

**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-14199, Water Right Application R-86297 ) PROPOSED FINAL  
in the name of Mark Wahle ) ORDER

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**Permit Information**

Application:	R-86297
Permit:	R-14199
Basin:	Middle Willamette / Watermaster District 16
Date of Priority:	May 6, 2005
Source of Water:	Runoff, tributary to Mud Slough
Storage Facility:	Wahle East Reservoir
Purpose or Use:	Multiple purpose
Maximum Volume:	20.0 Acre Feet (AF) each year

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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 apply water to full beneficial use from October 1, 2009 to October 1, 2021.<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

Application – Application for Extension of Time

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.

**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.

## **FINDINGS OF FACT**

### **Background**

1. On August 18, 2005 Permit R-14199 was issued by the Department. The permit authorizes the storage of up to 20.0 AF of water each year in Wahle East Reservoir from runoff, a tributary to Mud Slough, for multiple purpose. The permit specified the reservoir shall be filled and complete application of the stored water to the use was to be made on or before October 1, 2009.

2. On June 21, 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 R-14199 would begin.
3. On August 23, 2016, Mark Wahle, submitted an "Application for Extension of Time" to the Department, requesting the time to apply water to full beneficial use under the terms of Permit R-14199 be extended from October 1, 2009 to October 1, 2028. This is the first permit extension requested for Permit R-14199.
4. Notification of the Application for Extension of Time for Permit R-14199 was published in the Department's Public Notice dated August 30, 2016. No public comments were received regarding the extension application.
5. On October 10, 2016, the permit holder submitted an amendment and additional information to supplement their Application for an Extension of Time. The amendment requested the extended time to apply water to full beneficial use of the water system be changed from October 1, 2028 to October 1, 2021; and further explained the delay in development of the reservoir.

**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)]**

6. On August 23, 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)]**

7. Construction of the water system began prior to October 1, 2009, as specified in the permit as being the date to apply stored water to full beneficial use. The permit holder states, construction began August 2006 with land prep and boulder removal.

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.*

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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.

8. As of August 23, 2016, the permit holder states the remaining work to be completed consists of dam development; installation of a liner and tile; meeting all permit conditions, including installation of a pipe and a meter; and applying water to full beneficial use by storing 20.0 AF of water.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2021, to accomplish the application of water to beneficial use under the terms and conditions of Permit R-14199 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)]**

9. The Application states work was accomplished within the time allowed in the permit or previous extension as follows:
  - a. Work was completed during the original development time frame under Permit R-14199. The permit holder began reservoir development including excavation and boulder removal.
  - b. No other work has been accomplished since the summer of 2009.

The Application provides evidence of progress of physical work made towards completion of the water system, enough to qualify as the minimum necessary for the Department to find good cause and reasonable diligence towards complete application of water to a beneficial use.

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

10. The Application states no water has been stored under Permit R-14199.
11. Beneficial use of water has not yet been demonstrated under this permit because no water was stored and not all permit conditions were satisfied by October 1, 2009.
12. According to the permit holder delay of full beneficial use of water under Permit R-14199 was due, in part, to alternate recommendations provided by consultants after the construction of the reservoir began. The original consultant hired by the permit holder had proposed the use of a bentonite liner for the reservoir base. Prior to

bentonite application, a second consultant recommended against the use of bentonite, with concerns of leakage. The consultant recommended a more extensive development plan using impermeable pond liners. The new cost of the project prohibited the permit holder from continuing development of the reservoir. The permit holder is now in a financial position to continue reservoir development using pond liners. The permit holder requests additional time in which to complete construction of the reservoir and complete application of the stored water to the use.

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

13. The water right permit holder's conformance with the permit or previous extension conditions.

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 meter or other suitable measuring device has been installed, and (2) the record does not show that an outlet pipe, or the provisions of other means to evacuate water has been installed. The Department recognizes that it is the intent of the permit holder to comply with all permit conditions at the time the conditions become applicable.

In order to legally perfect the storage of water under this permit, the permit holder must demonstrate that all conditions of the permit have been satisfied.

The Department has determined that this extension will allow; 1) installation of a meter to satisfy compliance of the condition of "Before water use may begin under this permit, the water user shall install a meter or other suitable measuring device as approved by the Director," 2) installation of an outlet pipe to satisfy compliance of the condition of "The storage of water allowed herein is subject to the installation and maintenance of an outlet pipe, or the provisions of other means to evacuate water when determined necessary by the Water Resources Director to satisfy prior downstream rights," and 3) to store the full volume of water authorized under Permit R-14199, and to apply the water to full beneficial use.

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

14. The Applications states the permit holder has invested about \$6600, which is about 19 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$28,000 investment is needed for the completion of this project.

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

15. The Department has found good faith of the appropriator under Permit R-14199.

**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)].*

16. 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 R-14199; 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.
17. A current water availability analysis for Rickreall Creek, (Tributary to Willamette River) at the mouth (watershed ID 30200702) shows that no water is available during the months of August and September, at the 50% exceedance level.
  - A. The point of diversion is located on a tributary to Mud Slough, and is located within the Eola Hills Limited Groundwater Area.
  - B. Mud Slough is not located within or above a state or federal scenic waterway.
  - C. Mud Slough is located within an area ranked high” 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)].**

18. 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)].**

19. No other factors relevant to the determination of the market and present demand for water and power have been identified.
20. 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 determined the need to place a "Last Extension Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary to ensure future diligence in the development of Permit R-14199.

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

21. 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)]**

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

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

23. The Application did not identify unforeseen events.

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

24. 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 timeline requirements to begin construction 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 7 through 15, full application of water to beneficial use can be accomplished by October 1, 2021<sup>5</sup>, 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

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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.

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 apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

6. 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 "Last Extension Condition" in order to ensure future diligence is exercised in the development and perfection of Permit R-14199.

## 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-14199 from October 1, 2009, to October 1, 2021.

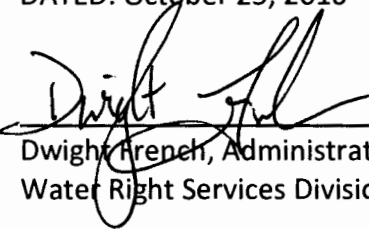
Subject to the following conditions:

## CONDITIONS

### 1. Last Extension Condition

This is to be the last extension of time granted for Permit R-14199. Any future extensions of time requests shall be denied.

DATED: October 25, 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 **December 9, 2016**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.



