

**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-12913, Water Right Application G-13084, in )	)	FINAL
the name of Joe Hitz )	)	ORDER

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Permit Information

Application:	G-13084
Permit:	G-12913
Basin:	16 – Umpqua / Watermaster District 16
Date of Priority:	August 20, 1992
Source of Water:	two wells in Butte Creek Basin
Purpose or Use:	irrigation of 44.6 acres and supplemental irrigation of 19.5 acres
Maximum Rate:	0.641 cubic foot per second (cfs), being 0.244 cfs for supplemental irrigation of 19.5 acres and 0.557 cfs for irrigation of 44.6 acres

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***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 30, 2020, to October 1, 2027.
- Grant an extension of time to apply water to full beneficial use from October 30, 2020, to October 1, 2027<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 537.630 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315.

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<sup>1</sup>Pursuant to ORS 537.630(5), upon the completion of beneficial use of water allowed under the permit, the permittee shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permittee shall submit a map of the survey and a new or revised claim of beneficial use as deemed appropriate by the Department.

## **ACRONYM QUICK REFERENCE**

Agent – Bill Ferber  
Application – Application for Extension of Time  
Department – Oregon Department of Water Resources  
FOF – Finding of Fact  
PFO – Proposed Final Order  
Well 1 – CLAC 2193  
Well 2 – MARI 18297  
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. Permit G-12913 was granted by the Department on October 28, 1996. The permit authorizes the use of up to 0.641 cfs of water from two wells in Butte Creek Basin for primary irrigation of 44.6 acres and supplemental irrigation of 19.5 acres. The permit

specified actual construction of the well to begin by October 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 23, 1999, a Final Proof Survey and Claim of Beneficial Use was submitted indicating “Irrigation and Supplemental Irrigation of 64.1 acres” was developed. The Final Proof Survey and Claim of Beneficial Use were not reviewed by the Department because no pump test was submitted.
3. One prior permit extensions have been granted for Permit G-12913. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 1999, to October 30, 2020.
4. On August 31, 2020, the permit holder, Joe Hitz, 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-12913 be extended from October 1, 1999 OR 2020, to October 1, 2027.
5. On September 22, 2020, notification of the Application for Permit G-12913 was published in the Department’s Public Notice. No public comments were received regarding the Application.
6. On March 8, 2021, the permit holder submitted an amendment to the Application. The Amendment was to clarify work accomplished during the most recent extension.

### **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)]**

7. On August 31, 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)]**

8. Actual construction of the well began prior to the October 28, 1997 deadline specified in the permit. Well 2 (MARI 18297) began construction October 29, 1992, and was completed December 14, 1992.

Based on Finding of Fact (FOF) 7, the Department has determined that the prosecution of the construction of the well began prior to October 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.<sup>2</sup>*

9. During the most recent extension period, being from October 1, 1999, to October 30, 2020, a second reel gun was installed.

The Application provides evidence of progress of physical work made towards completion of the water system, enough to qualify as the minimum necessary for the Department to find good cause and reasonable diligence towards complete application of water to a beneficial use.

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

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

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

The Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit G-12913:

**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.*

11. A maximum rate of 255 gallons per minute 0.568 cfs of water has been appropriated from Well 2 for irrigation of 44.0 acres.
12. There is no explanation why full beneficial use of water under G-12913 has been delayed.

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

Beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 30, 2020.

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

13. An investment of approximately \$84,000, has been made which is about 67 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.

Based on FOF 12, the Department has determined that the permit holder had made an investment, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

The Application provides evidence that work has been accomplished towards completion of the water system; the permit holder has demonstrated compliance with permit conditions, a financial investment has been made, and; beneficial use of water has been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit G-12913.

**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.

14. 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-12913; 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).

15. The points of appropriation for Permit G-12913, located within the Butte Creek Basin, are not located within a limited or critical groundwater area.
16. Butte Creek is not located within or above any state or federal scenic waterway.
17. The points of appropriation are not in an area listed by the Department of Environmental Quality as a water quality limited stream.

**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.

18. Butte Creek is located within an area ranked “high” 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.

19. An approximate total of \$84,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

20. The Application identifies family members and others working at the farm as economic interests dependent on the completion of the project.

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

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

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

22. 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 2 of the "Limitations and Conditions" section of this PFO to meet this condition.

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

23. 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)]**

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

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

25. Water quality issues from Well 1 have been identified as an unforeseen event.

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

26. A denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs. The Application identifies a minimum of 26.0 acres of irrigation and 19 acres of supplemental irrigation would be lost if the extension is not approved. The Application identifies that a portion of the place of use was sold, and the current land owners would not extend the lease.

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

27. The Application provides evidence of good faith of the appropriator under Permit G-12913.

Based on FOF 7, 8, 9, 10, 11, 12, and 18, 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.*

28. As of August 31, 2020, the remaining work to be completed consists of submitting a permit amendment to request a change in point of appropriation for Well 1, and request a change in place of use, and if approved, completing construction of the water system, meeting all permit conditions, and applying water to full beneficial use.
29. With approval of this Extension of Time, the permit holder is provided nearly 31 years for the complete development of the water system. The Application for Extension of

Time identifies minimal work accomplished during the previous 21 years. Additionally, the record identifies the total of 44.0 acres of irrigation has been developed previously, and the only work left to be accomplished to fully develop the allowable rate from Well 1 under Permit G-12913.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2027, 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-12913 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, and/or mitigate the effects of the subsequent development on competing demands on the resource. Based on FOF 28, 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 minimal additional work having been accomplished during the previous 21 years.
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, 25, and 28, the Department has determined the need to place a condition on this extension of time requiring the permit holder to obtain written permission from the current land owner for any property where the place of use will be removed as part of any permit amendment. This condition is specified under Item 2 of the "Conditions" section of this PFO, was determined necessary due to the change of ownership of the previously developed underlying land.



3. 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 3 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 7, through 26, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2027, as required by OAR 690-315-0040(1)(c).
4. The applicant can complete the project within the time period requested for the extension on the project, and is granted only for the reasonable time necessary to complete water development and apply water to beneficial use. OAR 690-315-0050(5).
5. The applicant has demonstrated good cause for the extension, 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).

**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:

Extend the time to complete construction of the water system under Permit G-12913 from October 30, 2020, to October 1, 2027.

Extend the time to apply water to beneficial use under Permit G-12913 from October 30, 2020, to October 1, 2027.

Subject to the following conditions:

### LIMITATIONS AND CONDITIONS

1. **Last Extension Condition**

This may be the last extension of time granted for Permit G-12913. Any future extensions of time request will be denied, unless the only work left to be accomplished is to demonstrate compliance with any permit conditions necessary to perfect the water use. Future extension may only be granted for sufficient time to demonstrate compliance with conditions, and will not be granted for additional development or alteration by permit amendment. Future changes in place of use after the completion of this development period, ending October 1, 2027, may only be approved after a water right certificate is issued confirming the beneficial use of water under this permit. If the permit holder intends to submit a permit amendment to request changes under this permit, it is the responsibility of the permit holder to submit the request with sufficient time for the Department to review the request, and issue a determination. Any permit amendment submitted after October 1, 2026, will not be provided additional time for the completion of review of the request.

2. **Permit Amendment Condition**

If a Permit Amendment is submitted requesting the change in place of use for any portion of the currently authorized lands not owned by the permit holder, the Permit Holder shall submit proof of authorization from the current land owners to move the place of use from the land currently authorized.

No change in place of use may be authorized unless the owners of the underlying land provide authorization allowing the change.

3. **Checkpoint Condition**

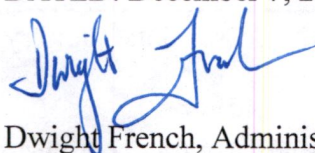
The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2023. A form will be enclosed with your Final Order.**

- (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: December 7, 2021



Dwight French, Administrator,  
Water Right Services Division  
Proposed Final Order Hearing Rights

*If you have any questions,  
please check the information  
box on the last page for the  
appropriate names and  
phone numbers.*

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 21, 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 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 503-986-0900.
  - 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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