

**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-13712, Water Right Application G-14845, in	)	PROPOSED FINAL
the name of Wilcox Farms, Inc.; and	)	ORDER
Northwest Farm Credit Services, FLCA/PCA	)	

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Permit Information

Application:	G-14845
Permit:	G-13712
Basin:	2B – Middle Willamette / Watermaster District 16
Date of Priority:	October 6, 1998
Source of Water:	Two wells in Willamette River Basin
Purpose or Use:	Irrigation and agricultural use on 100.0 acres and livestock
Maximum Rate:	1.22 cubic feet per second (cfs), being 0.84 cfs from Well 1, and 0.33 cfs from Well 2

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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 apply water to full beneficial use from October 1, 2005, to October 1, 2027<sup>1</sup>.
  
- 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.

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<sup>1</sup>Pursuant 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

Department – Oregon Department of Water Resources

Application – Application for Extension of Time

PFO – Proposed Final Order

cfs – cubic feet per second

gpm – gallons per minute

Well 1 – MARI 173

Well 2 – MARI 165

FOF – Finding of Fact

### **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) 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.

**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 July 30, 1999, Permit G-13712 was issued by the Department. The permit authorizes the use of up to 1.22 cfs of water, being 0.84 cfs from Well 1, and 0.33 cfs from Well 2 in Willamette River Basin for irrigation and agricultural use on 100.0 acres and livestock. The permit specified actual construction of the well to begin by May 28, 2000, and complete application of water was to be made on or before October 1, 2003.
2. One prior permit extension has been granted for Permit G-13712. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2003, to October 1, 2005.
3. On September 14, 2017, on behalf of the permit holder, Pacific Hydro-Geology, Inc., agent for Wilcox Farms, Inc., 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-13712 be extended from October 1, 2005, to October 1, 2027.
4. On September 19, 2017, notification of the Application for Permit G-13712 was published in the Department’s Public Notice. No public comments were received regarding the Application.

### **Review Criteria [OAR 690-315-0040]**

*In order to approve an Application for an Extension of Time to complete construction and/or apply water to full beneficial use pursuant to ORS 537.230 or 537.630, or to begin construction, pursuant to ORS 537.248, the Department must make the findings in OAR 690-315-0040(1)(a) – (d).*

### **Complete Extension of Time Application [OAR 690-315-0040(1)(a)]**

5. On September 14, 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)]**

6. Actual construction of the well began prior to the May 28, 2000 deadline specified in the permit. Construction of MARI 173 (Well 1) began May 2, 1973.
7. According to the well log received by the Department on June 21, 1973, construction of Well 1 began May 2, 1973.

The Department has determined based on Finding of Fact (FOF) 6 and 7 that the prosecution of the construction of the well began prior to May 28, 2000.

**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.*

**OAR 690-315-0040(3)(a)**

**Amount of Construction** (The amount of construction completed within the time allowed in the previous extension.<sup>2</sup>)

8. During the most recent extension period, being from October 1, 2003, to October 1, 2005, the permit holder completed the connection of reconstructed structures to the existing water delivery system.
9. Since October 1, 2005, the permit holder connected a diamond egg grading machine, equipment wash rack, and egg flat washer, and to the water delivery system;

The Department has determined based on FOF 8, that work has been accomplished during the last extension period, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

**OAR 690-315-0040(3)(c)**

**Compliance with Conditions**

*The water right permit holder’s conformance with the previous extension conditions.*

10. A meter was installed on Well 1 and MARI 165 (Well 2) in 2003.

**Well 1**

11. Department records show March static water level measurements were submitted for years 2003 through 2008.

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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.

## Well 2

12. Department records show March static water level measurements were submitted for years 2003, 2004, 2005, 2007, and 2008.
13. Department records show that the permit holder has not submitted seven consecutive March static water level measurements.

The Department has determined, based on FOF 10, 11, and 12 that the permit holder has demonstrated minimal compliance with permit conditions as required by Permit G-13712:

- “Before water use may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director;” and
- “The Department requires the permittee to submit an initial water level measurement in the month specified [March] once well construction is complete.”

### OAR 690-315-0040(3)(b)

Beneficial Use of Water: *the amount of beneficial use made of the water during the previous extension conditions.*

14. A maximum rate of 288 gpm (0.64) cfs of water, being 140 gpm (0.31 cfs) from Well 1, and 148 gpm (0.33 cfs) from Well 2, has been appropriated for agricultural use and livestock.
15. No water has been appropriated from Well 1 or Well 2 for irrigation use.
16. According to the permit holder, delay of full beneficial use of water under Permit G-13712 was due, in part, to a large fire that destroyed the brooding unit and pullet house in 2004. Rather than being able to focus on moving forward with completion of the water right, the permit holder focused on replacing the brooding units, pullet houses and reconnection to the water delivery system. The permit holder needs more time in which to obtain the full quantity of water allowed under the permit.

The Department has determined based on FOF 10, 11, and 12 that beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2005.

### OAR 690-315-0040(2)(b),(3)(d),(4)(d)

Financial Investments to Appropriate and Apply Water to a Beneficial Purpose

17. The Application states the permit holder has invested about \$2,013,000 , which is approximately 22 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$7,000,000 investment is needed for the completion 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 G-13712.

**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 G-13712; furthermore, water availability for other affected water rights and scenic waterway flows after the permit was issued is determined when an Application for a new water right is submitted.

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

Special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d).

19. The points of appropriation for Permit G-13712, located within the Willamette River Basin, are not located within a limited or critical groundwater area.

20. Willamette River is not located within or above any state or federal scenic waterway.
21. The points of appropriation are not in an area listed by the Department of Environmental Quality as a water quality limited stream.

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

The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife.

22. Willamette River is located within an area ranked “low” 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.

23. The Application states an approximate total of \$2,013,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

24. The Application states the permit holder provides employment to 30 full time employees.

**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.

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

**Fair Return Upon Investment**

26. The Application states the permit holder is transitioning from traditional livestock practices to free range/cage free livestock practices. Development of the irrigation portion for the livestock will establish live vegetation, which will allow industry certification for free range/cage free eggs, and will provide a fair and reasonable return.

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

**Other Governmental Requirements**

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

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

***Unforeseen Events***

28. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit G-13712, in that the permit holders were faced with destruction of property from a fire in 2004, which restricted their ability to complete development of the project in a timely manner.

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

***Denial of the Extension Will Result in Undue Hardship***

29. The Application states a denial of the extension would result in undue hardship. Wilcox Farms owns five individual farms, all of which require water use. Denial of the extension would be a 20 percent loss for all of Wilcox Farms, as well as loss of investment, assets, and jobs associated with the area of use under Permit G-13712.

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

***Good Faith of the Appropriator***

30. The Application provides evidence of good faith of the appropriator under Permit G-13712.

Based on FOF 6 through 12, 14, 17, and 23, 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.*

31. As of September 14, 2017, the Application states the remaining work to be completed consists of installing the irrigation delivery system and renovating four 25,000 square foot livestock barns; meeting all permit conditions, which includes submitting seven consecutive March static water level measurements; and applying water to full beneficial use on 100.0 acres.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2027, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-13712 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 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 since permit issuance on July 30, 1999.
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 6 through 29, full application of water to beneficial use can be accomplished by October 1, 2027, 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).

## 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-13712 from October 1, 2005, to October 1, 2027.

Subject to the following conditions:

### LIMITATIONS AND CONDITIONS

1. **Last Extension Condition**

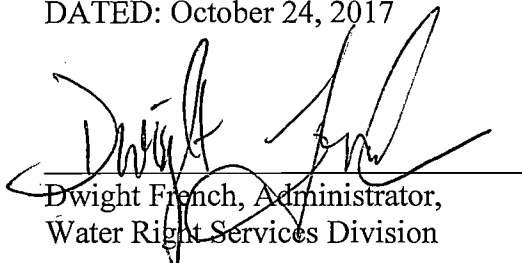
This is to be the last extension of time granted for Permit G-13712. Any future extensions of time requests shall be denied.

2. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2022 and 2026. 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: October 24, 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 **December 8, 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>

