

**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 R-13591, Water Right Application R-85435) PROPOSED FINAL ORDER
in the name of Michael Banks and Marianne Alderson)

Permit Information

Application:	R-85435
Permit:	R-13591
Basin:	7 – Umitilla / Watermaster District 5
Date of Priority:	January 21, 2003
Source of Water:	Couse Creek, a tributary of Walla Walla River
Storage Facility:	West Pond
Purpose of Use:	Multiple Purpose
Maximum Volume:	4.0 acre-feet (AF) each year

Please read this Proposed Final Order in its entirety.

In summary, the Department proposes to:

- Grant an extension of time to apply water to full beneficial use from October 1, 2007 to October 1, 2019.¹

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(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

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 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.

FINDINGS OF FACT

Background

1. Permit R-13591 was issued by the Department on May 1, 2003. The permit authorizes the storage of up to 4.0 AF of water in West Pond from Couse Creek, a tributary of Walla Walla River, for multiple purpose. The permit specified complete application of water was to be made on or before October 1, 2007.
2. On November 9, 2015, the Department issued a letter by certified mail, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit R-13591 would begin.
3. The permit holders Michael Banks and Marianne Alderson submitted an “Application for Extension of Time” to the Department on January 7, 2016, requesting the time to apply water to full beneficial use under the terms of Permit R-13591 be extended from October 1, 2007 to October 1, 2019. This is the first permit extension requested for Permit R-13591.

4. Notification of the Application for Extension of Time for Permit R-13591 was published in the Department's Public Notice dated January 19, 2016. No public comments were received regarding the extension application.

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 537.230², 537.248³ and/or 539.010(5)⁴.

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

5. On January 7, 2016, 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. Construction of the water system began before the complete construction date as specified in the permit as October 1, 2007. The permit holder states, excavation of the pond began January 27, 2005.

The Department has determined the permit holder has satisfied the condition requiring beginning of construction of the water works.

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 January 7, 2016, 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.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2019, to accomplish the application of water to beneficial use under the terms and conditions of Permit R-13591 is both reasonable and necessary.

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).

²ORS 537.230 applies to surface water permits only.

³ORS 537.248 applies to reservoir permits only.

⁴ORS 539.010(5) applies to surface water and ground water permits.

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)]

8. The application 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 October 1, 2007. The permit holder began excavation of West pond and laying pipe from the point of diversion to West pond.
 - b. Work was completed during the original development time frame under Permit R-13591. The permit holder installed a fish screen, and has applied 13.5 tons of bentonite to prevent leakage.
 - c. Since October 1, 2007, the permit holder has added another 9.0 tons of bentonite.

The Department has determined that work has been accomplished within the time allowed in the permit, which provides evidence of good cause and reasonable diligence from the appropriator towards the complete application of water to a beneficial use.

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

9. The application states a maximum volume of 3.0 AF of water has been stored for multiple purpose.
10. Beneficial use of water has been demonstrated under this permit all permit conditions were satisfied by October 1, 2007.
11. According to the permit holder delay of full beneficial use of water under Permit R-13591 was due, in part, to leakage in the pond. The permit holder needs more time to repair the leakage and develop the pond to obtain the full quantity of water allowed under the permit.

The Department has determined that this extension will allow the full development of West Pond and the documentation submitted after October 1, 2007 from Oregon Fish and Wildlife (ODFW) approving the fish screen that was installed in 2005 to satisfy compliance of the condition of the required screens and by pass devices are to be in place, functional and approved by an ODFW representative prior to diversion of any water to the Department, in an effort to make proof of beneficial use of the water as

required by Permit R-13591.

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

12. 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 did not identify any concerns. The record does show the permit holder has provided the Department with the required documentation from ODFW that the installed fish screen is approved and meets current state criteria for fish protection, on January 7, 2016.

The Department determined the permit holder did comply with conditions of the permit, as required by Permit R-13591.

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

13. The applications states the permit holder has invested about \$11,951, which is about 91 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$1,100 investment is needed for the completion of this project.

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

14. The Department has found good faith of the appropriator under Permit R-13591.

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:

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)].

15. 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-13591; 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 point of diversion is located on Couse Creek, a tributary of Walla Walla River, and is not located within a Withdrawn Area. Couse Creek, a tributary of

Walla Walla River is not located within or above a state or federal scenic waterway, however, it 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. The point of diversion is 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. None have been identified.

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

18. 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)]

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

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

20. 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 construction timeline requirements pursuant to ORS 537.230 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. Based on Finding of Facts 5 through 14, and full application of water to beneficial use can be accomplished by October 1, 2019⁵, as required by OAR 690-315-0040(1)(c).

⁵Pursuant 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.


5. 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).

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-13591 from October 1, 2007 to October 1, 2019.

DATED: May 10, 2016


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 **June 24, 2016**, 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;

