

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-52994, Water Right Application S-74012) FINAL
in the name of Arriola Bogs, LLC McKenzie Family Properties, LLC,) ORDER
and Northwest Farm Credit Services, FLCA

Permit Information

Application:	S-74012
Permit:	S-52994 (modified by Permit Amendment T-8138)
Basin:	South Coast / Watermaster District 14
Date of Priority:	April 11, 1994
Source of Water:	two unnamed reservoirs constructed under application R-74011, Permit R-12096, tributaries of Floras Lake
Purpose or Use:	cranberry operations on 70.0 acres
Maximum Rate/Volume:	125.0 acre-feet (AF)

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 1, 2010, to October 1, 2021.
- Grant an extension of time to apply water to full beneficial use from October 1, 2010, to October 1, 2021.¹
- Make the extension subject to certain conditions set forth below.

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

ACRONYM QUICK REFERENCE

¹ 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.

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

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 March 12, 1997 Permit S-52994 was issued by the Department. The permit authorizes the use of up to 125.0 AF of water from the two unnamed reservoirs constructed under application R-74011, Permit R-12096, tributaries of Floras Lake, for cranberry operations on 70.0 acres. The permit specified actual construction was to begin by March 12, 1998, and construction of the water system was to be completed by October 1, 1999, and complete application of water was to be made on or before October 1, 2000.
2. On May 25, 1999, the Department approved Permit Amendment T-8138 (Special Order Volume 53, Page 768) authorizing a change in the place of use, a change in the point of diversion, and additional point of diversion under Permit S-52994. (modified by Permit

Amendment T-8138) which is hereafter referred to simply as Permit S-52994.

3. On May 31, 2000, a partial assignment from Scott H. McKenzie, to Brian and Kyle Arriola, was recorded in the records of the Water Resources Department.
4. One prior permit extension has been granted for S-52994. The extension request resulted in the completion dates for construction being extended from October 1, 1999, to October 1, 2010, and full application of water being extended from October 1, 2000, to October 1, 2010.
5. On October 19, 2020, a partial assignment from Scott H. McKenzie, to McKenzie Family Properties, LLC, a Limited Liability Company, and Northwest Farm Credit Services, FLCA, was recorded in the records of the Water Resources Department.
6. On November 12, 2020, Scott McKenzie, owner of McKenzie Family Properties, 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, 2010, to October 1, 2021, and the time to apply water to full beneficial use under the terms and conditions of Permit S-52994 be extended from October 1, 2010, to October 1, 2021. This is the first permit extension requested for Permit S-52994.
7. On December 8, 2020, notification of the Application for Permit S-52994 was published in the Department's Public Notice. No public comments were received.
8. On September 9, 2021, an updated application was submitted to the Department. The updated Application included work accomplished on the Arriola Boggs property, and changing the date being requested for complete construction and application of water from October 1, 2021, to October 1, 2032.
9. On November 19, 2021, a partial assignment from Brian and Kyle Arriola, to Arriola Boggs, LLC, was recorded in the records of the Water Resources Department.

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)]

10. On September 9, 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)]

11. Actual construction of the water system began prior to the March 12, 1998 deadline

specified in the permit.

12. According to the Notice of Beginning of Construction submitted on September 28, 2000, construction began October 20, 1997.

Based on Findings of Fact (FOF) 11, and 12, the Department has determined the permit holder began construction prior to March 12, 1998.

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

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

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

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

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

The amount of construction completed within the time allowed in the permit or previous extension.²

13. During the most recent extension period, being from October 1, 2000, to October 1, 2010, work accomplished within the time allowed in previous extension includes:

- constructed additional cranberry bogs and installed pvc conveyance pipe, gate valves, and sprinkler heads on an additional 14.1 acres; (McKenzie Property)
- expanded Reservoir 1, constructed under Permit R-12096, to the 100 AF authorized capacity; (McKenzie Property)
- began construction of Reservoir 2, authorized under Permit R-12096; (Arriola Property) and
- began construction on 12 acres of bogs. (Arriola Property)

14. Since October 1, 2010, the permit holder has accomplished the following:

- constructed an additional 12.4 acres of bogs (McKenzie Property); and
- installed three totalizing flow meters and an irrigation control system (McKenzie

² “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.

Property).

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 permit or previous extension conditions.

15. The Department has considered the permit holder's compliance with conditions and did not identify any concerns.

Based on FOF 15, the Department has determined that the permit holder has demonstrated compliance with following permit conditions as required by Permit S-52994.

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

The amount of beneficial use made of the water during the permit time limits or previous extension time limits.

16. A maximum volume of 65.0 AF of water has been diverted from Reservoir 2 constructed under application R-74011, Permit R-12096, tributaries of Floras for cranberry operations on 44.2 acres.

Based on FOF 16, the Department has determined that beneficial use of water has been demonstrated under Permit S-52994.

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

17. The permit holder has invested approximately \$219,267, which is about 39 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$350,000 investment is needed for the completion of this project.

Based on FOF 17, the Department has determined that the permit holder had made an investment, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

The Application provides evidence that work has been accomplished towards completion of the water system; the permit holder has demonstrated compliance with permit conditions; a financial investment has been made, and; beneficial use of water has been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit S-52994.

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.

18. A review of the amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit S-52994; 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.
19. Current Water Availability Analysis has determined that 125.0 AF of water is authorized for storage, being 100 AF in Reservoir 1, and 25 AF in Reservoir 2, constructed under R-12096, to be appropriated under Permit S-52994.
20. As of September 9, 2021, the Claim of Beneficial Use for Permit R-12096 has not been submitted. The Department may find that less storage water is available for use under Permit S-52994 upon review of a Claim of Beneficial Use or Application for Extension of Time for Permit R-12096. The current date for completion of construction and the storage of water under Permit R-12096, is October 1, 2010. The use of water under Permit S-52994 for storage developed after October 1, 2010, under Permit R-12096 may not be perfected unless an extension of time is approved for Permit R-12096, allowing additional time to complete construction and to store water after October 1, 2010.

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).

21. The points of diversion are located on two unnamed reservoirs, constructed under

application R-74011, Permit R-12096, tributaries of Floras Lake, and are not located within a Withdrawn Area.

22. Floras Lake is not located within or above a state or federal scenic waterway.
23. The points of diversion are not in a location 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.

24. two unnamed reservoirs constructed under application R-74011, Permit R-12096, tributaries of Floras Lake is located within an area ranked “low” 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.

25. An approximate total of \$219,267 has been invested in the project.

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

Other economic interests dependent on completion of the project.

26. The Application identifies interests of the family business and benefits to the regional economy as additional interests.

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

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

27. 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)]

28. 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 690-315-0042(2)(g)]

29. Delay in the development of this project that was caused by other governmental requirements have not been identified.

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

30. Unforeseen events extended the length of time needed to fully develop and perfect Permit S-52994, in that cranberry prices declined which restricted cash flow for additional development of the water use under the permit.

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

31. A denial of the extension would result in undue hardship in that investment made since 2010 would be lost without an extension of time.

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

32. The Application provides evidence of good faith of the appropriator under Permit S-52994.
33. The Application does not provide evidence of diligence in the development of the water use on the Ariola Property, as no water has been used, and only minimum construction has occurred in the 24 years between the date the permit was issued and the date this Application for Extension of Time was submitted.

Based on FOF 11, 12, 13, 14, 15, 16, 17, and 25, the Department has determined that the applicant has shown good faith and reasonable diligence to allow for an extension of time to October 1, 2021.

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.

34. As of September 9, 2021, the permit holder states the remaining work to be completed consists of completing construction of the remaining 25.8 acres (Arriola Property) for cranberry use and applying water to full beneficial use.
35. Permit S-52994 was issued on March 12, 1997, and an extension of time to October 1, 2032, would allow for more than 35 years for development of the authorized water use.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2032, to complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit S-52994 is not reasonable. The Department has determined an extension of time to October 1, 2021, 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).

Permit S-52994 was issued on March 12, 1997, and on January 22, 2002, was extended to October 1, 2010. During this period, an additional 14.1 acres were put into cranberry production on the McKenzie Property. During the same period, construction began on Reservoir 2 and 12 acres of cranberry bogs on the Ariola Property. The Application does not identify that water has been stored in Reservoir 2, or that cranberry operations were developed on the 12 acres of bogs where construction began. The Application further identifies that 10.2 acres of cranberry bogs were developed on the McKenzie Property in 2011, and another 2.2 acres of cranberry bogs were developed on the McKenzie Property in 2020. The Application identifies that there was an intent to file Application for Extension of Time in 2010, when one was filed for related Permit G-13029, which resulted in the date for complete application of water under Permit G-13029 being extended to October 1, 2020, however, the application was not filed. This extension of time is being approved only for the time necessary to allow for perfection of the water use which was developed by October 1, 2021. This extension of time provides 24 years to develop the water use authorized on March 12, 1997. Good cause does not exist to allow for additional development beyond 2021.

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 to October 1, 2021, 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. 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 the amount of time provided for development of the water use to date, and the relatively small amount of additional development that has occurred since 2011.
2. 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. The Department determined the need to place a "Claim of Beneficial Use Condition" on this extension of time in order to ensure diligence is exercised in the 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 the amount of time since permit issuance, and the limitation on additional development beyond October 1, 2021, as conditioned by this

extension of time.

CONCLUSIONS OF LAW

1. The Applicant has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The Applicant complied with construction timeline requirements to begin 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 11, through 35, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2021³, as required by OAR 690-315-0040(1)(c).
4. The Applicant can complete the project within the time period requested for the extension on the project.
5. The Applicant has demonstrated good cause for the extension, but the extension must be conditioned to ensure this is the last extension granted in order to mitigate the effects of subsequent development on the resource; 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 complete construction of the water system under Permit S-52994 from October 1, 2010, to October 1, 2021.

Extend the time to apply water to beneficial use under Permit S-52994 from October 1, 2010, to October 1, 2021.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. Last Extension Condition

This may be the last extension of time granted for Permit S-52994. Any future extensions of time request that would result in additional development of new acres to cranberry use after October 1, 2021, will be denied. An additional extension of time may only be granted if an issue with compliance with conditions is discovered during

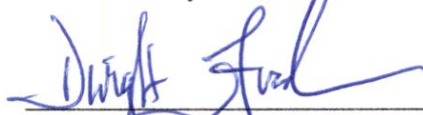
³Pursuant to ORS 537.230(5), upon the completion of beneficial use of water allowed under the permit, the permittee shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permittee shall submit a map of the survey and a new or revised claim of beneficial use as deemed appropriate by the Department.

review of the Claim of Beneficial Use, however, the extension of time may only be granted if a Claim of Beneficial Use has been submitted, and the extension of time will be conditioned to limit development to that which is reported in the claim of beneficial use, and occurred prior to October 1, 2021. ORS 539.010(5); OAR 690-315-0040.

2. **Claim of Beneficial Use Condition**

Each permit holder shall submit claim of beneficial use and request for certificate issuance by no later than July 26, 2023. Failure to submit the required claim of beneficial use by July 26, 2023, shall result in the cancelation of the portion of the permit for which a claim of beneficial use has not been submitted. The Department may proceed with issuance of a Certificate of Water Right for a partial claim of beneficial use, submitted by any permit holder of record, in absence of the partial claim of beneficial use submitted by any other permit holder of record.

DATED: July 26, 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 **September 9, 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
Salem, OR 97301-1266

Fax: 503-986-0901
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