

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-12293, Water Right Application G-13473, in)	FINAL
the name of Monrovia Nursery Company)	ORDER

Permit Information

Application:	G-13473
Permit:	G-12293
Basin:	0 – Middle Willamette / Watermaster District 16
Date of Priority:	July 20, 1993
Source of Water:	four wells in Yamhill River Basin
Purpose or Use:	Nursery Operations on 805.4 acres
Maximum Rate:	4.01 cubic feet per second (cfs) total, being 0.44 cfs – Well #15; 0.89 cfs - Well #16; 1.34 cfs – Well #17; 1.34 cfs – Well #18

Please read this Proposed Final Order in its entirety as it contains additional conditions not included in the original permit.

In Summary, the Department proposes to:

- Grant an extension of time to complete construction of the water system from October 1, 2019, to October 1, 2024.
- Grant an extension of time to apply water to full beneficial use from October 1, 2019, to October 1, 2024¹.
- 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.

¹Pursuant to ORS 537.630(5), 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

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
cfs - cubic feet per second
gpm – gallons per minute

Well Information

Well #15 – YAMH 1848/2806
Well #16 – YAMH 1849
Well #17 – YAMH 1851
Well #18 – YAMH 1852/54374

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.

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 April 3, 1996, Permit G-12293 was issued by the Department. The permit authorizes the use of up to 4.01 cfs of water from four wells in Yamhill River Basin for nursery operations on 805.4 acres, being 0.44 cfs from Well #15, 0.89 cfs from Well #16, 1.34 cfs

from Well #17, and 1.34 cfs from Well #18. The permit specified actual construction of the well to begin by April 3, 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. Two prior permit extensions have been granted for Permit G-12293. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2009, to October 1, 1999.
3. On April 3, 2019, Greg Rusow, vice president and general manager of Monrovia Nursery Company, 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-12293 be extended from October 1, 2009, to October 1, 2024.
4. On April 3, 2019, notification of the Application for Permit G-12293 was published in the Department's Public Notice. No public comments were received regarding the Application.
5. On November 14, 2019, the permit holder submitted additional information to supplement their Application. The additional information was to identify work accomplished and water put to beneficial use between when the Application was submitted on April 3, 2019, and the most recent date for complete application of water, being October 1, 2019.

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 April 3, 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)]

7. Actual construction of the well began prior to the April 3, 1997 deadline specified in the permit.
8. According to the well log received by the Department on August 28, 1992, construction of YAMH 1848 began August 5, 1992.

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 3, 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.²

9. During the most recent extension period, being from October 1, 2009, to October 1, 2019, the following was accomplished:
 - installed a pump in YAMH 1852/54374 (Well #18); and
 - installed electrical service to Well #18.

The Application provides evidence of progress of physical work made towards completion of the water system, enough to qualify as the minimum necessary for the Department to find good cause and reasonable diligence towards 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 and previous extension conditions.

10. The Department has considered the permit holder’s compliance with conditions, and did not identify any concerns.

Based on FOF 10, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-12293.

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.

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

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

11. A maximum rate of 450 gallons per minute (gpm) (1.0 cfs) of water, being 200 gpm (0.44 cfs) from Well #15, and 250 gpm (0.55 cfs) from Well #18, has been appropriated for nursery use on 522.9 acres.
12. Delay of full beneficial use of water under Permit G-12293 was due, in part, to ongoing effects of the 2008 recession. The permit holders identify that current production levels remain approximately 20% below those of 2007. Financial assets were available until the end of 2017, to continue development of the wells authorized under the permit.

Based on FOF 10, and 11, the Department has determined that beneficial use of water has been demonstrated under this permit.

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

13. An investment of approximately \$173,800, has been made which is about 44 percent of the total projected cost for complete development of this project. The Application establishes that the permit holder made little investment towards the development of this permit between 2009, and December 2017 when a pump and associated rough plumbing was installed in Well #18. This represents eight years where no additional development was pursued. An additional \$220,000 investment is needed for the completion of this project.

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 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-12293.

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-12293; 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 points of appropriation for Permit G-12293, located within the West Fork Palmer Creek Basin, are located within Amity Hills Limited Groundwater Area. The Amity Hills Limited Groundwater Area was established in December 2003, to limit the use of water from the Columbia River Basalt Group aquifers to classified exempt purposes as defined in ORS 537.545, or to irrigation by drip or equally efficient methods, under a limited license. Permit G-12293, was issued prior to the establishment of this Groundwater Limited Area. New water development under this permit, 23 years after issuance, and 16 years after the establishment of the Groundwater Limited Area, must be limited to reduce the impact of continued use under the permit within the Columbia River Basalt Group aquifers.
16. West Fork Palmer Creek is not located within or above any state or federal scenic waterway.
17. 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.

18. West Fork Palmer 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.

19. An approximate total of \$173,800 has been invested in the project.

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

Other economic interests dependent on completion of the project.

20. Other economic interests dependent on completion of the project have been identified. The permit holder employs more than 500 employees who would be effected by loss of the use of water on this nursery property. Additionally, a portion of the land is leased by a local farmer.

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

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

21. On October 29, 2019, the Department’s Groundwater Section determined that Well #15 develops water from the Columbia River Basalt Group aquifer within the boundaries of the Amity Hills limited groundwater area.
22. On October 29, 2019, the Department’s Ground Water Section determined that the reference levels for determining water level declines for Well #15 is 18.58 feet below land surface.
23. On October 29, 2019, the Department’s Ground Water Section determined that, due to observed water level declines occurring within the Columbia River Basalt Group Aquifers, the use of water from Well #15 (YAMH 1848/2806) must be limited to what has been developed as of the most recent completion date, being October 1, 2019, because the Columbia River Basalt Group aquifers cannot support additional development under this permit.
24. Water use from Well #18 began in 2019. The Department has not determined the reference level for Well #18 because the first measurement after use began has not yet been submitted to the Department. The reference level will be determined based on the submittal of the static water level measurement taken by April 15, 2020.

25. No water has been appropriated from Well #16, or Well #17, for nursery operations under this permit. Reference levels will be determined based on static water level measurements taken the year following the beginning of water use.
26. On November 15, 2019, the Department's Groundwater Section determined that use from Well #16, Well #17, and Well #18 must be limited to water developed from local sedimentary aquifers due to long-term declines of water level in the Columbia River Basalt Group aquifers in this area.
27. OAR 690-315-0050(6) requires the Department to place 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 3 of the "Limitations and Conditions" section of this PFO to meet this condition.

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

28. 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)]

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

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

30. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-12293 during the most recent extension of time period, being October 1, 2009, through October 1, 2019.

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

31. The Application identifies that a denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs. The permit holders believe that the inability to complete the development of the permit would put the company at risk, and that they are not aware of additional water available in the area.

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

32. The Application provides evidence of good faith of the appropriator under Permit G-12293.

Based on FOF 7, 8, 9, 10, 11, 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.

33. As of April 3, 2019, the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, 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, 2024, to complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit G-12293 is both reasonable and necessary.

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

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

The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and fair and reasonable return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the permit holder had no control, whether denial of the extension will result in undue hardship to the applicant and whether there are no other reasonable alternatives for meeting water use needs, any other factors relevant to a determination of good cause, and has determined that the applicant has shown that good cause exists for an extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

LIMITATIONS AND CONDITIONS

1. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to mitigate the effects of the subsequent development on competing demands on the resource. Based on Findings of Facts 15, 21, 22, and 23, the Department determined the need to place a "Development Limitation" on this extension of time in order to mitigate the effects of the subsequent development on competing demands on the resource. This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary because long-term declines are occurring in the Columbia River Basalt Group aquifers at this location.
2. 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. Based on FOF 1, 2, and 13, 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 2 of the

“Conditions” section of this PFO, was determined to be necessary due to minimal development under this permit during the most recent extension of time period, being October 1, 2009, to October 1, 2019, this being the third request for an extension of time, and upon approval, this extension of time authorized a total of 28 years to develop the use of water under this permit.

3. 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 3 of the “Limitations and 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 7 through 32, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2024, 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, 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).
6. For extensions exceeding five years, the Department shall establish progress checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between progress check points will not exceed five years periods, as required by OAR 690-315-0050(6).

PROPOSED ORDER

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

Extend the time to complete construction of the water system under Permit G-12293 from October 1, 2019, to October 1, 2024.

Extend the time to apply water to beneficial use under Permit G-12293 from October 1, 2019, to October 1, 2024.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Columbia River Basalt Group Aquifer Development Limitation**

Development of water from the Columbia River Basalt Group aquifers under this permit is limited to no more than 0.44 cfs of water for nursery operations on 522.9 acres from YAMH 1848/2806. Any future water development under this permit must be limited to appropriation from sedimentary aquifers at this location. Prior to use of water from any new, reconstructed, altered, or deepened well, the permit holder must demonstrate that water will not be developed from the Columbia River Basalt Group aquifer. If any additional development occurs from the Columbia River Basalt Group aquifer under this permit, the additional development will be excluded upon issuance of a certificate.

2. **Last Extension Condition**

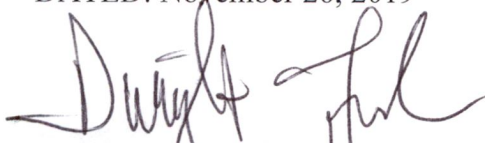
This shall be the last extension of time granted for Permit G-12293. Any future extensions of time request will be denied.

3. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2023. 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: November 26, 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 **January 13, 2020**, 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.

