

**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-51424, Water Right Application S-72029	)	PROPOSED FINAL
in the name of Birney D. and Ronda L. Dayton;	)	ORDER
Richard L. and Mary L. Krug	)	

Permit Information

Application:	S-72029
Permit:	S-51424
Basin:	South Coast / Watermaster District 19
Date of Priority:	November 21, 1991
Source of Water:	An unnamed stream, a tributary of Burnt Hill Creek
Purpose of Use:	Domestic use expanded for three families
Maximum Rate:	0.015 cubic foot per second (cfs)

***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 October 1, 2012 to October 1, 2027.
- Grant an extension of time to apply water to full beneficial use from October 1, 2012 to October 1, 2027.¹
- 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

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

Application – Application for Extension of Time

PFO – Proposed Final Order

cfs – cubic feet per second

gpm – gallons per minute

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(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. On November 21, 1991, the Department received an Application for a Permit to Appropriate Surface Water. The Application identified the Area of Use as Lot 5, Pacific Woodlands Subdivision, and Parcel 1 and Parcel 2 of the McVay Minor partition.
2. Permit S-51424 was issued by the Department on March 9, 1992. The permit authorizes the use of up to 0.015 cfs of water from an unnamed stream, tributary of Burnt Hill Creek, for domestic use expanded for three families. The permit specified actual

construction was to begin by March 9, 1993, construction of the water system was to be completed by October 1, 1994, and complete application of water was to be made on or before October 1, 1995.

3. On December 1, 1994, the Department received "FORM B – Notice of Completion of Construction," identifying that construction was completed March 1, 1994.
4. On November 22, 1995, the Department received "FORM C – Notice of Complete Application of Water to a Beneficial Use," identifying beneficial use was completed by May 15, 1995.
5. On December 10, 2001 a partial assignment from Rocky McVay to Steve Zink was recorded in the records of the Water Resources Department.
6. On October 22, 2003 a partial assignment from Steve Zink to Birney D. and Ronda L. Dayton was recorded in the records of the Water Resources Department.
7. On April 19, 2012 a partial assignment from Rocky McVay to Birney Dayton for a second lot, was recorded in the records of the Water Resources Department.
8. On April 19, 2012 a partial assignment from Rocky McVay to Richard L. and Mary L. Krug - Trustee was recorded in the records of the Water Resources Department.
9. On June 7, 2016, 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 S-51424 would begin.
10. Two prior permit extensions have been granted for Permit S-51424. The most recent extension resulted in the completion dates for construction being extended to October 1, 2012, and full application of water being extended to October 1, 2012.
11. The permit holders, Birney D. and Ronda L. Dayton; Richard L. and Mary L. Krug, submitted an "Application for Extension of Time" to the Department on July 22, 2016, requesting the time to complete construction of the water system extended from October 1, 2012 to October 1, 2027, and the time to apply water to full beneficial use under the terms of Permit S-51424 be extended from October 1, 2012 to October 1, 2027.
12. On July 25, 2016, the Department received the Progress Report that was due October 1, 2007, as required by the most recent extension.
13. Notification of the Application for Extension of Time for Permit S-51424 was published in the Department's Public Notice dated August 2, 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)]

14. On July 22, 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)]

15. Actual construction of the water system began prior to the March 9, 1993 deadline specified in the permit. According to the permit holder, construction of the water system began August 1, 1992.

According to the Application for a Permit to Appropriate Surface Water submitted to the Department November 21, 1991, actual construction began September 1, 1991. 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.

16. As of July 22, 2016, the permit holder states the remaining work to be completed consists of developing homes on the two remaining lots; completing construction of the water system; and applying water to the two remaining lots 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, 2027, 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-51424 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

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.

the permit:

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

17. As the Applications 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 March 9, 1993 deadline specified in the permit. Construction of the water system began September 1, 1991. The Application submitted on November 21, 1991, describes construction of the water system as, "The diversion is a simple earth and rock dam. This goes immediately to a round 3000 gallon fiberglass tank and from there by gravity through a 1 ¼ inch PVC pipe to the North boundary of Pacific Woodlands Subdivision. The service lines from here ¾ inch PVC pipe."
 - b. Work was completed during the original development time frame under Permit S-51424. According to the Progress Report submitted July 25, 2016, the water system was completed in 1993 with delivery to all 3 lots.

The Department has determined that work has been accomplished prior to permit issuance, 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)]

18. As stated on the Application, a maximum rate of 0.015 cfs of water has been diverted from the unnamed stream, tributary of Burnt Hill Creek for domestic use.
19. Beneficial use of water has been demonstrated under this permit, as all permit conditions were satisfied by October 1, 2012
20. According to the Application, delay of full beneficial use of water under Permit S-51424 was due, in part, to a slow housing economy and local economic conditions. The current market is too depressed to build out the remaining lots profitably. The permit holder needs more time in which to develop homes on the remaining two lots.

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

21. 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.
22. The most recent extension Final Order issued January 31, 2003, contained a condition to submit a Progress Report by October 1, 2007.

23. On July 25, 2016, the Progress Report for 2007 was submitted to the Department.

The Department determined the permit holder has complied with conditions of the permit, as required by Permit S-51424.

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

24. As stated on the Application, the previous permit holder had invested about \$10,000 towards development of the water delivery system. The current permit holder has invested about \$1,004,000, towards construction of a home and garage on one lot. The permit holder anticipates an additional \$800,000 investment is needed for the completion of the remaining two lots.

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

25. The Department has found good faith of the appropriator under Permit S-51424.

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)].

26. A review of 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-51424; 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.
27. A current review of water available shows water available all year long:
- A. The point of diversion is located on an unnamed stream, tributary of Burnt Hill Creek, and is not located within a Withdrawn Area.
 - B. Burnt Hill Creek is not located within or above a state or federal scenic waterway.
 - C. Burnt Hill Creek is located within an area ranked "low" 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.

- D. The point of diversion is 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)].

28. 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)].

29. No other factors relevant to the determination of the market and present demand for water and power have been identified.
30. 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 1 of the "Conditions" section of this PFO to meet this condition.

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

31. 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)].

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

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

33. No unforeseen events have been identified.

Denial of an Extension Would Result in Undue Hardship [OAR 690-315-0040(2)(i)].

34. The Application did not state if a denial of the extension would result in undue hardship.

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 14 through 24, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2027⁵, 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).
6. As required by OAR 690-315-0050(6) and as described in Finding 29, above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit S-51424.

Continued on the following page

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 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-51424 from October 1, 2012 to October 1, 2027.

Extend the time to apply water to beneficial use under Permit S-51424 from October 1, 2012 to October 1, 2027.

Subject to the following conditions:

CONDITIONS

1. Checkpoint Condition

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2021 and 2026. 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 6, 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 **October 28, 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>

