

Oregon Water Resources Department
Water Right Services Division

PROPOSED FINAL ORDER

In the Matter of the Application for an Extension of Time for Permit S-51164, Water Right Application S-70921, in the name of Wayne Clark.

	Permit Information
Application:	S-70921
Permit:	S-51164
Basin:	13 – Goose and Summer Lakes / Watermaster District 12
Date of Priority:	November 14, 1990
Source of Water:	Waters of Rivers End Reservoir and Chewaucan River
Purpose of Use:	Irrigation of 968.8 Acres
Maximum Rate:	24 cubic feet per second

****Please read this Proposed Final Order in its entirety as it contains additional conditions not included in the original permit****

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.

In summary, the Department proposes to:

- grant an extension of time to complete construction of the water system from October 1, 1996, to two years from the date a Final Order is issued approving the extension;
- grant an extension of time to apply water to full beneficial use from October 1, 1996, to two years from the date a Final Order is issued approving¹;
- condition the extension approval so this is the last extension of time for Permit S-51164, as described in Finding of Fact 19;

¹ Pursuant to ORS 537.230(4), 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.

- condition the extension to cap permit development at 4.68 cubic feet per second of water and 822.7 acres of land, as described in Finding of Fact 18; and
- confirm that conditions in the draft lease agreement, referenced and made part of the permit, remain in effect, as described in Finding of Fact 12a².

ACRONYM QUICK REFERENCE

Department – Oregon Water Resources Department

PFO – Proposed Final Order

cfs – cubic feet per second

gpm – gallons per minute

AF – acre-feet

AUTHORITY

Generally, see **ORS 537.230** and **OAR Chapter 690 Division 315**.

ORS 537.230(3) 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) provides in pertinent part that the Water Resources Director, for good cause shown, may extend the time within which the full amount of the water appropriated shall be applied to a beneficial use. This statute 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 thereof; and the income or use that may be required to provide fair and reasonable returns upon the investment.

OAR 690-315-0040 provides in pertinent part that the Department shall make findings to determine if an extension of time may be approved to complete construction and/or apply water to full beneficial use.

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.

² It is the Department's intention to reference all the land management and reservoir operation provisions contained in the draft lease agreement in any certificate issued for Permit S-51164. In addition, it is the Department's intention to include on any certificate issued for this permit, the specific minimum water levels at the dam by season, as identified in item "7 a" of the draft lease agreement.

FINDINGS OF FACT

Background

1. Permit S-51164 was granted by the Department on February 4, 1991. The permit authorizes the use of up to 24 cfs of water from Rivers End Reservoir and Chewaucan River, being 10 cfs for reservoir maintenance for wildlife habitat, and 14 cfs for irrigation of 968.8 acres. The permit specified actual construction was to begin by February 4, 1992, and construction of the water system was to be completed by October 1, 1992. Complete application of water was to be made on or before October 1, 1993.
2. Three prior permit extensions have been granted for Permit S-51164. The most recent extension resulted in the construction completion date being extended to October 1, 1996, and full application of water being extended to October 1, 1996.
3. The permit holder submitted an Application for Extension of Time to the Department on July 24, 2009, requesting the time to complete construction of the water system be extended from October 1, 1992 to October 1, 2011, and the time to apply water to full beneficial use under the terms of Permit S-51164 be extended from October 1, 1993 to October 1, 2011.
4. Notification of the Application for Extension of Time for Permit S-51164 was published in the Department's Public Notice dated March 30, 2010. Numerous public comments were received within the public comment period. In summary, the public comments were all opposed to an extension of time due primarily to concern about the effect the permitted water use would have on the ecology of Lake Abert and the associated decline in commercial and recreational values, and the potential negative impact on bird populations, and questionable diligence in developing the permit.

Review Criteria [OAR 690-315-0040]

The time limits to complete construction and/or apply water to full beneficial use may be extended if the Department finds that the permit holder has met the requirements set forth under OAR 690-315-0040. This determination shall consider the applicable requirements of ORS 537.230³, 537.248⁴ and/or 539.010(5)⁵.

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

5. On July 24, 2009, 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)]

6. Actual construction of the water system began prior to the February 4, 1992, deadline specified in the permit.

³ORS 537.230 applies to surface water permits only.

⁴ORS 537.248 applies to reservoir permits only.

⁵ORS 539.010(5) applies to surface water and ground water permits.

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.

7. As of July 24, 2009, the remaining work consists of completing construction of the water system and applying water to full beneficial use. The permit holder asked for an extension of just over two years beyond the date the extension application was submitted, from July 24, 2009, to October 1, 2011.
8. Since it is unclear to what extent development has occurred while all the permit conditions were satisfied, and there has been a delay in processing this extension application, the Department has determined that the permit holder's request to have until October 1, 2011, may now be inadequate to ensure all permit conditions are met. The Department finds that an extension of time for two years from the date that a Final Order approving an extension is issued will be reasonable for the applicant to ensure compliance with all permit requirements.

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

The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0040(2).

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

The Department's determination of reasonable diligence shall consider the requirements set forth under OAR 690-315-0040(3)(a-d). In accordance with OAR 690-315-0040(3), the Department shall consider, but is not limited to, the following factors when determining whether the applicant has demonstrated reasonable diligence in previous performance under the permit:

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

9. Work was accomplished within the time allowed in the permit or previous extension as follows:
 - a. Construction of the water system began prior to the February 4, 1992, deadline specified in the permit.
 - b. Since October 1, 1993, the permit holder has accomplished the following construction required under S-51164: installation of a distribution system, fish screen installation, pivots installed, and fields cultivated and irrigated.

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

10. According to the permit holder as indicated on the application for extension of time, a maximum rate of 4.68 cfs of water has been appropriated from the sources for irrigation of 822.7 acres of land at the date the application was submitted. No mention is made in the application of the amount developed for reservoir maintenance, but since the Chewaucan River flows directly into Rivers End Reservoir, 10 cfs has likely been used for reservoir maintenance as allowed by the permit.

11. Delay of full beneficial use of water under Permit S-51164 was due, in part, to a change in ownership, historic court cases that inhibited development, and the permittee's belief that land enrolled in the federal Conservation Reserve Program could not be developed and was protected from ramifications of non-use.

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

12. The permit holder's compliance with the permit or previous extension conditions.
 - a. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) though the extension application indicates many of the permit conditions were met in 1994, the application also indicates that the provisions in the "lease" were followed in 1994 but that the lease is "no longer in effect". The permit contains special conditions related to land management and reservoir operations contained in a ***draft lease agreement*** attached to, specifically referenced, and deliberately made part of the permit at the time the permit was issued. The permit further states "should a lease agreement be negotiated and signed by the Oregon Department of Fish and Wildlife (ODFW), the U.S. Fish and Wildlife Service and the permittee, the signed document shall supersede the referenced draft lease when it is delivered to and approved by the Water Resources Department". The Department received a document proposing to be a superseding lease agreement, however, it was not signed by ODFW and never approved by the Department. Therefore, there has not been a superseding lease in effect and the original draft lease agreement remains in effect. It is unclear from the record whether beneficial use has been made in compliance with all permit conditions.
 - b. Failure to comply with permit conditions constitutes illegal use 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.

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

13. As of July 24, 2009, the permit holder has invested approximately \$500,000, which is about 99.5 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$2,500 investment is needed to complete the project.

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

14. The Department has found good faith of the appropriator under Permit S-51164.

The Market and Present Demands for Water [OAR 690-315-0040(2)(d-e)]

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:

15. The amount of water available to satisfy other affected water rights and scenic waterway flows; 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); or the habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife [OAR 690-315-0040(4)(a-c)].
 - a. The amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit S-51164; 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. The points of diversion are located on the Chewaucan River and in Rivers End Reservoir and are not located within a Withdrawn Area. The waters of Chewaucan River and Rivers End Reservoir are not located within or above a state or federal scenic waterway, however it 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. The points of diversion are not in a location listed by the Department of Environmental Quality as a water quality limited stream.
16. Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].
 - a. None have been identified.
17. Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].
 - a. There exists a commercial brine shrimp business that is dependent on favorable water quality conditions in Lake Abert to support an abundant brine shrimp population. Lake Abert also supports important populations of migrating birds that depend on favorable water quality, lake water levels, and abundant brine shrimp. The commercial business and wildlife habitat needs represent a high market and present demand for the water flowing from the Chewaucan River into Lake Abert.
18. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to ensure future diligence, and/or mitigate the effects of the subsequent development on competing demands on the resource. The Department has determined a need to limit the use of water from sources authorized under Permit S-51164 with a "Development Limitations Condition." This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be

necessary due to the high market and present demand for water in the Chewaucan River and its receiving body, Lake Abert. This condition requires the permittee to limit development of beneficial use under the permit to no more than 4.68 cfs on 822.7 acres of land.

19. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to ensure future diligence, and/or mitigate the effects of the subsequent development on competing demands on the resource. The Department determined the need to place a "Last Extension Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. This condition, specified under Item 2 of the "Conditions" section of this PFO, was determined to be necessary due to the length of time since permit issuance and the fact that this is the fourth extension of time requested.

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

20. 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)]

21. Delay in the development of this project was not caused by any other governmental requirements.

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

22. None have been identified.

CONCLUSIONS OF LAW

1. The applicant is entitled to apply for an extension of time to complete construction and/or completely apply water to the full beneficial use pursuant to ORS 537.230(3).
2. 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).
3. The applicant complied with 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).
4. Completion of construction and full application of water to beneficial use can be accomplished within two years from the date a Final Order is issued approving the permit extension⁶, as required by OAR 690-315-0040(1)(c).
5. The Department has considered the reasonable diligence and good faith of the

⁶Pursuant to ORS 537.230(3), 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.

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 apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

6. As authorized in OAR 690-315-0050(5) and as described in Finding 18, above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), a "Development Limitations Condition" that prohibits any use of water beyond 4.68 cfs for irrigation on no more than 822.7 acres of land under Permit S-51164 in order to mitigate the effects of the permit development on competing demands on the resource.
7. As authorized in OAR 690-315-0050(5) and as described in Finding 19, above, the Department has established, as specified in the "Conditions" section of this PFO (Item 2), a "Last Extension Condition" in order to ensure future diligence is exercised in the development and perfection of Permit S-51164.

PROPOSED ORDER

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

Extend the time to complete construction of the water system under Permit S-51164 from October 1, 1996, to two years from the date a Final Order is issued approving the extension.

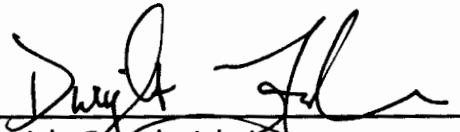
Extend the time to apply water to beneficial use under Permit S-51164 from October 1, 1996 to two years from the date a Final Order is issued approving the extension.

Subject to the following conditions:

CONDITIONS

1. **Development Limitations Condition**
Beneficial use of water under Permit S-51164 is limited to no more than 4.68 cfs for irrigation on no more than 822.7 acres of land.
2. **Last Extension Condition**
This is to be the last extension of time granted for Permit S-51164. Any future extensions of time requests will be denied.

DATED: March 17, 2015


Dwight French, Administrator
Water Right Services Division for
Tom Byler, Director

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

Proposed Final Order Hearing Rights

1. Under the provisions of OAR 690-315-0100(1) and 690-315-0060, the applicant or any other person adversely affected or aggrieved by the proposed final order may submit a written protest to the proposed final order. The written protest must be received by the Water Resources Department no later than **May 1, 2015**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.
2. A written protest shall include:
 - a. The name, address and telephone number of the petitioner;
 - b. A description of the petitioner's interest in the proposed final order and if the protestant claims to represent the public interest, a precise statement of the public interest represented;
 - c. A detailed description of how the action proposed in the proposed final order would adversely affect or aggrieve the petitioner's interest;
 - d. A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;
 - e. Any citation of legal authority supporting the petitioner, if known;
 - f. Proof of service of the protest upon the water right permit holder, if petitioner is other than the water right permit holder; and
 - g. The applicant or non-applicant protest fee required under ORS 536.050.
3. Within 60 days after the close of the period for requesting a contested case hearing, the Director shall:
 - a. Issue a final order on the extension request; or
 - b. Schedule a contested case hearing if a protest has been submitted, and:
 - 1) Upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or
 - 2) The applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests.

