

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

Agent – Marc J. Van Camp, Stuntzner Engineering and Forestry

Well 1 – COOS 672

FOF – Finding of Fact

AUTHORITY

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

ORS 537.630(2) 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.

FINDINGS OF FACT

1. On October 20, 2005, Permit G-15978 was issued by the Department, consistent with the terms of a settlement agreement. The permit authorizes the use of up to 0.18 cubic foot per second (cfs) (80 gallons per minute) of water, not to exceed the storage of 7.0 Acre-Foot (AF) per year from a well in Twomile Creek Basin for storage of water for irrigation on 2.7 acres and supplemental irrigation on 3.8 acres for cranberry operations. The permit specified complete application of water was to be made on or before October 1, 2010.

2. On June 24, 2003, an assignment from Howard W. Hoffer to Charles O'Donnell was recorded in the records of the Water Resources Department.
3. On November 29, 2017, Marc J. Van Camp of Stuntzner Engineering and Forestry, LLC (Agent) for permit holder, Charles O'Donnell, 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-15978 be extended from October 1, 2010, to October 1, 2020. This is the first permit extension requested for Permit G-15978.
4. On December 26, 2017, notification of the Application for Permit G-15978 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 November 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)]

6. Construction of the well began prior to permit issuance.
7. According to the well log received by the Department on January 20, 1993, construction of COOS 672 (Well 1) began December 16, 1992.

Based on Finding of Fact (FOF) 10 and 11, the Department has determined that the prosecution of the construction of the well began prior to October 1, 2010.

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

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

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

In order to make a finding of "good cause" to approve the extension, the Department shall consider whether the applicant has demonstrated "reasonable diligence" in previous performance under the permit. OAR 690-315-0040(2)(a). In determining "reasonable diligence", the Department shall consider, but is not limited to, the following factors: a) The amount of construction completed within the time allowed in the permit or previous extension; b)

The amount of beneficial use made of the water during the permit or previous extension time limits;c) Water right holder conformance with the permit or previous extension conditions; and d) Financial investments made toward developing the beneficial use of water.

Amount of Construction [OAR 690-315-0040(3)(a)]

The amount of construction completed within the time allowed in the permit.²

8. Construction of the well began prior to permit issuance. Construction of Well 1 was completed, a pump was installed, and 2.7 acres of cranberry bogs were constructed.
9. No other work was accomplished during the original development time frame under Permit G-15978, as a majority of the work was completed prior to permit issuance.
10. No new development of the water delivery system has been accomplished since October 1, 2010.

Based on FOF 7 and 8, the Department has determined that work has been accomplished prior to permit issuance, which provides evidence of good cause and reasonable diligence 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 permit conditions.

11. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the record does not show that a totalizing flow meter or other suitable measuring device has been installed, and (2) the required March static water level measurements have not been received by the Department.

Based on FOF 11, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-15978:

- “Before water use may begin under this permit, the water user shall install a totalizing flow meter at the diversion point as approved by the Director”; and
- “To monitor the effect of water use from the well(s) authorized under this permit, the Department requires the water user to make and report annual static water level measurements. The static water level shall be measured in the month of **March**. Reports shall be submitted to the Department within 30 days of measurement.

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.

After Use of Water has Begun

Seven Consecutive Annual Measurements

Following the first year of water use, the user shall submit seven consecutive annual reports of static water level measurements...

All measurements shall be made by a certified water rights examiner, registered professional geologist, registered professional engineer, licensed well constructor or pump installer licensed by the Construction Contractors Board and be submitted to the Department on forms provided by the Department.”

Failure to comply with permit conditions constitutes illegal use of water. 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 time limits.

12. A maximum rate of 0.18 cfs of water has been appropriated from Well 1, for storage of water for irrigation on 2.7 acres and supplemental irrigation on 3.8 acres for cranberry operations.

Based on FOF 1, 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, 2010.

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

13. An approximate total of \$12,000 has been invested. The costs included items associated with repair and maintenance costs of a system which are not “actual construction” under this permit and therefore are not counted towards development. After deducting these costs, the approximate total investment for “actual construction” to date is approximately \$9,000 which is about 82 percent of the total projected cost for complete development of this project. An additional \$2,000 investment is needed to complete this project, which includes installing a totalizing flow meter on Well 1.

Based on FOF 13, 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.*

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

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

14. 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-15978; 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).

15. The point of appropriation for Permit G-15978, located within the Twomile Creek Basin, is not located within a limited or critical groundwater area.
16. Twomile Creek is not located within or above any state or federal scenic waterway.
17. The point of appropriation is 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.

18. Twomile Creek is located within an area ranked "highest" for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of

Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife.

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

Economic interests dependent on completion of the project.

19. An approximate total of \$9,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

20. There are no other economic interests dependent on completion of the project identified.

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

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

21. 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)]

22. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date. Obtaining a water right is the only way to keep a cranberry operation viable.

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

23. Delay in the development of this project was not caused by any other governmental requirements.

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

24. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-15978.

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

25. A denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs. There is no surface water available for direct diversion and storage availability in the Twomile Creek Basin is limited, making surface water unviable to meet all water needs of a cranberry operation. Well 1 is the primary source and an important supplementary source for a total of 6.5 acres of cranberry bogs. A denial would render the bogs useless.

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

26. The Application provides evidence of good faith of the appropriator under Permit G-15978.

Based on FOF 6, 7, 8, 12, 13, and 19, 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.

27. As of November 29, 2017, the remaining work to be completed consists of meeting all permit conditions, which includes installing a totalizing flow meter on Well1, and submitting seven consecutive March 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, 2020, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15978 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. Based on Findings of Fact 11, the Department determined the need to place a "Water Use Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of water use permit. This condition, specified under Item 1

of the “Conditions” section of this PFO, was determined to be necessary because no beneficial use of water use under the terms and conditions of the permit has been-made since permit issuance.

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 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 26, full application of water to beneficial use can be accomplished by October 1, 2020, 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/or 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. OAR 690-315-0050(5).

Continued on the following page

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-15978 from October 1, 2010, to October 1, 2020.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

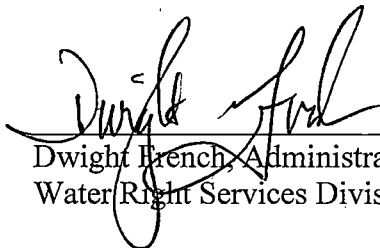
1. **Water Use Condition**

The use of any water under Permit G-15978 is subject to the condition requiring installation of a totalizing flow meter.

- Before water use may begin under this permit, the water user shall install a totalizing flow meter at the diversion point as approved by the Director.
- No water may be appropriated from COOS 672 (Well 1) under Permit G-15978 until a totalizing flow meter has been installed at Well 1. Use of any water under Permit G-15978 without installation of a totalizing flow meter is illegal use of water.
- The permittee shall install a totalizing flow meter on COOS 672 (Well 1), and submit documentation to the Department by September 24, 2018.

Failure to comply with the above condition by September 24, 2018, the Extension of Time to October 1, 2020 will be terminated. The Department shall begin cancellation of Permit G-15978.

DATED: January 30, 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 **March 16, 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>

