

ACRONYM QUICK REFERENCE

Department – Oregon Water Resources Department

PFO – Proposed Final Order

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) contain the factors that the Department must consider to make findings that support a “good cause” determination.

FINDINGS OF FACT

1. On August 15, 2000, Permit R-12894 was issued by the Department. The permit authorizes the storage of up to 32.0 AF of water being 5.0 AF in Reservoir #2, 5.0 AF in Reservoir #4, 4.0 AF in Reservoir #5, 9.0 AF in Reservoir #6, and 9.0 AF in Reservoir #7 from three unnamed streams (#2, 4, 5) and field runoff, tributaries of Two Mile Creek, and Two Mile Creek, a tributary of the Pacific Ocean, to be appropriated under Application S-73857, Permit 53694 for cranberry operations. The permit specified actual construction was to begin by August 15, 2001, and the reservoir shall be filled and complete application of water was to be made on or before October 1, 2004.
2. One prior permit extension has been granted for Permit R-12894. The Final Order on Extension of Time, issued November 16, 2010, resulted in the completion dates for construction being extended to October 1, 2015, and full application of water being extended to October 1, 2015.
3. On August 5, 2021, the permit holder, Jack, Sheri, or Barbra Fugate, submitted an “Application for Extension of Time” to the Department, requesting the time to complete

construction of the water system be extended from October 1, 2015, to October 1, 2031 and the time to apply water to full beneficial use under the terms of Permit R-12894 be extended from October 1, 2015, to October 1, 2031.

4. Notification of the Application for Extension of Time for Permit R-12894 was published in the Department's Public Notice dated August 31, 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 August 5, 2021, the Department received a completed Application for Extension of Time 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.*¹

9. During the most recent extension period, being from October 1, 2004, to October 1, 2015, no additional work towards the development of the reservoirs authorized by Permit R-12894, and the storage of additional water has been accomplished.

The Application does not provide evidence of progress made towards completion of the water development and application of water to full beneficial use as allowed in the time period specified in the permit. Therefore, the Department cannot find good cause or reasonable diligence towards the complete application of water to beneficial use under work has been accomplished within the time allowed in Permit R-12894.

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

The water right permit holder's conformance with the permit and previous extension conditions.

10. The Department has considered the permit holder's compliance with conditions, and has not identified any concerns.
11. The Application identifies that meters or measuring devices have not been installed in all authorized reservoirs, but further explains that it is due to these reservoirs have not been constructed.

Based on FOF 10, the Department has determined the permit holder has demonstrated compliance with permit conditions for the reservoirs that have been constructed.

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 volume of 26.0 AF of water has been stored in Reservoir #2, and #6. This exceed the volume authorized for storage in these reservoirs. The permit authorized the storage of 5.0 AF of water in Reservoir #2, and 9.0 AF of Water in Reservoir #6. No water has been stored in Reservoir #4, or Reservoir #5.
13. The delay of full beneficial use of water under Permit R-12894 was due, in part, to depressed and uncertain cranberry prices.

¹ "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.

Based on FOF 10, 11, and 12, the Department has determined beneficial use of water has been demonstrated in Reservoir #1, Reservoir #2, and Reservoir #6.

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 \$969,000, which is about 79 percent of the total projected cost for complete development of this project. An additional \$250,000 investment is needed for the completion of this project.
15. The Application identified a number of expenditures that are not related to the development of the reservoirs authorized by the permit and development of the remaining storage of water. These expenditures include work to begin construction of Reservoir #3, which is not authorized under the permit, clearing of ground for irrigation under Permit S-53694, and expenditures for C.W.R.E work to resolve water right issues. These expenditures are not towards the development of the authorized storage under Permit R-12864, and are not included in the above finding.

Based on FOF 15, the Department finds that there has been no investment towards the development of Permit R-12894 during the most recent extension of time period. The Application does not establish reasonable diligence has been demonstrated in the development of Permit R-12894.

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

The application provides evidence that no work has been accomplished towards completion of the water system during the most recent extension of time period; the permit holder has demonstrated compliance with permit conditions, and; beneficial use of water has been demonstrated. The Department has determined the applicant has not demonstrated reasonable diligence in previous performance under Permit R-12894.

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 available during the months of May through November at the 50% exceedance level.

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

21. 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.

22. An approximate total of \$972,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

23. 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.

24. 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)]

25. 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)]

26. The Application identifies complication with wetland permitting while attempting to construct Reservoir #3. Reservoir#3 is not an authorized storage facility under Permit R-12894.

27. The Application does not identify any additional government requirement which delayed the construction of the reservoirs authorized under Permit R-12984.

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

28. No unforeseen events were identified that extended the length of time needed to fully develop and perfect Permit R-12894.

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

29. The Application identifies a denial would result in an undue hardship.

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

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

Based on FOF 9, 11, 15, and 22, above, the Department finds that the Applicant has not demonstrated good faith.

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.

31. As of August 5, 2021, the permit holder states the remaining work to be completed consists of beginning and completing construction of the remaining reservoirs, and the storage of water for beneficial use.

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 not 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 complied with begin actual construction timeline requirements pursuant to ORS 537.230 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. The application established that there has been no construction, no financial invest or reasonable diligence towards development of this permit during the most recent extension of time period, or since. The permit holder has not 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).

continued on following page

PROPOSED ORDER

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

Deny the time to complete construction of the water system under Permit R-12894 from October 1, 2015 to October 1, 2031.

Deny the time to apply water to beneficial use under Permit R-12894 from October 1, 2015 to October 1, 2031.

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.*

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:

