

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-12723, Water Right Application G-13527, in)	FINAL
the name of Douglas John Lee)	ORDER

Permit Information

Application:	G-13527
Permit:	G-12723
Basin:	4 – Hood / Watermaster District 3
Date of Priority:	October 15, 1993
Source of Water:	a well in Rowena River Basin
Purpose or Use:	irrigation of 27.9 acres
Maximum Rate:	0.125 cubic foot per second (cfs)

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, 2014, to October 1, 2025.
- Grant an extension of time to apply water to full beneficial use from October 1, 2014, to October 1, 2025¹.
- 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

Agent – Theodore Ressler, GSI Water Solutions
Application – Application for Extension of Time
Department – Oregon Department of Water Resources
COBU – Claim of Beneficial Use
FOF – Finding of Fact
PFO – Proposed Final Order
Well – WASC 3023
Replacement Well – WASC 52703
cfs - cubic foot per second

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 August 28, 1996, Permit G-12723 was issued by the Department, consistent with the terms of a settlement agreement. The permit authorizes the use of up to 0.125 cfs of water from a well in Rowena River Basin for irrigation of 27.9 acres. The permit specified

actual construction of the well to begin by August 28, 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. On December 12, 2011, an assignment by proof from J. Scott Harris, to Eric and Laurie Holmes, was recorded in the records of the Water Resources Department.
3. On April 23, 2012, an assignment by proof from Eric and Laurie Holmes, to Shawn and Britta Bavaresco, DBA Bavaresco Family Farm, LLC, was recorded in the records of the Water Resources Department.
4. Two prior permit extensions have been granted for Permit G-12723. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2005, to October 1, 2014.
5. On July 6, 2018, a Claim of Beneficial Use (COBU) was submitted to the Department.
6. On May 29, 2019, an assignment from Shawn and Britta Bavaresco, DBA Bavaresco Family Farm, LLC, to Douglas John Lee, was recorded in the records of the Water Resources Department.
7. On January 6, 2020, the permit holder, Douglas John Lee, 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-12723 be extended from October 1, 2014, to October 1, 2025.
8. On January 9, 2020, Theodore Ressler, Agent for the permit holder submitted additional information to supplement their Application. The additional information was to clarify work accomplished on well abandonment and construction.
9. On January 14, 2020, notification of the Application for Permit G-12723 was published in the Department’s Public Notice. No public comments were received regarding the Application.

Review Criteria [OAR 690-315-0040]

In order to approve an Application for an Extension of Time to complete construction and/or apply water to full beneficial use pursuant to ORS 537.230 or 537.630, or to begin construction, pursuant to ORS 537.248, the Department must make the findings in OAR 690-315-0040(1)(a) – (d).

Complete Extension of Time Application [OAR 690-315-0040(1)(a)]

10. On January 6, 2020, 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)]

11. Actual construction of the well began prior to permit issuance.
12. According to the well log received by the Department on October 26, 1966, construction of WASC 3023 (Well) began October 5, 1966.

Based on Finding of Fact (FOF) 11 and 12, the Department has determined that the prosecution of the construction of the well began prior to August 28, 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

13. During the most recent extension period, being from October 1, 2005, to October 1, 2014, a new pump and flow meter were installed.
14. Since October 1, 2014, the Well was abandoned (WASC 52704), and WASC 52703 (Replacement Well) was constructed under the Mosier Well Repair and Replacement project.

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.

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.

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-12723.

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

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

16. A maximum rate of 0.08 cfs of water has been appropriated from the Well for irrigation of 19.0 acres. The Application indicates that 19.0 acres has been irrigated since 1998.
17. No additional beneficial use has been developed since 1998, including during the two most recent extensions of time.
18. Delay of full beneficial use of water under Permit G-12723 was due, in part, soil and water retention conditions have yielded a less productive fruit crop than originally expected. Lack of production combined with an ever-evolving agricultural market have led to various property owners altering crops and land use strategy.

Based on FOF 15, and 16, the Department has determined that beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2014.

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

19. An investment of approximately \$33,380, has been made which is about 9 percent of the total projected cost for complete development of this project. An additional \$330,000 investment is needed for the completion of this project.
20. Approximately \$90,000, of the \$330,000 investment remaining has been made in the construction of Replacement Well.

Based on FOF 19, 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 record The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit G-12723.

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.

21. 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-12723; 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).

22. The point of appropriation for Permit G-12723, located within the Dry Creek Basin, is located within Mosier Withdrawn Area (Special Order Volume 6, Page 489).
23. Dry Creek is not located within or above any state or federal scenic waterway.
24. The points of appropriation is not in an area listed by the Department of Environmental Quality as a water quality limited stream.

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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.

25. Dry 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.

26. An approximate total of \$33,380 has been invested in the project.

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

Other economic interests dependent on completion of the project.

27. The State of Oregon allocated funds to replace the Well. By allowing the extension, a return on this investment may be realized.

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

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

28. On March 16, 2020, the Department’s Ground Water Section completed a ground water review to determine if increased use under the permit can be supported by the resource.
29. On May 1, 2020, the Department’s Ground Water Section provided additional information clarifying the review completed on March 16, 2020.
30. The review concluded that WASC 52703 is likely open to multiple interflow zones of the Frenchman Springs aquifer. 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 with a similar pattern, indicating hydraulic connection between the two aquifers. Water levels in both aquifers display an overall trend of long-term water level declines to present day. Total declines of more than 150 feet have been observed in the Priest Rapids aquifer at well WASC 2759 since it was drilled in 1974.

Based on FOF 28, 29, and 30, the Department has determined that the resource cannot support additional development under Permit G-12723.

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

31. In recent years, former and current owners have found success in vineyard and grape production. However, market conditions and poor crop yield have not yet resulted in a return on investment.

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

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

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

33. The basalt aquifers in this area have experienced as much as 150 feet of water level decline over time. The declining water levels created uncertainty in the continued development and use of ground water in this area. As a result of these declines, the State of Oregon funded the Mosier Well Repair and Replacement Program, to repair or replace well that were identified to be contributing to these declines due to the construction of the well. The Well (WASC 3023) utilized under Permit G-12723 was identified as a well to be replaced, though it was given a low priority. Due to Program funding uncertainty, it was unknown when or if the well replacement would be funded. In 2019, the Program funded the Replacement Well, and the Well was subsequently abandoned.

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

34. A denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs. A denial of the Extension would require the COBU submitted on June 6, 2018, be reviewed for issuance of a Certificate prior to the water user being able to pursue authorization of use of water from Replacement Well under Permit G-12723. Additional time is needed under the permit to pursue authorization of the use of water from Replacement Well through submittal of a Permit Amendment.

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

35. The Application provides evidence of good faith of the appropriator under Permit G-12723.

Based on FOF 11, through 20, and 26, 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.

36. As of January 6, 2020, the permit holder identifies remaining work to be completed consists of completing construction of the water system, including the development of the remaining 8.9 acres, 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, 2025, 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-12723 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). However, due to severe declining water levels in the source aquifers, the Department has determined the development under Permit G-12723, must be limited to a rate of appropriation of 0.08 cfs to irrigate a total of 19.0 acres, as illustrated in the Claim of Beneficial Use submitted to the Department on June 6, 2018.

LIMITATIONS AND CONDITIONS

1. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to ensure future diligence, and/or mitigate the effects of the subsequent development on competing demands on the resource. Based on Findings of Facts 14, 20, and 32, the Department determined the need to place a “Permit Amendment Condition” on this extension of time in order to ensure diligence is exercised in the development and perfection of water use permit. This condition, specified under Item 1 of the “Conditions” section of this PFO, was determined to be necessary to authorize the use of water from Replacement Well.
2. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, mitigate the effects of the subsequent development on competing demands on the resource. Based on Findings of Facts 28, the Department determined the need to place a “Development Limitation” on Permit G-12723. This condition, specified under Item 2 of the “Conditions” section of this PFO, was determined to be necessary because the source aquifer cannot support additional development.
3. 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 4, and 17, 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 3 of the “Conditions” section of this PFO, was determined to be necessary due this being the third request for an Extension of time, and no new beneficial use being developed since 1998.

4. 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 4 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 11 through 35, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2025, 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 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-12723 from October 1, 2014, to October 1, 2025.

Extend the time to apply water to beneficial use under Permit G-12723 from October 1, 2014, to October 1, 2025.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Permit Amendment Condition**

The permit holder shall submit an application for a permit amendment within one year from the date of issuance of this Proposed Final Order, being May 12, 2020, requesting authorization of the use of water from WASC 52703 under this permit.

2. **Development Limitation**

The use of water under this permit is limited to a maximum rate of 0.08 cfs of water for irrigation of 19.0 acres.

3. **Last Extension Condition**

This shall be the last extension of time granted for Permit G-12723. Future requests for Extension of Time will be denied.

4. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2024. 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: May 12, 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 **June 26, 2020**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.

IMPORTANT: Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. mail. Please consider mailing early to ensure the Department receives the protest by the deadline specified above.

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
Salem, OR 97301-1266
Fax: 503-986-0901
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