

**Oregon Water Resources Department
Water Right Services Division**

Application for Extension of Time

In the Matter of the Application for an Extension of Time)
for Permit S-53985, Water Right Application S-85514,) PROPOSED FINAL ORDER
in the name of the Nesika Beach Ophir Water District)

Permit Information

Application File S-85514/ Permit S-53985

Basin 17 – South Coast Basin / Watermaster District 19

Date of Priority: March 25, 2003

Authorized Use of Water

Source of Water: Greggs Creek, a Tributary of the Pacific Ocean
Purpose or Use: Quasi-Municipal
Maximum Rate: 1.0 Cubic Feet per Second (cfs); being 1.0 cfs from
November 1 through June 30; 0.9 cfs from July 1
through July 31; 0.7 cfs from August 1 through
August 31; and 0.6 cfs from September 1 through
October 31

**This Extension of Time request is being processed in accordance with Oregon
Administrative Rule Chapter 690, Division 315.**

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

This Proposed Final Order applies only to Permit S-53985, water right Application S-85514.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to complete construction from October 1, 2008 to October 1, 2033.
- Make the extension of time subject to certain conditions as set forth below.

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources

PFO – Proposed Final Order

WMCP – Water Management and Conservation Plan

Units of Measure

cfs – cubic feet per second

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 and allow an extension to complete construction or perfect a water right. 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 therefore; and the income or use that may be required to provide fair and reasonable returns upon the investment.

OAR 690-315-0080 provides in pertinent part that the Department shall make findings to determine if an extension of time for municipal and/or quasi-municipal water use permit holders may be approved to complete construction and/or apply water to full beneficial use.

OAR 690-315-0090(3) authorizes the Department, under specific circumstances, to condition an extension of time for municipal and/or quasi-municipal water use permit holders to provide that diversion of water beyond the maximum rate diverted under the permit or previous extension(s) shall only be authorized upon issuance of a final order approving a WMCP Plan under **OAR Chapter 690, Division 86**.

FINDINGS OF FACT

Background

1. Permit S-53985 was granted by the Department on December 18, 2003. The permit authorizes the use of up to 1.0 cfs of water, being 1.0 cfs from November 1 through June 30; 0.9 cfs from July 1 through July 31; 0.7 cfs from August 1 through August 31; and 0.6 cfs from September 1 through October 31 from Greggs Creek, a tributary to the Pacific Ocean for quasi-municipal use. It specified complete application of water was to be made on or before October 1, 2008.
2. The permit holder submitted an "Application for Extension of Time" to the Department on March 2, 2015, requesting both the time to complete construction and the time to apply water to full beneficial use under the terms and conditions of Permit S-53985 be extended from October 1, 2008 to October 1, 2033. However, since the permit does not contain a specific deadline for completing construction, the Department needs to only consider an extension of the time to apply water to full beneficial use. This is the first extension of time request for Permit S-53985.
3. Notification of the Application for Extension of Time for Permit S-53985 was published in the Department's Public Notice dated March 10, 2015. No public comments were received regarding the extension application.

Review Criteria for Quasi-Municipal Water Use Permits [OAR 690-315-0080(1)]

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 690-315-0080(1). This determination shall consider the applicable requirements of ORS 537.230¹, 537.630² and/or 539.010(5)³

Complete Extension of Time Application [OAR 690-315-0080(1)(a)]

4. On March 2, 2015, 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 690-315-0080(1)(b)]

5. Senate Bill 300 (1999 legislation) eliminated the requirement that holders of new surface water and ground water permits start construction on water projects within one year after the Department issues the permit. Senate Bill 300 applies to any application for a permit filed after October 23, 1999.

¹ ORS 537.230 applies to surface water permits only.

² ORS 537.630 applies to ground water permits only.

³ ORS 537.010(5) applies to surface water and ground water permits.

Duration of Extension [OAR 690-315-0080(1)(c)(d)]

Under OAR 690-315-0080(1)(c),(d), in order to approve an extension of time for municipal and quasi-municipal water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

6. The remaining work to be accomplished under Permit S-53985 consists of completing construction of the infiltration gallery and pump house; installing pump, controls, and 0.5 miles of transmission line; meeting all permit conditions; and applying water to full beneficial use.
7. As of October 1, 2008, the permit holder has not diverted any water of the 1.0 cfs of water authorized under Permit S-53985 for quasi-municipal purposes.
8. In addition to the 1.0 cfs of water authorized under Permit S-53985 from Greggs Creek, Nesika Beach Ophir Water District holds the following rights:
 - Permit G-13613 for 0.5 cfs of water from one well for quasi-municipal use;
 - Certificate 37549 for 0.2 cfs of water from one well for group domestic for 112 families; and
 - Permit G-15728 for up to 1.0 cfs of water from one well for quasi-municipal use;

Nesika Beach Ophir Water District's permits and certificate total 1.7 cfs of ground water and 1.0 cfs of surface water. Nesika Beach Ophir Water District has not yet made beneficial use of 1.0 cfs of water under Permit G-15728 and 1.0 cfs of water under Permit S-53985.
9. The District's peak water demand within its service area boundaries was 1.24 cfs in 2014.
10. According to the District, in 2014, the population within the service boundary of Nesika Beach Ophir Water District was 2,167. The District estimates the population will increase at an average growth rate of 1.6 percent per year, reaching an estimated population of 2,975 by the year 2033. According to the District they recently annexed 33.22 acres of industrial zoned property into their service area.
11. According to the District, their peak demand is projected to be approximately 1.7 cfs of water by the year 2033. The newly annexed industrial zoned property owner projects water use of up to 10,000 gallons per day for a wood pyrolyzation facility. This is not reflected in the projected demand of 1.7 cfs
12. Full development of Permit S-53985 is needed to meet the present and future water demands of Nesika Beach Ophir Water District, including system redundancy and emergency use.
13. Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2033, to accomplish the application of water to beneficial use under the terms of Permit S-53985 is both reasonable and

necessary.

Good Cause [OAR 690-315-0080(1)(e) and (3)(a-g)]

The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0080(3).

Reasonable Diligence and Good Faith of the Appropriator [OAR 690-315-0080(3)(a) and (1)(c) and (4)]

Reasonable diligence and good faith of the appropriator must be demonstrated during the permit period or prior extension period as a part of evaluating good cause in determining whether or not to grant an extension. In determining the reasonable diligence and good faith of a municipal or quasi-municipal water use permit holder, the Department shall consider activities associated with the development of the right including, but not limited to, the items set forth under OAR 690-315-0080(4) and shall evaluate how well the applicant met the conditions of the permit or conditions of a prior extension period.

14. During the original development time frame under Permit S-53985 no work was accomplished.
15. As of March 2, 2015, the permit holder has invested no money for development of this project. The permit holder estimates an additional \$190,000 investment is needed for the completion of this project.
16. As of October 1, 2008, no water has been diverted.
17. The Department has considered permit holder's compliance with conditions, and did not identify any concerns.

Cost to Appropriate and Apply Water to a Beneficial Purpose [OAR 690-315-0080(3)(b)]

18. As of March 2, 2015, the permit holder has invested no money for development of this project. The permit holder estimates an additional \$190,000 investment is needed for the completion of this project.

The Market and Present Demands for Water [OAR 690-315-0080(3)(d) and (5)(a-f)]

For quasi-municipal water use permits issued after November 2, 1998, in making a determination of good cause pursuant to 690-315-0080(3)(d), the Department shall also consider, but is not limited to, the factors in 690-315-0080(5)(a-f).

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 690-315-0080(5)(a-f)].

19. 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-53985; furthermore, water availability for other affected water rights and scenic waterway

flows after the permit was issued is determined at such time that such application for a new water right is submitted. The point of diversion for Permit S-53985, located on the Greggs Creek, is not located within a Withdrawn Area. The Greggs Creek is not located within or above any state or federal scenic waterway, however it is located within an area ranked moderate for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife. The Greggs Creek is not listed by the Department of Environmental Quality as a water quality limited stream.

Economic investment in the project to date [OAR 690-315-0080(5)(d)].

20. As of March 2, 2015, the permit holder has invested \$1,000, which is 1 percent of the total projected cost for complete development of this project. The permit holder estimates an additional \$190,000 investment is needed for the completion of this project.

Other economic interests dependent on completion of the project [OAR 690-315-0080(5)(e)].

21. None have been identified.

Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0080(5)(f)].

22. As described in Findings 6 through 12 Nesika Beach Ophir Water District has indicated, and the Department finds that Nesika Beach Ophir Water District must rely on full development of Permit S- 53985 to meet its present and future water demands.
23. Nesika Beach Ophir Water District projects a population increase that averages 1.6 percent per year over a 19 year period, being the years 2014 to 2033 and also expects commercial and industrial growth.
24. Given the current water supply situation of Nesika Beach Ophir Water District, as well as current and expected demands including system redundancy and emergency use, there is a market and present demand for the water to be supplied under Permit S-53985.
25. OAR 690-315-0090(3) requires the Department to place a condition on this extension of time to provide that appropriation of any water up to 1.0 cfs under Permit S-53985 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan(s) under OAR Chapter 690, Division 86 that grants access to a greater rate of appropriation of water under the permit consistent with OAR 690-086-0130(7). "Development Limitation" condition is specified under Item 1 of the "Condition" section of this PFO to meet this requirement.

Fair Return Upon Investment [OAR 690-315-0080(3)(e)]

26. Use and income from the permitted water development project would result in reasonable returns upon the investment made in the project to date.

Other Governmental Requirements [OAR 690-315-0080(3)(f)]

27. Delays caused by any other governmental requirements in the development of this project have not been identified.

Events which Delayed Development under the Permit [OAR 690-315-0080(3)(g)]

28. According to Nesika Beach Ophir Water District, delay of development under Permit S-53985 was due, in part, to the size and scope of the quasi-municipal water system, which was designed to be phased in over a period of years and to the availability of funding to expand the water supply system.

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 under ORS 536.050(1)(k), as required by OAR 690-315-0080(1)(a).
3. The applicant complied with begin actual construction timeline requirements pursuant to ORS 537.230 as required by OAR 690-315-0080(1)(b)
4. The time requested to apply water to full beneficial use is reasonable, as required by OAR 690-315-0080(1)(c).
5. Full application of water to beneficial use can be completed by October 1, 2033⁴, as required by OAR 690-315-0080(1)(d).
6. 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 the fair return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the water right permit holder had no control, and the Department has determined that the permit holder has shown good cause for an extension of time to apply the water to full beneficial use pursuant to OAR

⁴ For permits applied for or received on or before July 9, 1987, upon complete development of the permit, you must notify the Department that the work has been completed and either: (1) hire a water right examiner certified under ORS 537.798 to conduct a survey, the original to be submitted as required by the Department, for issuance of a water right certificate; or (2) continue to appropriate water under the water right permit until the Department conducts a survey and issues a water right certificate under ORS 537.625.

690-315-0080(1)(e).

7. As required by OAR 690-315-0090(3) and as described in Finding 25, above, and specified under Item 1 of the "Conditions" section of this PFO, the diversion of any water up to 1.00 cfs under Permit S-53985 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan(s) under OAR Chapter 690, Division 86 that grants access to a greater rate of diversion under the permit consistent with OAR 690-086-0130(7).

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 the water to beneficial use under Permit S-53985 from October 1, 2008 to October 1, 2033.

Subject to the following conditions:

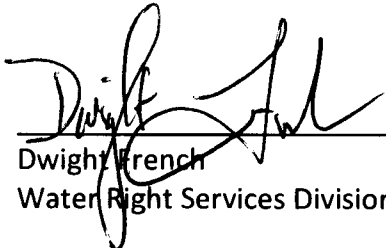
CONDITIONS

1. **Development Limitations**

Diversion of any water up to 1.00 cfs under Permit S-53985 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan(s) (WMCP) under OAR Chapter 690, Division 86 which grants access to a greater rate of diversion under the permit consistent with OAR 690-086-0130(7). The required WMCP shall be submitted to the Department within 3 years of this Final Order. Use of water under Permit S-53985 must be consistent with this and subsequent WMCP's approved under OAR Chapter 690, Division 86 on file with the Department.

The deadline established in the Extension Final Order for submittal of a WMCP shall not relieve a permit holder of any existing or future requirement for submittal of a WMCP at an earlier date as established through other orders of the Department. A WMCP submitted to meet the requirements of this order may also meet the WMCP submittal requirements of other Department orders.

DATED: April 14, 2015



Dwight French
Water Right Services Division Administrator

*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 29, 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.

NOTICE TO ACTIVE DUTY SERVICEMEMBERS: Active Duty service members have a right to stay these proceedings under federal Service members Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.of.mil>

