

**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-15320, Water Right Application R-87930) FINAL
in the name of Andres Blech; Sunny Valley Sand and Gravel) ORDER

Permit Information

Application:	R-87930
Permit:	R-15320
Basin:	Rogue / Watermaster District 14
Date of Priority:	September 12, 2013
Source of Water:	Grave Creek, tributary to Rogue River
Storage Facility:	Reservoir #2
Purpose or Use:	multiple purpose
Maximum Volume:	70.0 acre-feet (AF)
Storage Season:	January 1 through March 31 of each year

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 apply water to full beneficial use from March 22, 2023, to October 1, 2028.¹
- 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

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.

ACRONYM QUICK REFERENCE

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.

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 March 22, 2018 Permit R-15320 was issued by the Department. The permit authorizes the storage of up to 70.0 AF of water in Reservoir #2 from the Grave Creek, tributary to Rogue River, for multiple purpose use. The permit specified construction of the water system was to begin and the permitted volume of water was to be stored within five years from the date of permit issuance, being March 22, 2023.

2. On April 5, 2023, Andres Blech, president of Sunny Valley Sand and Gravel, submitted an "Application for Extension of Time" (Application) to the Department, requesting the time to apply water to full beneficial use under the terms and conditions of Permit R-15320 be extended from March 22, 2023, to October 1, 2028. This is the first permit extension requested for Permit R-15320.
3. On April 11, 2023, notification of the Application for Permit R-15320 was published in the Department's Public Notice. Comments were received from WaterWatch of Oregon and neighboring landowners. The comments submitted by WaterWatch of Oregon identified concerns with the storage season authorized by the permit, and that instream flow requirements provided by IS-71034 (Certificate 72697), were improperly evaluated at the time the permit was issued because the Water Availability Basin (WAB) failed to include the instream flow requirements. Additionally, the comments submitted by WaterWatch and other commentors urged the Department to deny the Application for Extension of Time due to impacts on the creeks in the area and the neighboring lands.
4. On June 2, 2023, Attorneys for the permit holder submitted a response to the comments submitted by WaterWatch.
5. On November 20, 2023, the permit holder submitted additional information. The information provided was in response to the watermaster approval of the plan for installing a liner in the reservoir.

Review Criteria [OAR 690-315-0040]

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

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

6. On April 5, 2023, 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)]

7. According to the Application, construction of the point of Diversion began April 1, 2018, with the installation of the pipeline from the point of diversion to Reservoir #2, excavation of the reservoir area, and construction of berms.

Based on Findings of Fact (FOF) 7, the Department has determined the permit holder began construction prior to March 22, 2023.

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

8. Construction of the water system or reservoir began prior to the March 22, 2023 deadline specified in the permit.
9. During the original development time frame under Permit R-15320, work accomplished includes:
 - excavation of the reservoir;
 - construction of berms;
 - installation of a clay liner; and
 - installation of an approved fish screen

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.

10. The Department has considered the permit holder’s compliance with conditions, and has identified the following concerns: the record does not show that a liner, sufficient to prevent intrusion of groundwater, has been installed to the satisfaction of the watermaster. The Department recognizes that it is the intent of the permit holder to

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.

comply with all permit conditions at the time the conditions become applicable.

The Department has determined that the permit holder has not demonstrated compliance with all permit conditions as required by Permit R-15320.

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.

11. According to the Application, no water has been stored in Reservoir #2.
12. A delay of full beneficial use of water under Permit R-15320 was due, in part, to the inability of the watermaster to approve the liner installed in the reservoir.

The Department has determined that beneficial use of water has not yet been demonstrated under this permit because no water has been stored, and not all permit conditions were satisfied by March 22, 2023.

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

13. The permit holder has invested approximately \$201,900, which is about 98.535871157 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$11,000 investment is needed for the completion of this project.

Based on FOF 13, 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.

14. A review of the amount of water available to satisfy other affected water rights and scenic waterway flows was completed at the time of issuance of Permit R-15320, however, the WAB utilized to determine the water availability was incomplete, and was missing the instream flow requirement provided by IS-71034 (Certificate 72697).
15. A review of the amount of water available to satisfy other affected water rights, including the instream flow requirement provided by IS-71034 (Certificate 72697), indicate that water is only available during the month of February.
16. Current Water Availability Analysis for the Grave Creek, (Tributary to Rogue River) above Burgess Gulch (watershed ID 31531009) show that water is only available during the month of February 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).

17. The point of diversion is located on Grave Creek, tributary to Rogue River, and is not located within a Withdrawn Area.
18. Grave Creek, tributary to Rogue River is located above the Rogue Scenic Waterway.
19. The point of diversion is in a location listed by the Department of Environmental Quality as a water quality limited stream.
 - a. Grave Creek, River Mile 0, to 33.1 listed under Water Quality Limited for; Sedimentation, Habitat Modification, Flow Modification, and Aquatic Weeds and Algae.

- b. Grave Creek, River Mile 0, to 37.6 listed under Water Quality Limited for; Temperature, Alkalinity, pH, E. Coli, Chlorophyll a, Dissolved Oxygen, Ammonia, Biologic Criteria, and Phosphate Phosphorus.

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. Grave Creek, tributary to Rogue River is located within an area ranked “highest” for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife.

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

Economic interests dependent on completion of the project.

21. An approximate total of \$201,900 has been invested in the project.

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

Other economic interests dependent on completion of the project.

22. Employees directly employed by the permit holder would be adversely affected if the permit extension is denied. Additionally, the aggregate provided from the mining operations may be utilized in state and federal infrastructure projects.

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

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

23. Other factors relevant to the market and present demand, which include a re-evaluation of water availability resulting from the correction of information regarding water availability when IS-71034 (Certificate 72697) is correctly applied to the WAB for watershed ID 31531009. 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. The Department has determined the need to place a “Monitoring and Diversion Condition” on the extension of time to limit the diversion of water to only the month of February. This condition is specified under Item 1 of the “Limitations and Conditions” section of this PFO to meet this condition.
24. 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)]

25. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date.

Other Governmental Requirements [OAR 690-315-0042(2)(g)]

26. The Application identifies the inability for the watermaster to approve the installed lining, and issues pertaining to the review and processing of Water Right Transfer T-12837 as additional government requirement which delayed the development of the project.

Though the Department recognizes that the permit holder was reliant upon approval of the installed liner and approval of the above transfer to complete the development authorized by this permit, the Department does not consider these additional government requirements because; 1) the condition requiring the approval of the liner by the watermaster prior to storage has been a requirement under the permit since it was issued, and 2) Water Right Transfer T-12837 is a separate process that was started by the permit holder in regard to other water rights, and was not a requirement under the development of this permit.

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

27. The Application identifies unforeseen events extended the length of time needed to fully develop and perfect Permit R-15320, in that the permit holders believed the installation of a clay liner would be sufficient to prevent groundwater intrusion into the reservoir; and in that the COVID-19 Pandemic resulted in additional delays in processing Water Right Transfer T-12837.

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

28. A denial of the extension would result in undue hardship, and there are no other reasonable alternatives exist for meeting water use needs. The Applicant identifies they also hold Water Right Certificate 3943, which is currently the subject of Water Right Transfer T-12837, and Water Right Permit R-15319, which provide a portion of the water needed for operations at the facility, however these rights are not sufficient to enable operation of the facility for the intended 50 weeks per year.

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

29. The Application provides evidence of good faith of the appropriator under Permit R-15320.

Based on FOF 7, 8, 9, 13, 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.

30. As of April 5, 2023, the permit holder states the remaining work to be completed consists of completing installation of the liner in Reservoir #2, gaining approval of the liner by the watermaster, and storing the volume of water authorized by the permit.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2028, to accomplish storage of water and the application of water to beneficial use under the terms and conditions of Permit R-15320 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 mitigate the effects of the subsequent development on competing demands on the resource. Based on FOF 14, 15, 16, and 23, the Department determined the need to place a "Monitoring and Diversion Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of water use permit. This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary because of the use of an unauthorized point of appropriation; place of use has occurred under this permit.
2. 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 2 of the "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 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 7, through 29, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2028³, 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 conditioned to mitigate the effects of the subsequent development on competing demands on the resource 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. 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).

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 apply water to beneficial use under Permit R-15320 from March 22, 2023, to October 1, 2028.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. Monitoring and Diversion Condition

The storage of any water under Permit R-15320 is subject to this condition. No water may be diverted for storage from Grave Creek during the period of January 1, thru

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.

January 31, and March 1, thru March 31, of each year unless the instream flows provided by Water Right Certificate 72697 are met, being 135.0 cfs for the month of January and 135.0 cfs for the month of March at a point immediately downstream of the point of diversion. The water user is responsible for development of a monitoring protocol, which is subject to the approval of Oregon Water Resources Department. No water may be diverted for storage during these periods until the monitoring protocol is approved, in writing by the Department. Failure to develop and gain approval of a monitoring protocol shall result in the storage season on any Water Right Certificate resulting from Permit R-15320 being limited to the month of February.

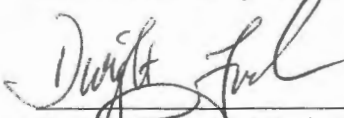
2. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2027. 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: January 23, 2024


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.*

Protests

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 **March 8, 2024**, at this address: Oregon Water Resources Department, Water Right Services Division, 725 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.

Notice Regarding Servicemembers: Active-duty service members have a right to stay 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 800-452-8260, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

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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 Will Davidson at 503-507-2749.
 - 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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