

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-12756, Water Right Application R-83756) FINAL
in the name of James Milgard) ORDER

Permit Information

Application:	R-83756
Permit:	R-12756
Basin:	Deschutes / Watermaster District 24
Date of Priority:	January 22, 1998
Source of Water:	springs and runoff, tributaries of Desert Creek
Storage Facility:	Desert Creek Dam
Purpose or Use:	fish, livestock and recreation
Maximum Rate/Volume:	318 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 apply water to full beneficial use from October 1, 2003 or 2021, 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.

FINDINGS OF FACT

1. On December 13, 1999 Permit R-12756 was issued by the Department. The permit authorizes the storage of up to 318 AF of water, being 208.0 AF for recreation, 100.0 AF for fish use, and 10.0 AF for livestock, in Desert Creek Reservoir from the springs and runoff, tributaries of Desert Creek, for fish, livestock and recreation. The permit specified actual construction was to begin by December 24, 1999 and complete application of water was to be made on or before October 1, 2003.

2. One prior permit extension has been granted for R-12756. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2003 to October 1, 2021. The Application for Extension of Time for this extension was submitted January 7, 2015, and the Final Order on Extension of Time was issued on April 10, 2015.
3. On October 16, 2023, James Milgard, 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-12756 be extended from October 1, 2021, to October 1, 2028.
4. On October 24, 2023, notification of the Application for Permit R-12756 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)]

5. On October 16, 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)]

6. Actual construction of the reservoir began prior to the December 24, 1999, deadline specified in the permit. According to the previous Application for Extension of Time, construction of the reservoir began April 1998.
7. According to the most recent Application for Extension of Time identifies that construction began December 2000.

The two Applications for Extension of Time submitted provide conciliatory information. A previous extension of time was issued based on the information provided in the Application for Extension of Time submitted January 7, 2015.

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. During the most recent extension period, being from October 1, 2003, to October 1, 2021, no additional work has been accomplished.
9. Since October 1, 2021, no additional work has been completed.

The Application does not provide evidence of work accomplished during the most recent extension of time period.

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: (1) written certification from the engineer of record that construction is in accordance with approved plans by October 1, 2021.
11. On October 27, 2023, the State Engineer determined that the plans and letter submitted with the Application for Extension of Time is sufficient to meet the requirements of the permit.

Based on FOF 10, the Department has determined that the permit holder has not demonstrated compliance with permit conditions as required by Permit R-12756 by the most recent date for complete application of water.

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.

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.

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.

12. A maximum volume of 26 AF of water has been stored from the springs and runoff, tributaries of Desert Creek

Based on FOF 10, and 11, the Department has determined that beneficial use has not been demonstrated.

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 \$150,000, which is about 99 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$2,000 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 does not provide evidence of progress towards completion of the water system; however 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 needs this extension of time to store water under the permit after compliance with conditions has been demonstrated.

The Market and Present Demands for Water [OAR 690-315-0040(4)(a-f)]

The Department's determinations of market and present demand for water or power to be supplied shall consider the requirements set forth under OAR 690-315-0040(4)(a-f). In accordance with OAR 690-315-0040(4), the Department shall consider, but is not limited to, the following factors when determining the market and the present demand for water or power to be supplied:

- *(a) The amount of water available to satisfy other affected water rights and scenic waterway flows;*
- *(b) Special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d);*
- *(c) The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife;*
- *(d) Economic investment in the project to date;*

- (e) Other economic interests dependent on completion of the project; and
- (f) Other factors relevant to the determination of the market and present demands for water and power.

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

The amount of water available to satisfy other affected water rights and scenic waterway flows.

14. A review of the amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit R-12756; 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.
15. Current Water Availability Analysis for the South Fork Crooked River (Tributary to Crooked River) at the mouth (watershed ID 70358) show that water is only available during the months of March and April 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).

16. The reservoir is located on tributaries of Desert Creek and is not located within a Withdrawn Area.
17. Desert Creek Reservoir is located above Deschutes Scenic Waterway.
18. The point of diversion is 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.

19. Desert Creek Reservoir 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.

20. An approximate total of \$150,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

21. 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.

22. Since issuance of the permit in December 1999, water availability has diminished and water is no longer available in the month of February.

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

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

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

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

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

25. The Application identifies drought as unforeseen events which caused delay in the storage of water.
26. Based on information in the file and applications, delay was caused by the death of the engineer of record and difficulty finding the necessary paperwork and plans to be submitted.

Based on the information provided in this and previous Applications for Extension of Time, the delay in the storage of water under the permit is the result of not submitting the required documentation to be able to store water.

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

27. The Applicant states denial of the extension would result in undue hardship, in that an unpermitted reservoir would remain if the extension is denied.

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

28. The Application does not provide evidence of good faith of the appropriator under Permit R-12756 during the most recent extension.

29. The submittal of the letter from an engineer with the Application for Extension of Time submitted October 16, 2013, allows the permit holder to begin storing water under the permit.

The Department has determined that the applicant has shown minimal good faith and reasonable diligence. However with the submittal of a letter from an engineer indication construction has been completed in accordance with the plans a specifications, and the permit holder may now begin storing water.

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 October 16, 2023, all work is complete, and storage may begin under 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 store water for beneficial use under the terms and conditions of Permit R-12756 is 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 8, 9, and 10, 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 work having been accomplished during the most recent extension of time period, and the extended delay in compliance with the terms and conditions of the permit.

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. Based on FOF 15, the Department determined the need to place a “Limited Storage Season” on this extension of time to mitigate the effects subsequent development on competing demands. This condition, specified under Item 2 of the “Conditions” section of this PFO, was determined to be necessary water availability during the month of February has diminished since issuance of the permit, and the permit holder has yet to store a significant volume of water under 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 30, 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 an 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 apply water to beneficial use under Permit R-12756 from October 1, 2021, to October 1, 2028.

Subject to the following conditions:

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.

LIMITATIONS AND CONDITIONS

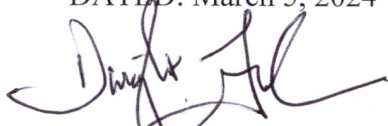
1. **Last Extension Condition**

This will be the last extension of time granted for Permit R-12756. Any future extensions of time request will be denied.

2. **Limited Storage Season**

Storage of water under this permit is hereby limited to the months of March and April.

DATED: March 5, 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 **April 19, 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.

