

**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 R-14999, Water Right Application R-87763 ) FINAL  
in the name of Irl M. Davis ) ORDER

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**Permit Information**

Application:	R-87763
Permit:	R-14999
Basin:	Deschutes / Watermaster District 3
Date of Priority:	November 3, 2015
Source of Water:	Spring 1, tributary to Butler Canyon, and Spring 2 and Spring 3, tributaries to White River
Storage Facility:	Reservoir 1, Reservoir 2, and Reservoir 3
Purpose or Use of the Stored Water:	domestic, irrigation, recreation, wildlife, livestock, and fish
Maximum Rate/Volume:	10.0 AF, being 0.5 AF in Reservoir 1, 9.0 AF in Reservoir 2, and 0.5 AF in Reservoir 3 acre-feet (AF)

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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 January 7, 2018, to October 1, 2024.
- Grant an extension of time to apply water to full beneficial use from January 7, 2018, to October 1, 2024.<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 537.230 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315

**ACRONYM QUICK REFERENCE**

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<sup>1</sup> 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.

**INCLUDE ONLY IF CONDITIONS REQUIRED**

**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.

**INCLUDE ONLY IF CHECKPOINTS REQUIRED**

**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. On January 7, 2013 Permit R-14999 was issued by the Department. The permit authorizes the storage of up to 10.0 AF, being 0.5 AF in Reservoir 1, 9.0 AF in Reservoir 2, and 0.5 AF in Reservoir 3 AF of water from Spring 1, tributary to Butler Canyon, and Spring 2 and Spring 3, tributaries to White River, for the purpose of domestic, irrigation, recreation, wildlife, livestock, and fish uses. The permit specified construction of the water system was to be completed by January 7, 2013, and complete application of water was to be made on or before January 7, 2013.

2. On July 27, 2022, Irl M. Davis, submitted an “Application for Extension of Time” (Application) to the Department, requesting the time to complete construction of the water system be extended from, January 7, 2013, to October 1, 2024, and the time to apply water to full beneficial use under the terms and conditions of Permit R-14999 be extended from January 7, 2013, to October 1, 2024. This is the first permit extension requested for Permit R-14999.
3. On August 9, 2022, notification of the Application for Permit R-14999 was published in the Department’s Public Notice. No public comments were received.

**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)]**

4. On July 27, 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)]**

5. Construction of Reservoir 1 began prior to permit issuance. The permit holder states, construction of the concrete reservoir began in the 1960’s

Based on Findings of Fact (FOF) 5, the Department has determined the permit holder began construction prior to January 7, 2013.

**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.*<sup>2</sup>

6. Construction of the water system or reservoir began prior to January 7, 2013.
7. No other work was accomplished during the original development time frame under Permit R-14999.
8. Since January 7, 2013, tanks for Spring 2 and Spring 3 were installed and 2" pipe installed to deliver spring water to reservoirs

The Application provides evidence that progress of physical work, enough to qualify as the minimum necessary, has been made towards completion of the water system 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.*

9. 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 totalizing flow meter or other suitable measuring device has been installed by January 7, 2013, and (2) the required outlet pipes have not been installed by January 7, 2013.

Based on FOF 9, the Department has determined that the permit holder has not demonstrated compliance with following (or any of the) permit conditions as required by Permit R-14999:

Beneficial use of water under this permit, therefore, has not yet been demonstrated. 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.

**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.*

10. The Application states a maximum volume of 10.0 AF of water has been stored from the Spring 1, tributary to Butler Canyon, and Spring 2 and Spring 3, tributaries to White River.

Based on FOF 9, the Department has determined that beneficial use of water has not been demonstrated under Permit R-14999.

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

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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.

11. The approximate total of \$8,850 has been invested. The costs included items associated with installation of seven stand pipes for irrigation. Permit R-1499 authorizes the storage of water, to be appropriated for irrigation under another right, therefore the construction associated with the irrigation system is not considered construction required to complete the storage of water. After deducting these costs, the approximate total investment for “actual construction” to date is approximately \$7500 which is 75 percent of the total projected cost for complete development of this project. An additional \$2,500 investment is needed to complete this project, installation of the required outlet pipes and flow meters.

Based on FOF 11, 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 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.

12. 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 R-14999; 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.
13. Current Water Availability Analysis for White River, (Tributary to Deschutes River) at the mouth (watershed ID 70088) show that no water is available during the months of July through December 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).

14. The point(s) of diversion is/are located on a tributary to Butler Canyon, and tributaries to White River, and is/are not located within a Withdrawn Area.
15. White River is located above Deschutes Scenic Waterway.
16. 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.

17. Spring 1, tributary to Butler Canyon, and Spring 2 and Spring 3, tributaries to White 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.

18. An approximate total of \$7,850 has been invested in the project.

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

Other economic interests dependent on completion of the project.

19. Other economic interests dependent on the 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.

20. 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)]**

21. 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)]**

22. 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)]**

23. The permit holder identifies supply chain issues associated with the Covid-19 pandemic as unforeseen events which delayed the completion of the project.
24. Permit G-14999 had a date for completion of construction and application of water to the beneficial use of January 7, 2018. The first declared case of the coronavirus infection in the United States was reported on January 20, 2020.

The Department has determined that no unforeseen event caused a delay in the development of the reservoirs under the permit during the authorized development time period being January 7, 2013, through January 7, 2018.

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

25. A denial of the extension would not result in undue hardship.

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

26. The Application provides evidence of good faith of the appropriator under Permit R-14999.

Based on FOF 6, 8, 10, 11, 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.*

27. As of July 27, 2022, the permit holder states the remaining work to be completed consists of completing construction of the water system and applying water to full beneficial use.

Given the amount of development left to 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 R-14999 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. Based on FOF 7, and 9, 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 no additional work having been accomplished during the authorized development timeline, and non-compliance with the terms and conditions of the permit.

**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 6, through 26, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2024<sup>3</sup>, as required by OAR

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<sup>3</sup>Pursuant 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



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, 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).

## 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 R-14999 from January 7, 2018, to October 1, 2024.

Extend the time to apply water to beneficial use under Permit R-14999 from January 7, 2018, to October 1, 2024.

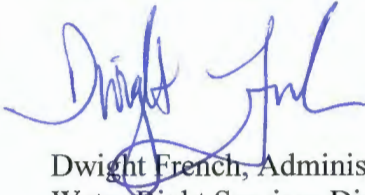
Subject to the following conditions:

## LIMITATIONS AND CONDITIONS

**1. Last Extension Condition**

This will be the last extension of time granted for Permit R-14999. Any future extensions of time request will be denied.

DATED: November 1, 2022



Dwight French, Administrator  
Water Right Services Division  
**Protests**

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

Pursuant to OAR 690-315-0060(1), 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. Protests must be received by the Water Resources Department no later than **December 16, 2022** at this address: Oregon Water Resources Department, Water Right Services Division, 725

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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.

Summer St NE, Suite A, Salem, OR 97301-1266. Protests may not be submitted by electronic mail. OAR 690-002-0025(3).

Protests must be in writing and include all of the following:

- The name, address, and telephone number of the protestant
- A detailed description of the protestant'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
- A detailed description of how the action proposed in the proposed final order would impair or be detrimental to the protestant's interest
- A detailed description of how the proposed final order is in error or deficient, and how to correct the alleged error or deficiency
- If the applicant protests, a statement of whether a hearing is requested
- Citation of legal authority supporting the protestant, if known
- Proof of service of the protest on the water right permit holder, if protestant is other than the water right permit holder, and
- If you are the applicant, the protest fee of \$480 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$950 required by ORS 536.050.

Within 60 days after the close of the period for requesting a contested case hearing, the Director shall either issue a final order on the extension request, or schedule a contested case hearing if a protest has been submitted, and, upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or, the applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests. The hearing will be conducted as provided in Oregon Revised Statutes (ORS) Chapter 183, and Oregon Administrative Rules (OAR) 137-003-0501 to 137-003-0700.

If the applicant does not request a hearing within 30 days after the close of the protest period, or if the request for a hearing is withdrawn, or the Department or the administrative law judge is notified that the protestant will not appear, or the protestant fails to appear, at a scheduled hearing, the Director may issue a Final Order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default.

A party may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 137-003-0555, an agency representative may represent a partnership, corporation, association, governmental subdivision or public or private organization if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

