

**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-54839, Water Right Application S-87373 )        PROPOSED FINAL ORDER  
in the name of Willow Creek District Improvement Co. )

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**Permit Information**

Application:	S-87373
Permit:	S-54839
Basin:	7 – Umatilla / Watermaster District 21
Date of Priority:	January 6, 2009
Source of Water:	Willow Creek Reservoir, Constructed under Permit R-10880, tributary to Willow Creek
Purpose of Use:	Primary irrigation and Supplemental irrigation of 2538.14 Acres
Maximum Volume:	2,500.0 Acre-Feet (AF)

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***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 complete construction of the water system from April 6, 2015 to October 1, 2030.
- Grant an extension of time to apply water to full beneficial use from April 6, 2015 to October 1, 2030.<sup>1</sup>
- 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

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<sup>1</sup> 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.

## **ACRONYM QUICK REFERENCE**

Department – Oregon Water Resources Department

PFO – Proposed Final Order

cfs – cubic feet per second

AF – acre-feet

ODFW – Oregon Department of Fish and Wildlife

POD – Point of diversion

## **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 therefore; 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 Water Resources 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.

**OAR 690-315-0050(6)** requires the Department, for extensions exceeding five years, to establish checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between checkpoints will not exceed five year periods.

## FINDINGS OF FACT

### Background

1. Permit S-54649 was issued by the Department on April 6, 2010. The permit authorizes the use of up to 2,500.0 AF of water from the Willow Creek Reservoir, constructed under Permit R-10880, tributary to Willow Creek, for primary irrigation and supplemental irrigation of 2,538.14 acres. The permit specified construction of the water system was to be completed by April 6, 2015, and complete application of water was to be made on or before April 6, 2015.
2. On August 7, 2012, the Department approved Permit Amendment T-11313 (Special Order Volume 88, Page 331) authorizing a change in the place of use under Certificate 64437, for irrigation of 13.9 acres.
3. On August 7, 2012, the Department approved Permit Amendment T-11314 (Special Order Volume 88, Page 336) authorizing a change in the place of use under Certificate 184 ½, for irrigation and supplemental irrigation of 2.5 acres.
4. On August 7, 2012, Permit S-54770, in the name of Willow Creek District Improvement Co., was issued to replace Permit S-54649, incorporating the change in place of use approved by the order issued for Permit Amendment T-11313 and T-11314.
5. On September 23, 2013, the Department received an application for a permit amendment, which was assigned Permit Amendment T-11664, proposing to add an additional point of appropriation. Permit Amendment T-11664 is currently under review by the Department, awaiting approval of the Extension of Time, submitted by Willow Creek District Improvement Company.
6. On March 20, 2014, the Department approved Permit Amendment T-11512 (Special Order Volume 91, Page 1021) authorizing a change in the point of diversion and place of use under Certificate 194, for primary and supplemental irrigation of 40.0 acres.
7. On May 27, 2015, Permit S-54839, in the name of Willow Creek District Improvement Company, was issued to replace Permit S-54770, incorporating the change in place of use approved by the order issued for Permit Amendment T-11512. Here forward, the permit will be referred to as Permit S-54839.
8. The permit holder, Willow Creek District Improvement Company, submitted an "Application for Extension of Time" to the Department on May 18, 2015, requesting the time in which to accomplish beneficial use of water to the full extend under the terms of Permit S-54770 be extended from April 6, 2015, to October 1, 2030. Permit S-54770 was superseded by Permit S-54839. The extension application form clearly suggests that construction is not complete. The Department, therefore, determined that the permit holder's intent was to also request the time in which to complete construction of the water systems under Permit S-54839 to be extended from April 6, 2015, to October 1,

2030. This is the first permit extension request for Permit S-54839.

9. Notification of the Application for Extension of Time for Permit S-54839 was published in the Department's Public Notice dated June 16, 2015. No public comments were received regarding the extension application.
10. On June 30, 2015, the permit holder, Willow Creek District Improvement Company, submitted additional information to supplement their Application for Extension of Time. The amendment clarified the amount of PODs currently developed as authorized under Permit S-54839, as well as permit conditions met.

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 537.230<sup>2</sup>, 537.248<sup>3</sup> and/or 539.010(5)<sup>4</sup>.*

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

11. On May 18, 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 690-315-0040(1)(b) and 690-315-0040(5)]

12. Construction of the water delivery system began within 5 years of permit issuance, as specified in Permit S-54649. The permit holder states, construction was completed by August 7, 2012.

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.*

13. As of May 18, 2015, the permit holder states the remaining work to be completed consists of meeting the permit conditions, including installing totalizing flow meters, reporting annual water use, installing ODFW approved fish screens and obtaining written approval from ODFW of all fish screens, restoring and enhancing riparian areas of three points of diversion; completing construction of the water system; and applying water to full beneficial use.
14. Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2030, to complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit S-54649 is both reasonable and necessary.

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<sup>2</sup>ORS 537.230 applies to surface water permits only.

<sup>3</sup>ORS 537.248 applies to reservoir permits only.

<sup>4</sup>ORS 539.010(5) applies to surface water and ground water permits.

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)]

15. The permit holder states work was accomplished within the time allowed in the permit or previous extension as follows:
  - a. Construction of the water system began prior to April 6, 2015. Construction of 15 points of diversion and the irrigation delivery system was completed by August 7, 2012.
  - b. Work was completed during the original development time frame under Permit S-54839. Construction of 15 points of diversion and irrigation delivery systems was completed. Of the 21 authorized PODs, 12 have installed totalizing flow meters and 2 have installed flumes. Of the 21 authorized PODs, 20 have installed fish screens not approved by ODFW.

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

16. According to the water user a maximum rate of 2,000.0 AF of water has been appropriated from Willow Creek Reservoir for irrigation of 2,427 acres.
17. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by April 6, 2015.

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

18. The water right permit holder's conformance 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) the record does not show that a totalizing flow meter or other suitable measuring device has been installed on all PODs authorized under this permit, (2) not all of the PODs authorized by the permit have an ODFW approved fish screening and by-pass devices, (3) the permit holder has not yet obtained written documentation from the Oregon Department of Fish and Wildlife approving the installation of fish screens on all points of diversion authorized under this permit.

- b. **Failure to comply with permit conditions constitutes illegal use of water.** Beneficial use of water under this permit, therefore, has not yet been demonstrated. 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)]

19. As of May 16, 2015, the permit holder states they have invested approximately \$1,310,000, which is about 79 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$350,000 investment is needed for the completion of this project.

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

20. Based on Findings of Fact 11(b) and 14(a), the Department has found marginal faith of the appropriator under Permit S-54649, for non-compliance of permit conditions.

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:*

21. 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-54649; 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 Willow Creek Reservoir, tributary to Willow Creek, and are not located within a Withdrawn Area. Willow Creek Reservoir is not located within or above a 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 points of diversion are not in a location listed by the Department of Environmental Quality as a water quality limited stream.

22. Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].
  - a. None have been identified.
23. Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].
  - a. None have been identified.
24. 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 condition the use of any water from any POD authorized under Permit S-54839 with a **"Fish Screen Condition."** This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary due to non-compliance with the fish screening condition specified in Permit S-54839, and the lack of due diligence in satisfying this condition. This condition requires the water user to install an ODFW approved fish screen and obtain written approval on each authorized POD, on or before June 1, 2017. This condition prohibits diversion of any water from any authorized POD not yet screened; diversion may begin only after ODFW has given written approval of an installed fish screen. Any POD unscreened or screened without ODFW written approval will be excluded from a final certificate.
25. OAR 690-315-0050(6) requires the Department to place a checkpoint condition on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. A "Checkpoint Condition" is specified under Item 2 of the "Conditions" section of this PFO to meet this condition.

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

26. 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)]

27. Delay in the development of this project was caused other governmental requirements. According to the permit holder as stated on the Application for Extension of Time, some members experienced a lack of cooperation from ODFW in the design and development of plans of their fish screens.

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

28. 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. Full application of water to beneficial use can be accomplished by October 1, 2030<sup>5</sup>, as required by OAR 690-315-0040(1)(c).
4. 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 marginal cause exists for an extension of time to apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).
5. As authorized in OAR 690-315-0050(5) and as described in Finding 20, above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), a Fish Screen Condition that applies to the use of any water from an authorized POD not containing a fish screen with ODFW written approval under Permit S-54839 in order to ensure future diligence.
6. As required by OAR 690-315-0050(6) and as described in Finding 21, above, the Department has established, as specified in the "Conditions" section of this PFO (Item 2), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit S-54649.

**Continued on the following page**

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<sup>5</sup>Pursuant 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.



## 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 S-54649 from April 6, 2015 to October 1, 2030.

Subject to the following conditions:

### CONDITIONS

1. **Fish Screen Condition**

On or before June 1, 2017 the water user shall install, maintain, and operate fish screening on each authorized POD consistent with current ODFW standards. PODs not currently screened must have the required screen in place and functional, and approved in writing by ODFW on or before June 1, 2017, **prior to** diversion of water. PODs screened but without ODFW written approval, must obtain approval in writing on or before June 1, 2017. If a fish screen without ODFW written approval is not installed on or before June 1, 2017, that authorized POD will be excluded on the final certificate.

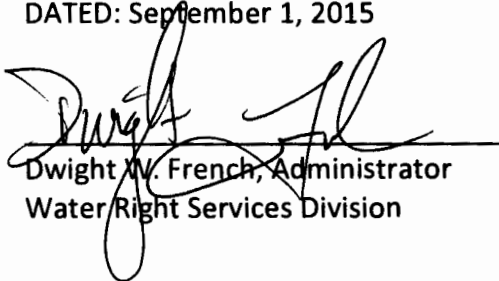
2. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2017, 2020, 2025, and 2030. A form will be enclosed with your Final Order.**

(a) At each checkpoint, the permit holder shall submit and the Department shall review evidence of the permit holder's diligence towards completion of the project and compliance with terms and conditions of the permit and extension. If, after this review, the Department determines the permit holder has not been diligent in developing and perfecting the water use permit, or complied with all terms and conditions, the Department shall modify or further condition the permit or extension to ensure future compliance, or begin cancellation proceedings on the undeveloped portion of the permit pursuant to ORS 537.260 or 537.410, or require submission of a final proof survey pursuant to ORS 537.250;

(b) The Department shall provide notice of receipt of progress reports in its weekly notice and shall allow a 30 day comment period for each report. The Department shall provide notice of its determination to anyone who submitted comments.

DATED: September 1, 2015

  
Dwight W. 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.*

#### 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 **October 16, 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.

