

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

**Application for Extension of Time**

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| In the Matter of the Application for an Extension of Time for ) | <b>PROPOSED<br/>FINAL ORDER<br/>TO DENY</b> |
| Permit G-12245, Water Right Application G-12446, in the )       |   |
| name of Gary Deniz )  |   |

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Permit Information

|                   |  |
|-------------------|--|
| Application:      | G-12446  |
| Permit:           | G-12245  |
| Basin:            | 13 – Goose and Summer Lake / Watermaster District 12 |
| Date of Priority: | March 13, 1991                                       |
| Source of Water:  | One well in Goose Lake Basin                         |
| Purpose of Use:   | Irrigation of 73.5 acres                             |
| Maximum Rate:     | 0.917 cubic foot per second (cfs)                    |

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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, 2018, to October 1, 2023.
  
- Deny an extension of time to apply water to full beneficial use from October 1, 2018, to October 1, 2023.

## **ACRONYM QUICK REFERENCE**

Application – Application for Extension of Time

Department – Oregon Department of Water Resources

FOF – Finding of Fact

PFO – Proposed Final Order

cfs – cubic foot per second

bls – below land surface

Extension Final Order - Final Order in the matter of an Application for Extension of Time for Permit G-12245

## **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 March 13, 1991, Samuel Farr submitted an application to the Department requesting the use of 411.60 gpm from one well for irrigation use on 73.5 acres. The application was assigned file G-12446.
2. On January 5, 1992, a ground water review was completed by Karl Wozniak in the Department’s Groundwater / Hydrology Section. The review makes a finding that “The applicant’s well comingles unconfined and confined groundwaters. In addition, because the well is <1/4 mile from Antelope Creek, Div[ision] 9 forces us to assume hydraulic connection and the potential for substantial interference. If the well is reconstructed to produce water from confined zones only ( $\geq$  150 feet below land surface) the potential for substantial interference will be eliminated and comingling will also cease to occur.”

3. On December 9, 1993, the Department prepared a technical review and a draft permit to include conditions supported by the January 5, 1992, groundwater review. Condition number 13 in the draft permit states, “No water may be appropriated under the terms of this permit until the well has been repaired to conform to current well construction standards and proof of such repairs is filed with the Enforcement Section of the Water Resources Department.” Condition 14 in the draft permit states, “No water may be appropriated under the terms of this permit from shallower than 150 feet below land surface.”
4. On February 2, 1994, the department received a “Letter of Appeal” dated January 31, 1994, from Samuel Farr stating “In my opinion this well has been constructed to meet all conditions”.
5. On October 20, 1995, Karl Wozniak prepared a memo to the file which states, “Data from the objection does not support any changes to the original findings by the Groundwater/Hydrology Section.”
6. On January 26, 1996, Permit G-12245 was issued, with the above well construction conditions, by the Department. The permit authorizes the use of up to 0.917 cfs of water from one well in the Goose Lake Basin for irrigation use on 73.5 acres. The permit specified actual construction of the well to begin by January 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.
7. On January 21, 1998, the Department received “Notice of Beginning of Construction” (Form A) from Samuel Farr stating actual construction began on January 13, 1997.
8. On January 21, 1998, the Department received “Notice of Completion of Construction” (Form B) from Samuel Farr stating complete construction was completed on January 14, 1997.
9. On March 10, 1999, the Department received “Notice of Complete Application of Water to a Beneficial Use” (Form C) from Samuel Farr stating complete application of “the water to a beneficial use in accordance with the terms of said permit” on March 9, 1999.
10. On March 10, 2000, a Claim of Beneficial Use (COBU) was submitted to the Department for review.
11. On April 25, 2016, an assignment by proof from Samuel Farr to Frances E. Farr was recorded in the records of the Water Resources Department.
12. On August 5, 2016, the Department issued a Final Order in the matter of an Application for Extension of Time for Permit G-12245 (Extension Final Order). The Final Order approved the Extension of Time until October 1, 2018, and included a condition prohibiting continued water use from the well until the well construction deficiencies have been remedied. The Final Order also included a condition that future Extensions of Time would be denied for Permit G-12446.

13. On May 20, 2019, Francis Farr 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-12245 be extended from October 1, 2018, to October 1, 2023. This is the first permit extension requested for G-12245.
14. On May 28, 2019, notification of the Application for Extension of Time for G-12245 was published in the Department’s Public Notice. No public comments were received regarding the extension application.
15. On June 17, 2019, an assignment from Frances Farr to Gary Deniz was recorded in the records of the Water Resources Department.

### **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)]**

16. On May 20, 2019, 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)]**

17. Actual construction of the well began prior to the January 26, 1997 deadline specified in the permit. According to the permit holder, construction of the Well (Lake 4144) began on March 4, 1991. A well log received by the Department on November 6, 1992, states that construction of Well (LAKE 4144) began on March 3, 1991, and was completed October 20, 1992.
18. According to the well log received by the Department on November 6, 1992, Well (LAKE 4144) construction began March 3, 1991. The Department has determined that the prosecution of the construction of the well began on March 3, 1991, and was completed October 20, 1992. The well was constructed to a completed depth of 350 feet bls with a cement seal from 0 feet to 20 feet bls. A 14 inch steel casing was installed from 0 feet to 160 feet bls with perforations from 25 feet to 160 feet bls. The Groundwater / Hydrology Review conducted by the Department on January 5, 1992, indicated that well (LAKE 4144) appropriates water from both confined and unconfined aquifers at depths shallower than 150 feet bls.
19. On March 6, 2017, the Department received an email from Hollie Cannon, Certified Water Right Examiner (CWRE), which stated that the location of LAKE 4144 was constructed in a location that was not authorized by the Permit G-12245.

Based on Finding of Fact (FOF) 17, the Department has determined that the prosecution of the construction of the well began prior to January 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 previous extension.<sup>1</sup>*

20. During the most recent extension period, being from October 1, 1999, to October 1, 2018, the permit holder constructed LAKE 52837. This well is reported to have been constructed in the location authorized by Permit G-12245.
21. Since October 1, 2018, a pipeline was installed from LAKE 52837 to the pivot.

The Application provides evidence of progress of physical work made towards completion of the water system.

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

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

22. The Department has considered the permit holder’s compliance with conditions, and has identified the following concerns: (1) the record does not show that LAKE 4144, the well previously asserted as the well authorized under Permit G-12245, has been repaired to conform to current well construction standards (2) the record does not show that LAKE 4144, the well previously asserted as the well authorized under Permit G-12245, has been altered to appropriate no water from shallower than 150 feet bls, and (3) the Application identifies that irrigation continued from LAKE 4144 during 2017.

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<sup>1</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.

Based on FOF 22, the Department has determined that the permit holder has not demonstrated compliance with following conditions as required by Permit G-12245:

- “No water may be appropriated under the terms of this permit until the well has been repaired to conform to current well construction standards and proof of such repair is filed with the Enforcement Section of the Water Resources Department”; and
- “No water may be appropriated under the terms of this permit from shallower than 150 feet below land surface.”

Based on FOF 22, the Department has determined the permit holder has not demonstrated compliance with the following condition specified in the Extension Final Order issued August 5, 2016:

- **Well Construction Condition**  
The use of any water under Permit G-12245 is subject to this Well Construction Condition.
  - **No water may be appropriated under the terms of this permit until the well has been repaired to conform to current well construction standards and proof of such repair is filed with the Enforcement Section of the Water Resources Department.**
  - **No water may be appropriated under the terms of this permit from shallower than 150 feet below the land surface.**

**No further appropriation of water from this well shall be allowed under the terms of this permit until proof of the above two conditions is submitted to and approved by the Department.”**

**Failure to comply with permit conditions constitutes illegal use of water. 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 permit or previous extension conditions.*

23. A maximum rate of 0.917 cfs of water has been appropriated from LAKE 4144 for irrigation of 73.5 acres.
24. No water has been appropriated from LAKE 52837.
25. Delay of beneficial use of water under Permit G-12245 was due, in part, to beginning in summer of 2018, “Klamath Pump had the pump from the old well (LAKE 4244) to repair and install in the new well. This was not completed until October 2018, too late to apply water before Completion Date.”

Based on FOF 22, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because not all permit conditions have been satisfied.

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

26. An investment of approximately \$111,400 has been made, which is approximately 97 percent of the total projected cost for complete development of this project. An additional \$4,000 investment is anticipated for the completion of this project.

Based on FOF 26, the Department has determined that the permit holder had made an investment.

**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 permit or previous extension conditions, and; beneficial use has not been demonstrated. The Department has determined the applicant has not 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.

27. 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-12245; 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).

28. The point of appropriation for Permit G-12245, located within the Antelope Creek Basin, is not located within a limited or critical groundwater area.
29. Antelope Creek is not located within or above any state or federal scenic waterway.
30. 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.

31. Antelope 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.

32. An approximate total of \$111,400 has been invested in the project.

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

Other economic interests dependent on completion of the project.

33. 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.

34. 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)]**

35. 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)]**

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

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

37. The Application states, “Klamath Pump dropped the ball on repair and installing the pump.”

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

38. The Application states, “a denial would keep us from proving use of water from the new well and result in a loss of the whole water right. The loss of the water right affects the value of the land.”

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

39. The Application does not provide evidence of good faith of the appropriator under Permit G-12245.

Based on Findings of Fact 22, above, the Department finds that the Applicant has not demonstrated good faith. Though the Application does provide evidence of some work accomplished during the most recent extension of time period, the Application also provides evidence that compliance with the conditions of the permit and of the previous extension has not been demonstrated, and water continued to be appropriated from LAKE 4144 in violation of the conditions contained in the permit and conditions contain in the previous Extension Final Order. In addition, though there may have been a delay in the installation of the pump that was out of the control of the applicant, the Application identifies that the infrastructure, i.e. pipeline, necessary to deliver water from the newly constructed LAKE 52837 to the place of use, was not installed until after October 1, 2018 (see FOF 21). With the previous extension of time being conditioned so that it was to be the last extension granted for Permit G-12245, the installation of this infrastructure would still have not been accomplished within the time specified by the previous extension.

**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.*

40. As of May 20, 2019, the remaining work to be completed consists of completing installation of the pump, and connection of the well to the pipeline and pivot.

Based on FOF 39, the Department has determined that the applicant could complete the project within the time requested, however, the Applicant has not demonstrated that good cause exists to grant an additional extension of time.

**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 reasonable diligence toward developing the project 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).

**continued on following page**

## 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-12245 from October 1, 2018, to October 1, 2023.

Deny the time to apply water to beneficial use under Permit G-12245 from October 1, 2018, to October 1, 2023.

DATED: July 9, 2019



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 **August 23, 2019**, 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 TO ACTIVE DUTY SERVICEMEMBERS:** Active duty Servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

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- If you have questions about statements contained in this document, please contact Jeffrey D. Pierceall at (503) 986-0802.
  - If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at 503-986-0820.
  - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0900.
  - Address any correspondence to :     Water Right Services Division  
   725 Summer St NE, Suite A  
Fax: 503-986-0901                         Salem, OR 97301-1266
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Mailing List for Extension PFO Copies

PFO Date: July 9, 2019

Copies Mailed

Application: G-12446

By: \_\_\_\_\_

Permit: G-12245

On: \_\_\_\_\_

Original mailed to Applicant:

Gary Deniz  
P.O. Box 110  
Lakeview, OR 97630

Copies sent to:

1. WRD - App. File G-12446/ Permit G-12245

Fee paid as specified under ORS 536.050 to receive copy:

2. None

Receiving via e-mail (10 AM Tuesday of signature date)  
(DONE BY EXTENSION SPECIALIST)

3. WRD - Watermaster District 12, Brian Mayer
4. WRD – SCR Regional Manager, Kyle Gorman

CASEWORKER: JDP