

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 R-11579, Water Right Application R-71828) FINAL
in the name of Mary Anne Puhl) ORDER

Permit Information

Application:	R-71828
Permit:	R-11579
Basin:	South Coast / Watermaster District 19
Date of Priority:	September 10, 1991 for 49.28 Acre-Feet (AF) and August 11, 1994 for 137.92 AF
Source of Water:	Camp Creek, Bull Creek, and surface runoff, tributaries of Elk River
Storage Facility:	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
Purpose or Use:	Cranberry use
Maximum Volume:	187.2 AF; being 5.81 AF in Bull Creek Reservoir 1; 14.3 AF in Bull Creek Reservoir 2; 6.69 AF in East Side Recovery Pond; 6.0 AF in Sand Pit Recovery Pond; 136.0 AF in Camp Creek Reservoir 2; 9.2 AF in West Side Recovery Pond 1; and 9.2 AF in West Side Recovery Pond 2

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, October 1, 1999, to October 1, 2022.
- Grant an extension of time to apply water to full beneficial use from October 1, 1999, to October 1, 2022.¹

¹ 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
Department – Oregon Water Resources Department
ERP – Eastside Recovery Pond
FOF – Finding of Fact
ODFW – Oregon Department of Fish and Wildlife
PFO – Proposed Final Order
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 R-11579 was issued by the Département. The permit authorizes the storage of up to 187.2 AF of water, being 5.81 AF in Bull Creek Reservoir 1; 14.3 AF in Bull Creek Reservoir 2; 6.69 AF in East Side Recovery Pond; 6.0 AF in Sand Pit Recovery Pond; 136.0 AF in Camp Creek Reservoir 2; 9.2 AF in West Side Recovery Pond 1; and 9.2 AF in West Side Recovery Pond 2, from Camp Creek, Bull Creek, and surface runoff, tributaries of Elk River, for cranberry use. The permit specified actual construction was to begin on or before 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. One prior permit extension has been granted for R-11579. The most recent extension request resulted in the completion date for construction being extended from October 1, 1997, to October 1, 1999, and full application of water being extended from October 1, 1998, to October 1, 1999.
3. On October 2, 2001, a Claim of Beneficial Use (COBU) was submitted to the Department for review.
4. Due to a backlog of COBUs, the Department was delayed in reviewing the 1999 COBU until 2014. During the review, it was found 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 and allowing storage of water to begin, was not received by the Department by October 1, 2001.
5. 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, 1999, to October 1, 2022, and the time to apply water to full beneficial use under the terms and conditions of Permit R-11579 be extended from October 1, 1999, to October 1, 2022.
6. On July 11, 2017, notification of the Application for Permit R-11579 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)]

7. 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)]

8. Actual construction of the reservoir began prior to the November 8, 1996, deadline specified in the permit. Construction of the reservoirs 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).
9. On November 5, 1996, the Department received "Form-A" (Notice of Beginning of Construction), identifying that actual construction began November 18, 1995. The attachment to Form A stated that BCR 1, BCR 2, ERP, and SRP had been completed as per the specifications in the permit. CCR 2 was about two-thirds complete and WRP 1 was complete except for some minor finish work.

Based on Findings of Fact (FOF) 8 and 9, the Department has determined actual construction began prior to November 8, 1996, as required by Permit R-11579.

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, 1998, to October 1, 1999, construction of WRP 2 was completed.
11. No other work has been completed since October 1, 1999, as all construction of the reservoirs was completed.

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.

Based on Finding of Facts (FOF) 10, the Department has determined that work has been accomplished within the time allowed in the previous extension, which provides evidence of good cause and reasonable diligence from the appropriator towards the 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.

12. On June 1, 1995, the Department received written documentation from the Oregon Department of Fish and Wildlife (ODFW). The documentation states that in-stream reservoir BCR 1 is above a natural barrier and likely increases the habitat available to resident cutthroat trout. The current proposal is well designed and there will be little or no impact to fisheries resources.
13. The Application states meters were installed on Bull Creek and Camp Creek prior to 1999.

Based on FOF 12 and 13, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit R-11579:

- “The permittee shall install, maintain, and operate fish screening and by-pass devices as required by the Oregon Department of Fish and Wildlife to prevent fish from entering the proposed diversion. The required screens and by-pass devices are to be in place, functional and approved by an ODFW representative prior to diversion of any water.”
 - “Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director.”
14. The Department has considered the permit holder's compliance with conditions, and has identified the following concern: the record does not show that weirs were constructed upstream and downstream of the reservoirs.

The Department has determined based on FOF 14, that the permit holder has not demonstrated compliance with following permit conditions as required by Permit R-11579:

- “Plans and specifications shall be approved by the watermaster before installation. Work shall be done under the general supervision of the watermaster. Weirs will be required both upstream and downstream of the reservoirs.”

CCR 2

15. The Department has considered the permit holder's compliance with conditions, and has identified the following concern: the record does not show that written certification from the engineer of record that construction of CCR 2 has been completed.

The Department has determined based on FOF 15, that the permit holder has not demonstrated compliance with following permit conditions as required by Permit R-11579:

- “No water shall be stored until the Water Resources Department receives written certification from the engineer of record that construction has been completed.”

Beneficial use of water under this permit, therefore, has not yet been demonstrated. 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 previous extension time limits.

16. The Application states a maximum volume of 162.79 AF of water has been stored from Camp Creek, Bull Creek, and surface runoff, tributaries of Elk River for cranberry use. The amount stored in each reservoir is as follows:

Reservoir	Maximum volume authorized	Amount stored
BCR 1	5.81 AF	7.7 AF
BCR 2	14.3 AF	18.3 AF
CCR 2	136.0 AF	95.8 AF
ERP	6.69 AF	6.69 AF
SRP	6.0 AF	7.8 AF
WRP 1	9.2 AF	10.5 AF
WRP 2	9.2 AF	16.0 AF

The amount stored in BCR 1, BCR 2, SRP, WRP 1, and WRP 2 exceeds the amount of water authorized under this permit.

17. According to the permit holder delay of full beneficial use of water under Permit R-11579 was due, in part, to 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, had not been submitted to the Department by October 1, 2001

Based on FOF 14 and 15, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because not all permit conditions 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)]

18. The Application states the permit holder has invested approximately \$422,300, which is the total projected cost for complete development of this project.

The Department has determined based on FOF 18, 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.*

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

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

19. 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 R-11579; 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.
20. 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 May through October at the 50% exceedance level for reservoirs.

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 Camp Creek and Bull 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 for 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 \$422,300 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 reasonable 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 R-11579.

Based on FOF 7 through 13, 16, 18, 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 meeting all permit conditions, including submitting written certification from the engineer of record that construction of CCR 2 is complete, and submitting approval from the Watermaster that weirs are not required upstream and downstream of the reservoirs; 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 R-11579 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 31, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2022³, 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).

³Pursuant 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.

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 complete construction of the water system under Permit R-11579 from October 1, 2001, to October 1, 2022.

Extend the time to apply water to beneficial use under Permit R-11579 from October 1, 2001, to October 1, 2022.

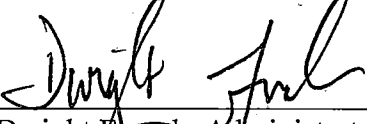
Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Last Extension Condition**

This is to be the last extension of time granted for Permit R-11579. Any future extensions of time requests shall be denied.

DATED: September 5, 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 **October 20, 2017**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.

