

**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-53380, Water Right Application S-81526) FINAL
in the name of Scott and Cheryl Ogilvie) ORDER DENIAL

Permit Information

Application:	S-81526
Permit:	S-53380
Basin:	Middle Willamette / Watermaster District 16
Date of Priority:	September 12, 1996
Source of Water:	South Santiam River and Willamette Basin Project Reservoirs, constructed under Permits R-1625, and R-5363, tributaries of the Willamette River
Purpose or Use:	Irrigation of 94.3 acres
Maximum Rate and Volume:	1.18 cubic feet per second (cfs) from live flow and 188.6 acre- feet (AF) per year, from stored water only

Please read this Proposed Final Order in its entirety.

In summary, the Department proposes to:

- Deny an extension of time to apply water to full beneficial use from October 1, 2005, to October 1, 2028.

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

Department – Oregon Water Resources Department

PFO – Proposed Final Order

cfs - cubic feet per second

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) contain the factors that the Department must consider to make findings that support a “good cause” determination.

FINDINGS OF FACT

1. On April 30, 1999, Permit S-53380 was issued by the Department. The permit authorizes the use of up to 1.18 cfs of water from South Yamhill River and 188.6 AF of water annually from Willamette Basin Project Reservoirs, constructed under Permits R-1625 and R-5363, tributaries of the Willamette River, for irrigation of 94.3 acres. The permit specified actual construction was to begin by April 30, 1998, and complete application of water was to be made on or before October 1, 2002.
2. One prior permit extension has been granted for Permit S-53380. The extension resulted in the completion dates for full application of water being extended to October 1, 2005.
3. The permit holder, Scott and Cheryl Ogilvie, submitted an “Application for Extension of Time” to the Department on December 15, 2023, requesting the time to apply water to full beneficial use under the terms of Permit S-53380 be extended from October 1, 2005 to October 1, 2028.
4. Notification of the Application for Extension of Time for Permit S-53380 was published in the Department’s Public Notice dated December 19, 2023. No public comments were received regarding the extension application.

Review Criteria [OAR 690-315-0040]

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

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

5. On December 15, 2023, the Department received a completed Application for Extension of Time 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)]

ORS 537.230 (1) states in part that “Except for a holder of a permit for municipal use, the holder of a water right permit shall prosecute the construction of any proposed irrigation or other work with reasonable diligence and complete the construction within a reasonable time, as fixed in the permit by the Water Resources Department, not to exceed five years from the date of approval” [emphasis added]. S-53380 was issued pursuant to ORS 537.625. The application states that construction of the well has not yet begun. An extension cannot be approved to begin construction.

OAR 690-315-0040(5) states “if the extension is requested pursuant to ORS 537.230, the applicant must have begun actual construction work, as Defined in OAR 690-315-0020(3)(d)(A) and (B), during the period required by statute. If the Department finds the applicant did not begin construction by that date, the permit cannot be extended and the Department may begin cancellation proceeding pursuant to ORS 537.260.”

6. Construction of the water system began prior to October 1, 2002, as specified in the permit as being the date to apply water to full beneficial use.

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.¹

7. Work completed during the original development time frame under Permit S-53380 is identified as installation of electrical service, pump, motor and fish screen.
8. During the most recent extension period, being from October 1, 2002, to October 1, 2005, the application identifies a fish screen was installed.
9. No additional work was completed since the end of the previous extension of time period.

The Application does not provide sufficient evidence of progress made towards completion of the water development and application of water to full beneficial use as allowed in the time period specified in the permit or in the previous extension of time period. Therefore, the Department cannot find good cause or reasonable diligence towards the complete application of water to beneficial use under work has been accomplished within the time allowed in Permit S-53380.

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

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

10. The Department has considered the permit holder's compliance with conditions, and has identified the following concern, the permit holder has not yet obtained written documentation from the Oregon Department of Fish and Wildlife approved the installation of fish screens.

The Department has determined the permit holder has not been diligent in developing or perfecting the water use permit, and has not complied with all terms and conditions, as required by Permit S-53380.

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

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

11. No water has been appropriated under Permit S-53380

The Department has determined that beneficial use of water has not yet been demonstrated under this permit.

¹ "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.

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

12. The Application identifies an investment of 32,692, which includes items associated with maintaining a Bureau of Reclamation Contract, a flood plain survey, and costs of electrical service, which are costs of operation, and not considered development under the permit. After deducting these costs, the permit holder invested approximately \$11,741, which is about 30 percent of the total projected cost for complete development of this project. An additional \$27,000 investment is needed for the completion of this project.
13. The Application does not identify any investment in the development of the water system since 2003.

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

The application provides evidence that no work has been accomplished towards completion of the water system; the permit holder has demonstrated noncompliance with permit conditions, and; beneficial use of water has not been demonstrated. The Department has determined the applicant has not demonstrated reasonable diligence in previous performance under Permit S-53380.

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 G-53380; 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 Santiam River, (Tributary to Santiam River) at the mouth (watershed ID 30200601) show that no water is available during the months of August, September and October at the 80% (50% for reservoirs) 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 points of diversion are located on South Yamhill River tributary of the Willamette River, and are not located within a Withdrawn Area.
17. South Yamhill River is not located within or above a state or federal scenic waterway.
18. The points of diversion are in a location listed by the Department of Environmental Quality as a water quality limited stream.
 - a. South Santiam River, River Mile 0 to 63.4, is listed under Water Quality Limited for lead, alkalinity, biological criteria, copper, temperature, and manganese.
 - b. South Santiam River, River Mile 0 to 25.9 listed under Water Quality Limited for chlorophyll a.

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. South Yamhill River and Willamette Basin Project Reservoirs, constructed under Permits R-1625 and R-5363, tributaries of the Willamette River is located within an area ranked "high" 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 \$11,741 has been invested in the project.

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

Other economic interests dependent on completion of the project.

21. No other economic interests dependent on completion of the project have 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. 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)]

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 690-315-0040(2)(g)]

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

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

25. The Application identifies the theft of the permit holders pipe trailer as an unforeseen event

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

26. The Applicant states a denial of the extension would result in undue hardship.

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

27. The Application does not provide evidence of good faith of the appropriator under Permit S-53380.

The Department has determined that the permit holder has not demonstrated good faith in the development of the use authorized by the permit..

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.

28. As of December 15, 2023, 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.

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 not shown that good cause exists for an extension of time to apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d) because no water has been used since the date of permit issuance, and no investment has been made in the development of the authorized use in over two decades.

CONCLUSIONS OF LAW

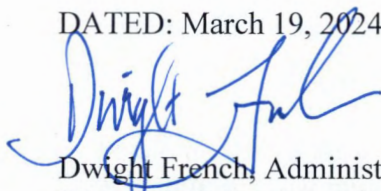
1. The applicant has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The applicant did begin actual construction timeline requirements pursuant to ORS 537.230 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. The application established that there has been no construction, no financial invest or reasonable diligence towards development in more than two decades. The permit holder has not 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).

PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department proposes to issue an order to:

Deny the time to apply water to beneficial use under Permit S-53380 from October 1, 2005, to October 1, 2028.

DATED: March 19, 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 **May 3, 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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