in which to submit the written certification from the engineer of record for CCR 2. Additionally an Application for a Permit to Store Water in a Reservoir, requesting to store the additional 8.41 AF in ERP, will need to be approved so the water user may claim all of the stored water used from ERP under this permit.

Based on FOF 13 and 14, the Department has determined that beneficial use of water has been demonstrated under this permit, as all permit conditions required by Permit S-51700 were satisfied by October 1, 2001.

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

17. The Application states the permit holder has invested approximately \$437,300, which is the total projected cost for complete development of this project.

The Department has determined based on FOF 17, 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 that work has been accomplished towards completion of the water system; the permit holder has demonstrated compliance with permit conditions; a financial investment has been made, and; beneficial use of water has been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit S-51700.

**The Market and Present Demands for Water [OAR 690-315-0040(4)(a-f)]**

*The Department's determinations of market and present demand for water or power to be supplied shall consider the requirements set forth under OAR 690-315-0040(4)(a-f). In accordance with OAR 690-315-0040(4), the Department shall consider, but is not limited to, the following factors when determining the market and the present demand for water or power to be supplied:*

- *(a) The amount of water available to satisfy other affected water rights and scenic waterway flows;*
- *(b) Special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d);*
- *(c) The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife;*
- *(d) Economic investment in the project to date;*
- *(e) Other economic interests dependent on completion of the project; and*
- *(f) Other factors relevant to the determination of the market and present demands for water and power.*

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

The amount of water available to satisfy other affected water rights and scenic waterway flows.

18. A review of the amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit S-51700; 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.
19. Current Water Availability Analysis for the Elk River, (Tributary to Pacific Ocean) at the mouth (watershed ID 70895) shows that no water is available during the months of April through November at the 80% exceedance level.
20. Current Water Availability Analysis has determined that 187.2 AF of water is available from BCR 1, BCR 2, ERP, SRP, CCR 2, WRP 1, and WRP 2, constructed under Permit R-11579.

**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).

21. The points of diversion are located on BCR 1, Bull Creek and Camp Creek, tributaries of Elk River, and are not located within a Withdrawn Area.
22. Elk River is not located within or above a state or federal scenic waterway.
23. The points of diversion are in a location listed by the Department of Environmental Quality as a water quality limited stream: Elk River, River Mile 0 to 29.9 listed under Water Quality Limited for Temperature.

**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.

24. Elk River 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.

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

Economic interests dependent on completion of the project.

25. The Application states an approximate total of \$437,300 has been invested in the project.

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

Other economic interests dependent on completion of the project.

26. The Application states the permit holder has two sons who work on the farm and are partners in the cranberry business, and provides employment to four full time employees, one half time employee, and 15 seasonal employees.

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

Other factors relevant to the determination of the market and present demand for water and power.

27. The Application states there are no alternatives for meeting the water use needs of the permit holder.

**OAR 690-315-0040(2)(f)**

Fair Return Upon Investment

28. The Application states income from the 42.7 acres of cranberry bogs generated an income of \$344,270 in 2016. The permit holder estimates the income from newly renovated bogs just coming into full production, to be over \$500,000 due to increasing markets. The permit holder has steadily increased their value added market, by marketing their own brand of fresh and high quality frozen cranberries.

**OAR 690-315-0040(2)(g)**

Other Governmental Requirements

29. 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)]**

30. The Application did not identify any unforeseen events.

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

31. The Application states a denial would result in the death of the cranberries grown on the farm, and a loss of the substantial investment made.

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

32. The Department has found good faith of the appropriator under Permit S-51700.

Based on FOF 7 through 11, 13, 14, 15, 17, and 25, 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.*

33. As of June 29, 2017, the permit holder states the remaining work to be completed consists of submitting written certification from the engineer of record that construction of CCR 2 is complete; submitting an Application for a Permit to Store Water in a Reservoir, requesting an enlargement of ERP to store the additional 8.41 AF; 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, 2022, to complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit S-51700 is both reasonable and necessary.

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

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

The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and fair and reasonable return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the permit holder had no control, whether denial of the extension will result in undue hardship to the applicant and whether there are no other reasonable alternatives for meeting water use needs, any other factors relevant to a determination of good cause, and has determined that the applicant has shown that good cause exists for an extension of time to complete construction and 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, and/or mitigate the effects of the subsequent development on competing demands on the resource. 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 the lapse in time, being 22 years, since the issuance of Permit S-51700 on November 8, 1995.

## **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 complied with construction timeline requirements to begin actual construction as required by ORS 537.230, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. Based on Finding of Facts 7 through 32, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2022<sup>3</sup>, 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 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).

**Continued on the following page**

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<sup>3</sup>Pursuant to ORS 537.230(3), 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.

## 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 S-51700 from October 1, 2001, to October 1, 2022.

Extend the time to apply water to beneficial use under Permit S-51700 from October 1, 2001, to October 1, 2022.

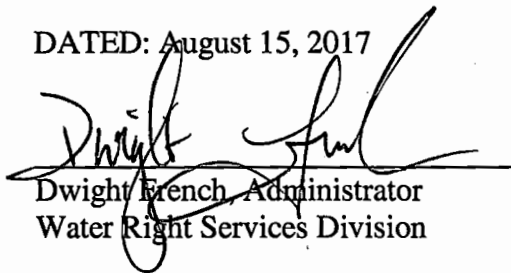
Subject to the following conditions:

### LIMITATIONS AND CONDITIONS

1. **Last Extension Condition**

This is to be the last extension of time granted for Permit S-51700. Any future extensions of time requests shall be denied.

DATED: August 15, 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 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 **September 29, 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.

**Notice Regarding Service Members:** Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>

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- If you have any questions about statements contained in this document, please contact Corey A Courchane at (503) 986-0825.
  - 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 503-986-0820.
  - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0801.
  - 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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