

**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 G-12411, Water Right Application G-13570,)	FINAL ORDER
in the name of Forrest D. Evans, Jr.)	TO DENY

Permit Information

Application:	G-13570
Permit:	G-12411
Basin:	4 – Hood / Watermaster District 3
Date of Priority:	December 1, 1993, for 0.22 cfs; and November 25, 1994, for 0.47 cfs
Source of Water:	A well in Dry Creek Basin
Purpose or Use:	Irrigation of 56.17 Acres
Maximum Rate:	0.69 cubic foot per second (cfs)

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.

In Summary, the Department proposes to:

- Deny an extension of time to complete construction of the water system from October 1, 2006, to October 1, 2026.

- Deny an extension of time to apply water to full beneficial use from October 1, 2006, to October 1, 2026.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
Well – WASC 2075/51435
cfs – cubic foot per second
gpm – gallons per minute

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.

FINDINGS OF FACT

1. On April 26, 1996, Permit G-12411 was issued by the Department. The permit authorizes the use of up to 0.69 cfs of water from a well in Dry Creek Basin for irrigation of 56.17 acres. The permit specified actual construction of the well to begin by April 26, 1997, construction of the water system was to be completed by October 1, 1998, and complete application of water was to be made on or before October 1, 1999.
2. One prior permit extension has been granted for Permit G-12411. The extension request resulted in the completion dates for construction and full application of water being extended to October 1, 2006.
3. On December 16, 2016, the permit holder submitted an “Application for Extension of Time” (Application) to the Department, requesting both the time to complete construction of the water system and the time to apply water to full beneficial use under the terms and conditions of Permit G-12411 be extended from October 1, 1999, to October 1, 2026.

4. On December 20, 2016 notification of the Application for Extension of Time for G-12411 was published in the Department's Public Notice. No public comments were received regarding the extension application.
5. On December 20, 2016, the permit holder submitted additional information to supplement their Application. The additional information clarified that no water has been used from the well under Permit G-12411.

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 December 16, 2016, 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 well began prior to the April 26, 1997, deadline specified in the permit.
8. According to the well log received by the Department on April 7, 1993, construction of WASC 2075 began February 10, 1993.

Based on Finding of Fact (FOF) 7 and 8, the Department has determined that the prosecution of the construction of the well began prior to April 26, 1997.

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 and previous extension.¹

9. During the most recent extension period, being from October 1, 1999, to October 1, 2006, irrigation equipment was installed and well WASC 2075 was deepened under WASC 51435. WASC 2075/51435 is herein referred to as the Well.
10. Since October 1, 2006, a new pump, electrical service, and a measuring tube have been installed.

Based on FOF 9, the Department has determined that work has been accomplished during the last extension period.

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

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

11. The Department has considered the permit holder's compliance with the condition requiring submittal of annual March static water level measurements to the Department, and did not identify any concerns.

Based on FOF 11, the Department has determined that the permit holder has demonstrated compliance with the following permit condition as required by Permit G-12411:

- "The static water level shall be measured in the month of March. Reports shall be submitted to the Department within 30-days of measurement."
12. The Department has considered the permit holder's compliance with conditions, including mitigation requirements, and has identified the following concern: the record does not show that a meter or other suitable measuring device has been installed. The Department recognizes that it is the intent of the permit holder to comply with all permit conditions at the time the conditions become applicable.

Based on FOF 12, the Department has determined that the permit holder has not demonstrated compliance with following permit condition as required by Permit G-12411:

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

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

¹ "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.

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

The amount of beneficial use made of the water during the permit or previous extension conditions.

13. No water has been appropriated from the Well under Permit G-12411 for irrigation. No acres authorized under Permit G-12411 have been irrigated.
14. Delay of beneficial use of water under Permit G-12411 was due, in part, to monitoring of water levels of the Well by the Department indicated that the static water level had dropped to a level that would make it unfeasible to utilize the well without first deepening it. Additionally, electrical problems plaguing the pump since its original installation remained unresolved by numerous electricians, ultimately resulting in a new pump being installed in 2007.

Based on FOF 12 and 13, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because no water has been used from the well, and not all permit conditions were satisfied by October 1, 2006.

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

15. An investment of \$90,461 has been made in the water system, which is approximately 73 percent of the total projected cost for complete development of this project. An additional \$32,800 investment is needed for the completion of this project.

Based on FOF 15, the Department has determined that the permit holder had made an investment in the development of the water system.

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

The Application provides evidence of progress towards completion of the water system; 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 not demonstrated reasonable diligence in previous performance under Permit G-12411 as no water has been appropriated from the Well under the permit in the more than 22 years since the permit was issued.

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.

16. 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-12411; 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).

17. The point of appropriation for Permit G-12411, located within Dry Creek Basin, is within Pomona-Priest Rapids groundwater restricted subunit within the Mosier Withdrawn Area (Special Order Volume 76, Page 489).
18. Dry Creek is not located within or above any state or federal scenic waterway.
19. 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.

20. Dry Creek is located within an area ranked “moderate” for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife.

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

Economic interests dependent on completion of the project.

21. An approximate total of \$90,461 has been invested in the project.

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

Other economic interests dependent on completion of the project.

22. The Application did not identify economic interests other than those of the applicant's that may be dependent on completion of the project.

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

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

23. On January 26, 2018, the Department groundwater section reviewed the Application and the Well and determined that the Well is open to the bottom portion of the Basalt of Rosalia of the Priest rapids Member of the Wanapum Basalt, the Quincy-Squaw Creek Member of the Ellensburg Formation, and multiple basalts of the Frenchman Springs Member of the Wanapum Basalt. Water levels from wells producing from the Priest Rapids aquifer, the Frenchman Springs aquifer, or wells open to both aquifers have shown a persistent decline.

Fair Return Upon Investment [OAR 690-315-0040(2)(f)]

24. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date.

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

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

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

26. Unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-12411, in that the permit holders were faced with a continuous decline of the water levels in the Well even though the Well was not in use. The Department monitoring of the Well confirms the declines of the static water level.

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

27. No undue hardship that would result from a denial of the Application has been identified.

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

28. The Application provides evidence of good faith of the appropriator towards the development of the water system and in monitoring the static water levels in the Well, however, no evidence is provided that shows beneficial use of water under Permit G-12411.

Based on Findings of Fact 12, 13, and 29, the Department finds that the Applicant has not demonstrated good faith in the development of the beneficial use of the water.

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.

29. As of December 16, 2016, the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, which include installing a totalizing flow meter; and applying water to full beneficial use.

Based on FOF 13, 16 and 23, the Department cannot find that the applicant can complete the project or apply water to full beneficial use within the time requested for the extension, because the applicant has not begun use of any water under this permit in the twenty years since the permit was issued, and monitoring of the Well has indicated that the resource cannot support the development of the water authorized under the permit.

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 not 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).

CONCLUSIONS OF LAW

1. The permit holder 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 permit holder has not complied with the time allowed for construction work under the permit pursuant to ORS 537.630 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. The Application established that there has been construction, and financial investment toward developing the project, however, reasonable diligence towards the development of beneficial use has not been demonstrated. The permit holder has not 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).


PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department proposes to issue an order to:

Deny the time to complete construction of the water system under Permit G-12411 from October 1, 2006, to October 1, 2026.

Deny the time to apply water to beneficial use under Permit G-12411 from October 1, 2006, to October 1, 2026.

DATED: February 13, 2018


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 30, 2018**, 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:

