

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

**Application for Extension of Time**

In the Matter of the Application for an Extension of Time  
for Permit S-53703, Water Right Application S-69654  
in the name of Windhurst Water Inc.

) PROPOSED  
) FINAL  
) ORDER

---

**Permit Information**

|                      |                                                                                                                          |
|----------------------|--------------------------------------------------------------------------------------------------------------------------|
| Application:         | S-69654                                                                                                                  |
| Permit:              | S-53703                                                                                                                  |
| Basin:               | South Coast / Watermaster District 15                                                                                    |
| Date of Priority:    | June 30, 1988                                                                                                            |
| Source of Water:     | Bill Creek, a tributary of Bear Creek, and legally stored water under Permit R-12928                                     |
| Purpose or Use:      | cranberry operations on 162.4 acres, agricultural use on 27.7 acres, and supplemental cranberry operations on 18.1 acres |
| Maximum Rate/Volume: | 614.0 acre-feet (AF) of stored water; not to exceed 2.75 cfs combined under Permit R-12928 and S-53703 from Bill Creek   |

---

***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 apply water to full beneficial use from October 30, 2019, to October 1, 2024.<sup>1</sup>
- Make the extension subject to certain conditions set forth below.

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.230 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315

---

<sup>1</sup> Pursuant to ORS 537.230(5), upon the completion of beneficial use of water allowed under the permit, the permit holder 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 permit holder shall submit a map of the survey and the claim of beneficial use.

## **ACRONYM QUICK REFERENCE**

Application – Application for Extension of Time  
Department – Oregon Water Resources Department  
ODFW – Oregon Department of Fish and Wildlife  
PFO – Proposed Final Order  
FOF – Finding of Fact  
AF - acre-feet  
cfs – cubic feet per second  
ODFW – Oregon Department of Fish and Wildlife

## **AUTHORITY**

**Generally, see ORS 537.230 and OAR Chapter 690 Division 315.**

**ORS 537.230(2)** provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, order 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.

## **FINDINGS OF FACT**

1. On October 10, 2000, Permit S-53703 was issued by the Department. The permit authorizes the use of up to 614.0 AF of water legally stored under Permit R-12928 from the Bill Creek, a tributary of Bear Creek, not to exceed a combined rate of 2.75 cfs from Bill Creek between Permits R-12928, and S-5370, for cranberry operations on 162.4 acres, agricultural use on 27.7 acres, and supplemental cranberry operations on 18.1 acres. The permit specified actual construction was to begin by October 10, 2001 and complete application of water was to be made on or before October 1, 2005.

2. Two prior permit extensions have been granted for S-53703. 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 30, 2019.
3. On September 13, 2021, Jack O. Haga of Windhurst Water Inc., submitted an "Application for Extension of Time" (Application) to the Department, requesting the time to apply water to full beneficial use under the terms and conditions of Permit S-53703 be extended from October 30, 2019, to October 1, 2024.
4. On October 12, 2021, notification of the Application for Permit S-53703 was published in the Department's Public Notice. No public comments were received.

**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)]**

5. On September 13, 2021, 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)]**

6. Actual construction of the water system began prior permit issuance.

Based on Findings of Fact (FOF) 10 and 11, the Department has determined the permit holder began construction prior to October 10, 2001.

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

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

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

*In order to make a finding of "good cause" to approve the extension, the Department shall consider whether the applicant has demonstrated "reasonable diligence" in previous performance under the permit. OAR 690-315-0040(2)(a). In determining "reasonable diligence", the Department shall consider, but is not limited to, the following factors: a) The amount of construction completed within the time allowed in the permit or previous extension; b) The amount of beneficial use made of the water during the permit or previous extension time limits; c) Water right holder conformance with the permit or previous extension conditions; and d) Financial investments made toward developing the beneficial use of water.*

**Amount of Construction [OAR 690-315-0040(3)(a)]**

*The amount of construction completed within the time allowed in the permit or previous extension.<sup>2</sup>*

7. Construction of the water system began prior to the permit issuance.
8. Work was completed during the original development time frame under Permit R-12928 as identified in the Applications for Extension of Time submitted March 6, 2009, and September 26, 2014.
9. During the most recent extension period, being from October 1, 2014, to October 30, 2019, work accomplished within the time allowed in previous extension includes construction of additional bogs.
10. Since October 30, 2019, an additional 2 acres of bogs were constructed.

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)]**

11. The Department has considered the permit holder's compliance with conditions, including mitigation requirements, and did not identify any concerns.

Based on FOF 11, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit S-53703.

**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 time limits.*

12. A maximum volume of 614 AF of legally stored water under Permit R-12928 has been diverted not exceeding a maximum of 2.75 cfs from the Bill Creek, a tributary of Bear Creek, for cranberry operations on 112.0 acres. The Application does not identify water used for agricultural uses or supplemental cranberry operations.

Based on FOF 12, the Department has determined that beneficial use of water has been demonstrated under Permit S-53703.

13. A delay of full beneficial use of water under Permit S-53703 was due, in part, to low cranberry prices.

Based on FOF 11, and 12, the Department has determined that beneficial use of water has been demonstrated under this permit.

---

<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.

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

14. An approximate total of \$2,937,517, has been invested. The costs included the cost to have a registered geologist be present for the initial filling of Windhurst Reservoir, which is not "actual construction" under this permit and therefore are not counted towards development. After deducting these costs, the approximate total investment for "actual construction" to date is approximately \$2,929,617 which is about 89 percent of the total projected cost for complete development of this project. The Application identifies an additional \$370,000 investment is needed to complete this project, which includes developing the cost of upgrading the diversion on Bill Creek, and construction of up to 40.0 acres of additional bogs. The Department maintains that the upgrade to the diversion on Bill Creek represents maintenance and upgrading of an existing point of diversion under the permit, and does not consider this new development under the permit.

Based on FOF 14, 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 S-53703.

**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.

15. 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 S-53703; 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.
16. Water Availability Analysis for the Bear River, (Tributary to Coquille River) at the mouth (watershed ID 70230) show that no water is available during the months of June through November of each year at the 80% exceedance level.
17. Current Water Availability Analysis has determined that 614.0 AF of water is available from water legally stored under Permit R-12928.

**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).

18. The points of diversion are located on Bill Creek, a tributary of Bear Creek, and reservoirs within the Bill Creek drainage, and are not located within a Withdrawn Area.
19. Bill Creek, a tributary of Bear Creek, is not located within or above a state or federal scenic waterway.
20. The points of diversion are in a location listed by the Department of Environmental Quality as a water quality limited stream. Bear Creek, Watershed Unit (1<sup>st</sup> through 4<sup>th</sup> order streams) listed under Water Quality Limited for BioCriteria, Dissolved Oxygen, and Temperature.

**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.

21. Bill Creek, a tributary of Bear Creek, is located within an area ranked “highest” 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.

22. An approximate total of \$2,929,617 has been invested in the project.

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

Other economic interests dependent on completion of the project.

23. Individual families utilize water from this permit for their cranberry operations

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

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

24. No other factors relevant to the determination of the market and present demand for water and power have been identified.
25. 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 1 of the "Limitations and Conditions" section of this PFO to meet this condition.

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

26. 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)]**

27. The Application identifies that Oregon Department of Fish and Wildlife (ODFW) have requested improvements to the diversion on Bill Creek.
28. According to the Application, and previous applications for extension of time, the permit holder has identified that an ODFW compliant fish screen was installed in 2002.

Though ODFW is requesting an update to the intake, it is not considered a requirement that delayed the development of the water use authorized by the permit because the permit holder has identified that the required fish screen had been installed within the time authorized by the permit.

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

29. The Application identifies the original landowners have passed away in the last few years.

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

30. The Application identifies the multiple families who produce cranberries under this permit would experience undue hardships if the extension of time is denied.

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

31. The Application provides evidence of good faith of the appropriator under Permit S-53703.

Based on FOF 6, through 14, and 22, 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 13, 2021, the permit holder states the remaining work to be completed consists of completing construction of the water system 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 accomplish the application of water to beneficial use under the terms and conditions of Permit S-53703 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 ensure future diligence. Based on the time allowed by this extension of time provides for 24 years to complete application of water to the beneficial use, 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 1 of the "Conditions" section of this PFO, was determined to be necessary due to the amount of time provided by previous extensions and this extension of time.

## 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 complied with construction timeline requirements to begin actual construction as required by ORS 537.230, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. Based on Finding of Facts 6, through 31, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2024<sup>3</sup>, 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.
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 excised 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 apply water to beneficial use under Permit S-53703 from October 30, 2019, to October 1, 2024.

Subject to the following conditions:

## LIMITATIONS AND CONDITIONS

### 1. Last Extension Condition

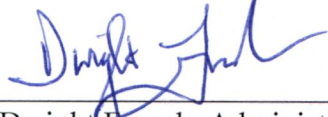
This may be the last extension of time granted for Permit S-53703. Future extensions of time request will only be approved for a period of two years, and will only allow

---

<sup>3</sup>Pursuant to ORS 537.230(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.

for the demonstration of compliance with permit conditions. No additional development of the beneficial use will be authorized beyond October 1, 2024. ORS 539.010(5); OAR 690-315-0040.

DATED: November 23, 2021

  
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 7, 2022**, 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.

- If you have any questions about statements contained in this document, please contact Jeffrey D. Pierceall at (503) 979-3213.
  - 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 503-979-9160.
  - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0801.
  - Address any correspondence to :  
Fax: 503-986-0901
- Water Right Services Division  
725 Summer St NE, Suite A  
Salem, OR 97301-1266