

**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-53072, Water Right Application S-70477) PROPOSED FINAL
in the name of Eric Pond and Northwest Farm Credit Services, FLCA) ORDER

Permit Information

Application: S-70477
Permit: S-53072
Basin: Middle Willamette / Watermaster District 16
Date of Priority: July 13, 1990
Source of Water: Yamhill River, tributary of Willamette River
Purpose of Use: Irrigation of 72.1 acres and frost protection on 5.0
acres
Maximum Rate: 0.90 cubic feet per second (cfs) , being 0.90 for
irrigation and 0.75 cfs for frost protection

Please read this Proposed Final Order in its entirety.

In summary, the Department proposes to:

- Grant an extension of time to complete construction of the water system from October 1, 2003 to October 1, 2020.
- Grant an extension of time to apply water to full beneficial use from October 1, 2003 to October 1, 2020.¹

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

cfs – cubic feet per second

RM – River Mile

ODFW – Oregon Department of Fish and Wildlife

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 S-53072 was issued by the Department on February 5, 1997 to Larry and Cheryl Dutton. The permit authorizes the use of up to 0.90 cfs of water, being 0.90 cfs for irrigation of 72.1 acres and 0.75 cfs for frost protection on 5.0 acres, from the Yamhill River, tributary of Willamette River. The permit specified actual construction was to begin by February 5, 1998, construction of the water system was to be completed by October 1, 1999, and complete application of water was to be made on or before October 1, 2000.
2. On April 29, 1997, the Department received a Notice of Beginning of construction, which stated Larry Dutton began actual construction on April 13, 1997.
3. On June 18, 1998, the Department received a Notice of Completion of Construction,

which stated Larry Dutton completed construction on June 13, 1998, and was using the water.

4. On August 16, 1999, the Department received a Claim of Beneficial Use.
5. On March 20, 2000, an assignment from Larry and Cheryl Dutton to Maria's Chance Delford, LLC was recorded in the records of the Water Resources Department.
6. On December 23, 2014, the Department issued a Proposed Order of Certification to cancel Permit S-53072, for failure to comply with conditions of the permit by not submitting water usage reports timely.
7. On April 7, 2015, the Department issued a Cancellation of Certain Permit(s) (Special Order Volume 95, Page 413) to Appropriate Water under the provisions of ORS 537.260 for Permit S-53072, for failure to make proof of appropriation of water under the terms and conditions of the permit.
8. On April 21, 2015, the Department issued an Order Granting Reconsideration, Reversing Cancellation Order, and Reinstating Permit S-53072(Special Order Volume 95, Page 582).
9. On July 31, 2015 a Final Order on a permit extension was granted for Permit S-53072. The most recent extension resulted in the completion dates for construction being extended to October 1, 2003 and full application of water being extended to October 1, 2003.
10. On August 28, 2015, the Department issued a Proposed Certificate for reduced acres and authorized rate of use.
11. On November 10, 2015, an assignment from Maria's Chance Delford, LLC to Eric Pond was recorded in the records of the Water Resources Department.
12. On January 6, 2016, the Department received a request to withdraw the Claim of Beneficial use to allow for full development of Permit S-53072.
13. The permit holder, Eric Pond submitted an "Application for Extension of Time" to the Department on January 29, 2016, requesting the time to complete construction of the water system be extended from October 1, 2003 to October 1, 2017 and the time to apply water to full beneficial use under the terms of Permit S-53072 be extended from October 1, 2003 to October 1, 2017.
14. On February 18, 2016, an assignment from Eric Pond to Eric Pond and Northwest Farm Credit Services, FLCA was recorded in the records of the Water Resources Department.

15. Notification of the Application for Extension of Time for Permit S-53072 was published in the Department's Public Notice dated February 23, 2016. No public comments were received regarding the extension application.
16. On February 26, 2016, the permit holder submitted an amendment to the Application for an Extension of Time. The amendment requested the extended time to complete construction of the water system be changed from October 1, 2017 to October 1, 2020, and the extended time to apply water to full beneficial use of the water system be changed from October 1, 2017 to October 1, 2020.

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)]

17. On January 29, 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)]

18. Actual construction of the water system began prior to the February 5, 1998 deadline specified in the permit. According to the permit holder, they were not able to establish the exact date, but according to the Claim of Beneficial Use report dated August 18, 1999, the report indicated all permit condition had been met.

According to the Notice of Beginning of Construction (A-Form) submitted to the Department April 29, 1997, actual construction began April 13, 1997. 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.

19. As of January 29, 2016, the permit holder states the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, and applying water to full beneficial use on the remaining 5.3 acres.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2020, to complete construction of the water system and to accomplish the application of water to beneficial use under the

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.

terms and conditions of Permit S-53072 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).

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)]

20. 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 the February 5, 1998 deadline specified in the permit. According to the, A form, the initial permit holder began construction on April 13, 1997. The permit initial holder installed 3,500 feet of six inch mainline, 20 horsepower pump, fish screen, and electrical.
 - b. Work was completed during the original development time frame under Permit S-53072. The permit holder completed construction which included a meter, a pump, a booster pump, and mainlines.
 - c. During the most recent extension period, being from October 1, 1999, to October 1, 2003, the permit holder installed a 30 horsepower submersible pump with fish screen, rebuilt the track rail and # 3 pump panels with timer.
 - d. Since October 1, 2003, the permit holder has replaced the motor on the submersible pump, installed a floating platform with A-frame hoist and 30 feet of six inch discharge hose for pump.

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)]

21. The application states a maximum rate of 0.83 cfs of water has been diverted from Yamhill River for irrigation of 66.8 acres and 0.015 cfs of water for frost protection on 1.2 acres.
22. Beneficial use of water has been demonstrated under this permit because all permit conditions were satisfied by the October 1, 2003.

23. According to the permit holder delay of full beneficial use of water under Permit

S-53072 was due, in part, to the current permit holder purchased the property in 2015 and discovered that the former owner had not fully developed the permit. The permit holder needs more time in which to fully develop the permit and is installing a new high efficiency drip irrigation system.

The Department has determined that this extension will allow the permit holder to fully Permit S-53072, in an effort to accomplish full beneficial use of water under the terms and condition of the permit.

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

24. 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 installed a water meter in 1997, submitted the annual water use records in 2001-2003, and submitted required documentation, on January 14, 2016 from ODFW on approval of fish screen.

The Department determined the permit holder has complied with conditions as required by Permit S-53072.

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

25. The applications states the pervious and current permit holders has invested about \$57,981, which is about 46 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$67,000 investment is needed for the completion of this project.

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

26. The Department has found good faith of the appropriator under Permit S-53072.

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)].

27. 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-53072; 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 Yamhill River, tributary of Willamette River, and is not located within a Withdrawn Area. The Yamhill River, 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 point of diversion is in a location listed by the Department of Environmental Quality as a water quality limited stream for E. Coli (RM 0 to 11.2), dissolved oxygen (RM 0 to 11.2).
28. Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].
 - a. None have been identified.
29. 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)]

30. 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)]

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

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

32. 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. Based on Finding of Facts 18 through 26, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2020⁵, as required by OAR 690-315-0040(1)(c).
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 complete construction of the water system under Permit S-53072 from October 1, 2003 to October 1, 2020.

Extend the time to apply water to beneficial use under Permit S-53072 from October 1, 2003 to October 1, 2020.

DATED: May 17, 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.*

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.

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 **July 17, 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;
 - 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 Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>

