

**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-18305, Water Right Application G-12961, in the name	)	FINAL
of Earl Van Volkinburg; and Kay Freund and Robert Freund	)	ORDER

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Permit Information

Application:	G-12961
Permit:	G-18305
Basin:	2B – Middle Willamette / Watermaster District 16
Date of Priority:	June 4, 1992
Source of Water:	three wells in the Croisan Creek Basin
Purpose or Use:	irrigation of 30.0 acres
Maximum Rate:	0.11 cubic foot per second (cfs), or its equivalent in the case of rotation, measured at the well

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***Please read this Proposed Final Order in its entirety.***

*In Summary, the Department proposes to:*

- Grant an extension of time to complete construction of the water system from October 1, 2010, to October 1, 2024.
- Grant an extension of time to apply water to full beneficial use from October 1, 2010, to October 1, 2024<sup>1</sup>.

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.630 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315.

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<sup>1</sup>Pursuant to ORS 537.630(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  
Well 1 – MARI 12101  
Well 2 – MARI 12102  
Well 3 – MARI 17884  
cfs - cubic foot per second

**PREVIOUS PERMIT NUMBERS**

Permit G-11800  
Permit G-15046  
Permit G-15747  
Permit G-17487

**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 October 24, 1994, Permit G-11800 was issued by the Department. The permit authorized the use of up to 0.11 cfs of water from a well in the Croisan Creek Basin for irrigation of 30.0 acres. The permit specified actual construction of the well to begin by October 24, 1995, construction of the water system was to be completed by October 1, 1996, and complete application of water was to be made on or before October 1, 1997. Use of water under the permit was to expire on October 24, 1999, allowing for renewals of additional five-year periods if the Director finds that the groundwater resource can probably support the extended use.
2. One prior permit extension has been granted for Permit G-11800. The extension request resulted in the completion dates for construction and full application of water being extended to October 1, 2010.

3. On July 3, 2001, the Department approved Permit Amendment T-8182 (Special Order Volume 55, Page 684) authorizing two additional points of appropriation, and the change in place of use under Permit G-11800 (modified by Permit Amendment T-8182) which is hereafter referred to simply as Permit G-11800.
4. On September 12, 2019, Kay Freund, 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-17487 be extended from October 1, 2010, to October 1, 2024.
5. On September 23, 2019, a partial assignment from Earl Van Volkinburg to Kay Freund and Robert Freund was recorded in the records of the Water Resources Department. The Departments records now identify Earl Van Volkinburg, Kay Freund and Robert Freund as permit holders of record.
6. On October 1, 2019, notification of the Application for Permit G-17487 was published in the Department’s Public Notice. No public comments were received regarding the Application.
7. On January 10, 2020, the Department issued Renewed Permit G-18305, to replace Permit G-17487. Permit G-18305 expiring October 1, 2020, is the fifth renewed permit originating from Water Right Permit Application G-12961.
8. On January 21, 2020, the permit holder submitted additional information to supplement their Application. The additional information was to clarify the location and number of acres irrigated to date.

### **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)]**

9. On September 12, 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)]**

10. Construction of the wells began prior to permit issuance.
11. According to the well log received by the Department on May 10, 1978, construction of MARI 12102 (Well 2) began April 12, 1978.
12. According to the well log received by the Department on May 10, 1978, construction of MARI 12101 (Well 1) began April 25, 1978.

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 24, 1995.

**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>2</sup>*

13. During the most recent extension period, being from October 1, 1997, to October 1, 2010, a drip irrigation system was expanded.
14. Since October 1, 2010, the drip irrigation system continued to expand.

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 conditions.*

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

Based on FOF 15, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-18305.

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<sup>2</sup> “Actual Construction” is defined in OAR 690-315-0020(3)(d)(A)and(B) as physical work performed toward completion of the water system which demonstrates the water right permit holder’s good faith and intention to complete the project with reasonable diligence. Actual construction does not include planning a diversion system, formulating a business plan, securing financing, letting contracts, purchasing but not installing equipment, surveying, clearing land or planting crops.

**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.*

16. A combined maximum rate of 0.11 cfs of water has been appropriated from Well 1, Well 2, and MARI 17884 (Well 3) for irrigation of 22.0 acres. According to the Application, each well has produced the maximum rate of 0.11 cfs individually, however, the combined rate does not exceeds 0.11 cfs.
17. No explanation is provided as to why full beneficial use of water under G-18305 has been delayed.

Based on FOF 15, and 16, the Department has determined that beneficial use of water has been demonstrated under this permit because 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)]**

18. An investment of approximately \$35,000, has been made which is about 78 percent of the total projected cost for complete development of this project. An additional \$10,000 investment is needed for the completion of this project.

Based on FOF 18, 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-18305.

**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.

19. 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-18305; 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).

20. The points of appropriation for Permit G-18305, located within the Croisan Creek Basin, are located within South Salem Hills Groundwater Limited area.
21. Croisan Creek is not located within or above any state or federal scenic waterway.
22. The points of appropriation are located in an area listed by the Department of Environmental Quality as a water quality limited stream.
  - a. Croisan Creek, River Mile 0.0 to 6.5 listed under Water Quality Limited for Dissolved Oxygen, Biological Criteria, and E. Coli.

**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.

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

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

Economic interests dependent on completion of the project.

24. An approximate total of \$35,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

25. Other economic interests dependent on completion of the project have not been identified.

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

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

26. The vineyard employs contractors for work around the property, who could lose income if the permit extension is denied.

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

27. 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)]**

28. Delay in the development of this project caused by any other governmental requirements has not been identified.

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

29. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-18305.

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

30. A denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs. To acquire a winery license, there is a need to plant additional acres of grapes. Without the ability to irrigate the new plants, they would not survive, resulting in the loss of the winery license.

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

31. The Application provides evidence of good faith of the appropriator under Permit G-18305.

Based on FOF 10, through 18, and 24, 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.*

32. As of September 12, 2019, the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, which include extension of the irrigation system to the lands to be irrigated; 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-18305 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).

**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 10 through 31, 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 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.

## 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-18305 from October 1, 2010, to October 1, 2024.

Extend the time to apply water to beneficial use under Permit G-18305 from October 1, 2010, to October 1, 2024.

DATED: February 4, 2020



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 20, 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:

