

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 S-53694, Water Right Application S-73857) FINAL
in the name of Jack, Sheri, or Barbra Fugate) ORDER

Permit Information

Application:	S-73857
Permit:	S-53694
Basin:	South Coast / Watermaster District 15
Date of Priority:	January 21, 1994
Source of Water:	three unnamed streams and Reservoir R-1, to be constructed under Application R-73854, Permit R-12893, Reservoirs R-2, R-4, R-5, R-6, and R-7, to be constructed under Application R-73855, Permit R-12894, and Reservoir R-1(R-3) ¹ , to be constructed under Application R-73856, Permit R-12895, tributaries of Twomile Creek; and Twomile Creek, a tributary of the Pacific Ocean
Purpose of Use:	cranberry operations
Maximum Rate and Volume:	2.0 cubic feet per second (cfs), being 1.7 cfs from Twomile Creek, 0.1 cfs from each of three unnamed streams (#2, 4 and 5); and 110.0 acre feet (AF) of water stored in 7 reservoirs, being 30.0 AF in Reservoir #1; 5.0 AF in Reservoir #2; 48.0 AF in Reservoir #3; 5.0 AF in Reservoir #4; 4.0 AF in Reservoir #5; 9.0 AF in Reservoir #6; 9.0 AF in Reservoir #7

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 1, 2004 or 2015, to October 1, 2024.²
- Make the extension subject to certain conditions set forth below.

¹ The permit contains a scrivener's error in identifying R-1 as the reservoir authorized under Application R-72896, Permit R-12895.

² 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.

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

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
cfs - cubic feet per second
AF – acre-feet

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 August 15, 2000, Permit S-53694 was issued by the Department. The permit authorizes the use of up to 2.0 cfs of water, being 1.7 cfs from Twomile Creek, 0.1 cfs from each of three unnamed streams (#2, 4 and 5); and 110.0 acre feet (AF) of water stored in 7 reservoirs, being 30.0 AF in Reservoir #1; 5.0 AF in Reservoir #2; 48.0 AF in

Reservoir #3; 5.0 AF in Reservoir #4; 4.0 AF in Reservoir #5; 9.0 AF in Reservoir #6; 9.0 AF in Reservoir #7, for cranberry operations. The permit specified actual construction was to begin by August 15, 2001, complete application of water was to be made on or before October 1, 2004.

2. One prior permit extension has been granted for Permit S-53694. The extension resulted in the completion dates for full application of water being extended to October 1, 2015.
3. On May 13, 2021, the permit holder, Jack Fugate, submitted an "Application for Extension of Time" to the Department, requesting the time to apply water to full beneficial use under the terms of Permit S-53694 be extended from October 1, 2015, to October 1, 2031.
4. Notification of the Application for Extension of Time for Permit S-53694 was published in the Department's Public Notice dated June 8, 2021. No public comments were received regarding the extension application.
5. On October 15, 2021, Bill Flatz, agent for the permit holder submitted additional information to supplement their Application for Extension of Time. The additional information clarified work accomplished under this permit.

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 May 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)]

7. Actual construction of the water system began prior to the deadline specified in the permit.
8. Construction of the water system began prior to permit issuance. According to the Application, construction of Reservoirs #1, #2, and #6 was completed prior to permit issuance.

Based on FOF 7, and 8, the Department has determined the permit holder has satisfied the condition requiring beginning of construction of the water works.

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.³

9. During the most recent extension period, being from October 1, 2004, to October 1, 2015, new totalizing flow meters and a new pump were installed.
10. During the most recent extension of time period, being from October 1, 2004, to October 1, 2015, no additional land was developed to cranberry or irrigation use.

Based on FOF 9, the Department has determined work was accomplished during the most recent extension period.

Compliance with Conditions [OAR 690-315-0040(3)(c)]

The water right permit holder’s conformance with the permit conditions.

11. The Department has considered the permit holder’s compliance with conditions, and did not identify any concerns with the portion of the permit developed to date.

Based on FOF 11, the Department has determined compliance with permit conditions has been demonstrated.

continued on following page

³ “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 or previous extension conditions.

12. A maximum rate of 2.0 cfs of water has been diverted Twomile Creek, and a maximum volume of 26.0 AF of stored water has been diverted, for cranberry operations. This exceed the rate authorized for use from Twomile Creek. The permit authorizes the use of 1.7 cfs of water from Twomile Creek. The permit holder has identified the point of diversion developed on Twomile Creek is not in the location authorized by the permit.
13. Based on information provided in the Application for Extension of Time for Permit R-12894, submitted on August 5, 2021, and the Claim of Beneficial Use for Permit R-12893, submitted on May 5, 2021, to date, Reservoirs #2, and #6, authorized under Permit R-12894, and Reservoir #1 authorized under Permit R-12893, have been developed. No water has been stored in Reservoirs #4, #5, and #7 authorized under Permit R-12984, and Reservoir #3 authorized under Permit R-12895.

Based on FOF 11, and 12, the Department has determined that beneficial use of water has been demonstrated under this permit for the portion that has been developed prior to October 1, 2015.

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

14. An invested approximately \$1,030,100, which is about 95 percent of the total projected cost for complete development of this project. An additional \$50,000 investment is needed for the completion of this project.
15. The Application identified a number of expenditures for C.W.R.E work to resolve water right issues, which is not “actual construction” under this permit and therefore are not counted towards development.

Based on FOF 14, the Department has determined an investment has been made in the application of water to the beneficial use authorized under this permit.

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-53694.

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.

16. 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-12894; 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.
17. Current Water Availability Analysis for Twomile Creek, (Tributary to Pacific Ocean) at the mouth (watershed ID 72803) show that no water is except during the month of February at the 80% exceedance level.
18. Based on the Claim of Beneficial Use for Permit R-12893, a maximum of 8.42 AF of water has been claimed to be stored in Reservoir #1.
19. Based on the Application for Extension of Time submitted for Permit R-12894, submitted on August 5, 2021, a maximum of 14.0 AF has been stored in Reservoir #2, and Reservoir #6, for use under this permit.

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 diversion are located on three unnamed streams (#2, 4, 5) and field runoff, tributaries of Two Mile Creek, and Two Mile Creek, a tributary of the Pacific Ocean, and are not located within a Withdrawn Area.

21. Two Mile Creek, a tributary of the Pacific Ocean is not located within or above a state or federal scenic waterway.
22. The points of diversion are in a location listed by the Department of Environmental Quality as a water quality limited stream. Lower Twomile Creek (H.U.C. Watershed 1710030601_02_104996), Twomile Creek (H.U.C. Watershed 171003060106_02_105009), and Lower Twomile Creek (H.U.C. Watershed 1710030601_02_104993)

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. Two Mile Creek, a tributary of the Pacific Ocean 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.

24. An approximate total of \$1,030,100 has been invested in the project.

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

Other economic interests dependent on completion of the project.

25. The permit holder has identified extended family and employees may experience undue hardship if the extension of time is denied.

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

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

26. No other factors relevant to the determination of the market and present demand for water and power have been identified.

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

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. The delay in the timely completion of the development of the project and timely application of water to full beneficial use was caused in part by wetland mitigation

requirements from Oregon Department of Environmental Quality which ended the construction of Reservoir #3, authorized under Permit R-12895. The Application identifies this work as having occurred in 2017.

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

29. The Application identifies depressed cranberry prices as why development of water was not completed.

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

30. A denial of the extension would result in undue hardship.

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

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

The Department has found minimal good faith of the appropriator under Permit S-53694.

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 May 13, 2021, the permit holder states the remaining work to be completed consists of applying for a permit amendment to add an additional point of diversion, submitting an Application to Split a Permit, to separate the use of water authorized on lands owned by another land owner, completing construction of the remaining reservoirs authorized under Permit R-12894, constructing a water system to serve the remaining acres, and applying water to full beneficial use.

Based on FOF 32, the Department has determined the work could be completed within the time requested. However, the Department has determined, based on FOF 10, the Department has determined the water user has not been diligent in pursuing additional development of cranberry use or irrigation authorized by the permit during the most recent extension of time period, and therefor the request for additional time to develop the water use to October 1, 2031, is not reasonable. The Department has determined an extension of time to October 1, 2024, is sufficient for the permit holder to submit the permit amendment to authorize the point of diversion developed on Twomile Creek, for the use developed by the most recent date for complete application of water, being October 1, 2015.

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, and/or mitigate the effects of the subsequent development on competing demands on the resource. Based on FOF 12, 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 because of the use of an unauthorized point of diversion has occurred under this permit.
2. 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 FOF 10, 13, 17, and 32, the Department determined the need to place a “Development Limitation” 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 no additional construction of reservoirs to store water under Permits R-12893, R-12894, and R-12894, and no additional acres for cranberry use or irrigation has been developed during the most recent extension of time period. Additional time is being provided only to allow for the submittal and review of the permit amendment necessary to authorized the point of diversion developed on Twomile Creek.

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 7, through 32, full application of water to beneficial use can be accomplished by October 1, 2024⁴, as required by OAR 690-315-0040(1)(c).

⁴Pursuant to ORS 537.230(5), upon the completion of beneficial use of water allowed under the permit, the

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. OAR 690-315-0050(5).

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-53694 from October 1, 2015, to October 1, 2024.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Permit Amendment Condition**
The permit holder shall submit an Application for Permit Amendment by no later than June 1, 2022, requesting authorization of the point of diversion developed on Twomile Creek. If the Application for Permit Amendment is not submitted by June 1, 2022, the Extension of Time to October 1, 2024, will be terminated.
2. **Development Limitation Condition**
The use of water under Permit S-53694, shall be limited to no more than 37.52 acres of cranberry use developed by October 1, 2015, further limited to no more than 1.7 cfs of water from Twomile Creek; a maximum of 8.42 AF of water stored in Reservoir #1 under Permit R-12893; and a maximum of 5.0 AF of stored water in Reservoir #2, and 9.0 AF of stored water in Reservoir #6, authorized under Permit R-12984.

DATED: November 30, 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.*

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.

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 14, 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.

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- 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 : Water Right Services Division
725 Summer St NE, Suite A
Fax: 503-986-0901 Salem, OR 97301-1266
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