

**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-12933, Water Right Application G-14107, in	)	FINAL
the name of Keystone Pacific LLC c/o Chuck Eggert	)	ORDER

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Permit Information

Application:	G-14107
Permit:	G-12933
Basin:	2B – Middle Willamette / Watermaster District 16
Date of Priority:	June 26, 1995
Source of Water:	Well #1 and Well #2 in Pudding River Basin
Purpose or Use:	agricultural use (nursery use) on 137.5 acres
Maximum Rate:	5.16 cubic feet per second (cfs)

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***Please read this Proposed Final Order in its entirety***

*In Summary, the Department proposes to:*

- Grant an extension of time to complete construction of the water system from October 1, 1998, to October 1, 2020.
- Grant an extension of time to apply water to full beneficial use from October 1, 1999, to October 1, 2020<sup>1</sup>.

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 – Doann Hamilton  
Application – Application for Extension of Time  
Department – Oregon Department of Water Resources  
FOF – Finding of Fact  
PFO – Proposed Final Order  
Well 1 – MARI 172  
Well 2 – MARI 168  
cfs - cubic feet 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.

## FINDINGS OF FACT

1. On October 29, 1996, Permit G-12933 was issued by the Department. The permit authorizes the use of up to 5.16 cfs of water from Well #1 and Well #2 in Pudding River Basin for agricultural use (nursery use) on 137.5 acres. The permit specified actual construction of the well to begin by October 29, 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. A claim of beneficial use was submitted on September 16, 1999.
2. On September 16, 2019, an assignment by proof from Femrite Nursery Company to Keystone-Pacific LLC, c/o Chuck Eggert, was recorded in the records of the Water Resources Department.

3. On January 10, 2022, the permit holder, Chuck Eggert, owner of Keystone-Pacific LLC, submitted an "Application for Extension of Time" (Application) to the Department, requesting the time to complete construction of the water system be extended from October 1, 1998, to October 1, 2024, and the time to apply water to full beneficial use under the terms and conditions of Permit G-12933 be extended from October 1, 1999, to October 1, 2024. This is the first permit extension requested for Permit G-12933.
4. On February 1, 2022, notification of the Application for Permit G-12933 was published in the Department's Public Notice. No public comments were received regarding the Application.

**Review Criteria [OAR 690-315-0040]**

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

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

5. On January 10, 2022, 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 well began prior to permit issuance.
7. According to the well log received by the Department on January 31, 1966, construction of MARI 172 (Well 1) began October 20, 1965.
8. According to the well log received by the Department on August 30, 1976, construction of MARI 168 (Well 2) began August 14, 1976.

Based on Finding of Fact (FOF) 10 and 11, the Department has determined that the prosecution of the construction of the well began prior to October 29, 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 permit.<sup>2</sup>*

9. Construction of the wells began prior to permit issuance.
10. The Application for a Permit to Appropriate Groundwater, submitted June 26, 1995, identified that all 137.5 acres described in the application are covered under water right Certificate 54874, and Water Right Certificate 36410, using the existing Well 1 and Well 2; and the existing water system.
11. During the original development time frame under Permit G-12933, a meter was installed on Well 2.
12. Since October 1, 1999, a meter was installed on Well 1. The Application identifies a meter was installed on Well 1 in April 2020.

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. However, the Application does not provide evidence of additional development of the rate of appropriation from the wells beyond what has previously been demonstrated under Certificate 54874 and Certificate 36410. The Department has determined an extension of time to allow for additional development of the rate of appropriation under this permit is not reasonable because no additional development has occurred since prior to permit issuance.

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

*The water right permit holder's conformance with the permit conditions.*

13. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the record does not show that a meter or other suitable measuring device has been installed on Well 1 by October 1, 1999, (2) the required March static water level measurements have not been received by the Department by October 1, 1999, and (3) annual reports of the amount of water used each month have not been received by the Department by October 1, 1999.

Based on FOF 13, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-12933:

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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.

- ” Before any water use...mete may begin under this permit, the permittee shall install a meter or other suitable measuring device as approved by the Director. The permittee shall maintain the meter or measuring device in good working order, shall keep a complete record of the amount of water used each month and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as may be required by the Director.”; and
- “To monitor the effect of water use from the well(s) authorized under this permit, the Department requires the water user to make and report annual static water level measurements. The static water level shall be measured in the month of March.”

In order to legally perfect the use of water under this permit, the permit holder must demonstrate that all conditions of the permit have been satisfied.

The Department has determined an extension of time to allow for demonstration of compliance with permit conditions is reasonable and necessary.

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

*The amount of beneficial use made of the water during the permit time limits.*

14. A maximum rate of 1.67 cfs of water has been appropriated, being 1.34 cfs from Well 1, and 0.33 cfs from Well 2 for agriculture use (nursery use) on 137.5 acres.

Beneficial use of water, in compliance with the terms and conditions of Permit G-12933 has not been demonstrated under this permit as all permit conditions were satisfied by October 1, 1999. The Department has determined an extension of time to October 1, 2020, would allow for demonstration of compliance with the terms and conditions of Permit G-12933.

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

15. An approximate total of \$40,100 has been invested. The costs included items associated with static water level measurements, pump tests, and permit assignment, which are 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 \$35,000 which is about 81 percent of the total projected cost for complete development of this project. An additional \$8,000 investment is needed to complete this project, which includes improving production from Well 2.

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.

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

The Application provides evidence of progress towards completion of the water system; a financial investment has been made; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use has not been demonstrated. The Department has determined the applicant has demonstrated the minimum necessary for the Department to find reasonable diligence towards complete application of water to a beneficial use.

### **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-12933; 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).

17. The points of appropriation for Permit G-12933, located within the Pudding River Basin, is not located within a limited or critical groundwater area
18. Pudding River is not located within or above any state or federal scenic waterway.

19. 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.

20. Pudding River is located within an area ranked “moderate” 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.

21. An approximate total of \$40,100 has been invested in the project.

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

Other economic interests dependent on completion of the project.

22. Other economic interests dependent on completion of the project have not been identified.

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

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

23. 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)]**

24. 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)]**

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

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

26. The current permit holder believed compliance with permit conditions had been demonstrated by the previous permit holder.

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

27. 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 original permit holder submitted a Claim of Beneficial Use in September 1999. Keystone-Pacific LLC acquired the property from Femrite Nursery Company in 2011, and believed compliance with conditions has been demonstrated prior to the completion date. A denial of the extension of time would result in the loss of the use of water developed under this permit.

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

28. The Application provides evidence of good faith of the appropriator under Permit G-12933, enough to allow for an extension of time to demonstrate compliance with permit conditions.

Based on FOF 6, 7, 8, 9, 10, 11, 12, 15, and 21, 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.*

29. As of January 10, 2022, remaining work to be completed consists of increasing the yield from Well 2, and applying water to full beneficial use.
30. The Application does not provide evidence of additional development since permit issuance.

Given the amount of time provided for development of Permit G-12933, and no additional development occur, the Department has determined that the permit holder's request to have until October 1, 2024, 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-12933 is not reasonable. The Department has determined an extension of time to October 1, 2020, is both reasonable and necessary to allow for demonstration of compliance with permit conditions.

**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 October 1, 2020, to complete construction and apply water to 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 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 6, through 28, completion of construction and application of water to beneficial use can be accomplished by October 1, 2020, as required by OAR 690-315-0040(1)(c).
4. The applicant can complete the project within the time period requested for the extension on the project, but the extension is 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.

### 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-12933 from October 1, 1998, to October 1, 2020.

Extend the time to apply water to beneficial use under Permit G-12933 from October 1, 1999, to October 1, 2020.

DATED: March 15, 2022



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 **April 29, 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
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- Fax: 503-986-0901

