

**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-52617, Water Right Application S-72092) PROPOSED FINAL
in the name of Linda K. Mallery-McLean;) ORDER
Darrell V. Mallery; and Sandra Mallery)

Permit Information

Application:	S-72092
Permit:	S-52617
Basin:	Powder / Watermaster District 8
Date of Priority:	December 23, 1991
Source of Water:	Clear Creek, Holbrook Creek and an unnamed drainage ditch
Purpose or Use:	Primary irrigation of 35.0 acres (5.0 acres from Holbrook Creek and an unnamed drainage ditch and 30.0 acres from Clear Creek and an unnamed drainage ditch) and supplemental irrigation of 125.0 acres from Holbrook Creek and an unnamed drainage ditch
Maximum Rate:	4.0 cubic feet per second (cfs), being 1.5 cfs from Clear Creek, 1.5 cfs from Holbrook Creek and 1.0 cfs from an unnamed drainage ditch

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, 1998 to October 1, 2001.
- Grant an extension of time to apply water to full beneficial use from October 1, 1999 to October 1, 2001.¹

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.

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

ACRONYM QUICK REFERENCE

Department – Oregon Water Resources Department
Application – Application for Extension of Time
PFO – Proposed Final Order
cfs – cubic feet per second
COBU – Claim of Beneficial Use

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.

Continued on the following page

FINDINGS OF FACT

Background

1. Permit S-52617 was issued by the Department on August 14, 1996. The permit authorizes the use of up to 4.0 cfs of water, being 1.5 cfs from Clear Creek, 1.5 cfs from Holbrook Creek and 1.0 cfs from an unnamed drainage ditch, primary irrigation of 35.0 acres (5.0 acres from Holbrook Creek and an unnamed drainage ditch and 30.0 acres from Clear Creek and an unnamed drainage ditch) and supplemental irrigation of 125.0 acres from Holbrook Creek and an unnamed drainage ditch. The permit specified actual construction was to begin by August 14, 1997, construction of the water system was to be completed by October 1, 1998, and complete application of water was to be made on or before October 1, 1999.
2. On October 19, 1999, a Claim of Beneficial Use (COBU) and map was submitted to the Department for review.
3. On September 3, 2008, an assignment from Daryl Robertson to Keith and Linda McLean was recorded in the records of the Water Resources Department.
4. On November 12, 2008, a correcting assignment was issued by the Department to correct an error in the request for assignment dated September 3, 2008. The receiving assignees were listed in error as Keith and Linda McLean. The correcting assignment properly listed Linda Mallery-McLean; Darrell V. Mallery; and Sandra Mallery as the permit holders.
5. On February 18, 2016, the Department began review of the COBU and map for issuance of a water right certificate.
6. On March 18, 2016, the Department issued a Proposed Order of Certification in the Matter of Cancellation of Permit S-52617, for failure to comply with conditions of the permit by not submitting annual water use reports prior to the complete application of water date, being October 1, 1999, as required by Permit S-52617. A draft Proposed Certificate of Water Right for Permit S-52617 was also submitted by the Department.
7. The permit holder, Linda K. Mallery-McLean, submitted an "Application for Extension of Time" to the Department on June 15, 2016, requesting the time to complete construction of the water system extended from October 1, 1998 to October 1, 2001, and the time to apply water to full beneficial use under the terms of Permit S-52617 be extended from October 1, 1999 to October 1, 2001. This is the first permit extension requested for Permit S-52617.
8. Notification of the Application for Extension of Time for Permit S-52617 was published in the Department's Public Notice dated June 21, 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)]

9. On June 15, 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)]

10. Actual construction of the water system began prior to the August 14, 1997 deadline specified in the permit. According to the permit holder, the date actual construction began is not known.

According to the Application for a Permit to Appropriate Surface Water submitted to the Department December 23, 1991, beginning of construction was stated as being completed. The Department has determined the permit holder has satisfied the condition requiring beginning of actual 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.

11. As of June 15, 2016, the permit holder states the remaining work to be completed consists of meeting all permit conditions, including submitting annual water use reports; 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, 2001, 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-52617 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

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.

whether the applicant has demonstrated reasonable diligence in previous performance under the permit:

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

12. The Application states work was accomplished within the time allowed in the permit or previous extension as follows:

- a. Actual construction of the water system began prior to the August 14, 1997 deadline specified in the permit. According to the Application for a Permit to Appropriate Surface Water, previous permit holder Daryl Robertson stated beginning of construction of the water system was completed by December 23, 1991.
- b. Work was completed during the original development time frame under Permit S-52617. The previous permit holder installed water measuring devices and locking head gates.
- c. Since October 1, 1999, the current permit holder has replaced head gates, and built and replaced measuring boxes.

The Department has determined that work has been accomplished by the date to begin actual construction, and 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)]

13. The application states a maximum rate of 3.25 cfs of water has been diverted from the Clear Creek, Holbrook Creek and an unnamed drainage ditch for primary irrigation of 35.0 acres, and supplemental irrigation of 117.1 acres.
14. According to the COBU submitted to the Department on October 19, 1999, the maximum rate of water diverted for use was reported as 7.48 cfs, being 0.74 cfs from Clear Creek, 3.0 cfs from Holbrook Creek, and 3.74 cfs from an unnamed drainage ditch. This exceeds the amount of water for primary and supplemental irrigation authorized under this permit. The authorized amount of water for primary and supplemental irrigation is 4.0 cfs, being 1.5 cfs from Clear Creek, 1.5 cfs from Holbrook Creek, and 1.0 cfs from an unnamed drainage ditch.
15. According to the draft Proposed Certificate of Water Right issued March 18, 2016, the Department determined to limit the amount of water appropriated to 3.25 cfs, being 1.5 cfs from Holbrook Creek, and 1.0 cfs from an unnamed drainage ditch, as authorized by the permit, and 0.75 cfs from Clear Creek.
16. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 1999.

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

17. 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 concern: (1) annual reports of the amount of water used each month were not submitted to the Department by the complete application of water date, being October 1, 1999.
 - b. The Application states a meter was installed. The date of installation is unknown as the meter was installed prior to the purchase of the property in 2008.
 - c. Department records show annual water use reports were submitted for 2000-2003, 2009, and 2013-2015.

The Department has determined that this extension will allow the annual water use reports submitted after October 1, 1999, in an effort to make proof of beneficial use of the water as required by Permit S-52617.

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

18. The Application states the amount invested in development of the project by the previous permit holder is unknown; however the current permit holder has invested about \$885.00 in completing development of the project.

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

19. The Department has found good faith of the appropriator under Permit S-52617.

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)].

20. 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-52617; 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 tributaries of Clear Creek, and are not located within a Withdrawn Area. Clear Creek 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 points of diversion are not in a location listed by the Department of Environmental Quality as a water quality limited stream.

Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].

21. No other economic interests dependent on completion of the project have been identified.

Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].

22. No other factors relevant to the determination of the market and present demand for water and power have been identified.

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

23. 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)]

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

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

25. No unforeseen events 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 10 through 19, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2001⁵, as required by OAR

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

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-52617 from October 1, 1998 to October 1, 2001.

Extend the time to apply water to beneficial use under Permit S-52617 from October 1, 1999 to October 1, 2001.

DATED: July 26, 2016


Dwight 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 **September 9, 2016**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.

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.

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>

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- If you have any questions about statements contained in this document, please contact Corey Courchane at (503) 986-0825.
 - If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at 503-986-0820.
 - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0801.
 - Address any correspondence to : Water Right Services Division
725 Summer St NE, Suite A
Salem, OR 97301-1266
Fax: 503-986-0901
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