

**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-54741, Water Right Application S-87564) PROPOSED FINAL
in the name of Carlton Nursery Company, LLC) ORDER

Permit Information

Application: S-87564
Permit: S-54741
Basin: Willamette / Watermaster District 16
Date of Priority: December 28, 2009
Source of Water: Palmer Creek, a Tributary of Yamhill River, and Gordon Farm
Irrigation Reservoir, constructed under Permit R-14933
Purpose or Use: Nursery Use on 261.8 Acres
Maximum Rate/Volume: 1.0 cubic foot per second (cfs) from Palmer Creek, and 60.0 Acre-
Feet (AF) from Gordon Farm Irrigation Reservoir

***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 January 5, 2017, to October 1, 2027.
- Grant an extension of time to apply water to full beneficial use from January 5, 2017, 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

PFO – Proposed Final Order

Reservoir – Gordon Farm Irrigation Reservoir

AF – acre-feet

cfs – cubic foot per second

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 January 5, 2012, Permit S-54741 was issued by the Department. The permit authorizes the use of up to 1.00 cfs of water from Palmer Creek, a tributary of Yamhill River, and 60.0 AF of water from Gordon Farm Irrigation Reservoir, constructed under Permit R-14933, a tributary of Palmer Creek, for nursery use on 261.8 acres. The permit specified completion of construction and application of water was to be made on or before January 5, 2017.

2. On October 19, 2016, the permit holder, Carlton Nursery Company, LLC, submitted an "Application for Extension of Time" to the Department, requesting the time to complete construction of the water system be extended from October 1, 2017, to October 1, 2027, and the time to apply water to full beneficial use under the terms of Permit S-54741 be extended from October 1, 2017, to October 1, 2027. This is the first permit extension requested for Permit S-54741.
3. On October 25, 2016, the Department received a letter from Oregon Department of Fish and Wildlife (ODFW) dated October 14, 2016. In the letter it states;

"... ODFW concludes that the [fish] screen will meet all criteria up to the maximum diversion rate allowed per the water right...This approval is contingent on the following: the screen is installed prior to any diversion of water, the screen is installed so that the effective area is submerged during operation..."
4. On October 25, 2016, the permit holder submitted an updated page four of the Application. The updated page indicates the beginning of construction of the water system.
5. Notification of the Application for Extension of Time for Permit S-54741 was published in the Department's Public Notice dated October 25, 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)]

6. On October 19, 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 permit issuance. The permit holder states, construction began in 1991 under another water right which utilizes the same point of diversion (POD), and serves a different part of the farm.

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

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.

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.

8. As of October 19, 2016, the permit holder states the remaining work to be completed consists of completing construction of the water system including; completing excavation of the Reservoir, installation of a pump and meter, 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, 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-54741 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 is as follows:
 - a. Construction of the water system began prior to permit issuance, under other water rights.

In the Application it states that construction of the water system, including installation of a pump, electrical and buried PVC mainline, began in 1991. "The same pump and irrigation mainline we use on other parts of the farm are the same to be used on this farm just tee into [the] reservoir", which is an authorized source under this permit.

- b. Work was completed during the original development time frame under Permit S-54741. Work consisted of the start of excavation of Gordon Farm Irrigation Reservoir, an authorized source under this permit, including; removing and stockpiling of overburden [topsoil], excavating the core trench, building and compacting of a berm and feathering the slopes.

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)]

10. The Application states no water has been diverted from Palmer Creek, tributary to Yamhill River for nursery use.
11. The Application states no water has been diverted from the Reservoir for nursery use.
12. As of October 19, 2016, beneficial use of water has not yet been demonstrated under this permit because no water has been diverted or stored under Permit S-54741.

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

13. The Department has considered the permit holder's compliance with conditions, and has identified compliance with the condition of "Before water use may begin, the permittee shall install a totalizing flow meter at each point of diversion."
14. The record does show the permit holder installed a meter at the point of diversion in 1991 on the Palmer Creek. This point of diversion is shared with other water rights.
15. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) annual reports of the amount of water used each month were not submitted to the Department, (2) the permit holder has not obtained written documentation from ODFW approving the installation of fish screens or that ODFW has determined fish screens are not required, (3) the permit holder has not obtained documentation from ODFW approving the installation of by-pass devices or that ODFW has determined a by-pass devices are not required, and (4) the permit holder has not installed a totalizing flow meter or other suitable measuring device on the Reservoir diversion. 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.

Failure to comply with permit conditions constitutes illegal use of water. 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 the permit holder to complete construction of the water system, submit annual water use reports and documentation from ODFW that fish screen and by-pass device conditions have been satisfied, obtain the full rate and volume of water, and apply water to the full beneficial use on 261.8 acres authorized under Permit S-54741.

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

16. The Applications states the permit holder has invested about \$36,316, which is about 15 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$202,500 investment is needed for the completion of this project.

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

17. The Department has found good faith of the appropriator under Permit S-54741.

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)].

18. 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-14933; 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.
19. A current water availability analysis for the Yamhill River, (Tributary to Willamette River) at the mouth (watershed ID 30200801) shows that no water is available during the months of August and September, at the 80% exceedance level.
- A. The point of diversion is located on Palmer Creek, a tributary to Yamhill River, and is not located within a Withdrawn Area.
 - B. The point of diversion is located within the Amity Hills/ Walnut Hill Groundwater Limited Area.
 - C. Palmer Creek, a tributary to Yamhill River, is not located within or above a state or federal scenic waterway.
 - D. Palmer Creek, a tributary to Yamhill River, 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.

- E. The point of diversion is in a location listed by the Department of Environmental Quality as a water quality limited stream. Palmer Creek, River Mile 0 to 17 is listed for Water Quality Limited for Dissolved Oxygen.

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

- 20. 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)].

- 21. No other factors relevant to the determination of the market and present demand for water and power have been identified.
- 22. 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.
- 23. 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. Based on Findings of Facts 10, 11, and 12, the Department determined the need to place a "Water Use Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of water use permit. This condition, specified under Item 2 of the "Conditions" section of this PFO, was determined to be necessary because no beneficial use of water use under the terms and conditions of the permit has been made since the permit issuance. (see FOF 10, 11, and 12)

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

- 24. 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)]

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

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

- 26. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit R-14933, in that their financial recovery after the drop in the economy in 2008 on was slower than predicted. Additional time was necessary to increase revenue and absorb the cost of constructing the reservoir.

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

27. 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 as required by ORS 537.230, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. Based on Finding of Facts 7 through 17, 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 22, 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-54741.
7. As authorized in OAR 690-315-0050(5) and as described in Finding of Facts 23, above, the Department has established, as specified in the "Conditions" section of this PFO (Item 2), a "Water Usage Condition" in order to ensure future diligence is exercised in the development and perfection of Permit R-14933.

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-54741 from January 5, 2017, to October 1, 2027.

Extend the time to apply water to beneficial use under Permit S-54741 from January 5, 2017, 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 October 1, 2026. A form will be enclosed with your Final Order.**

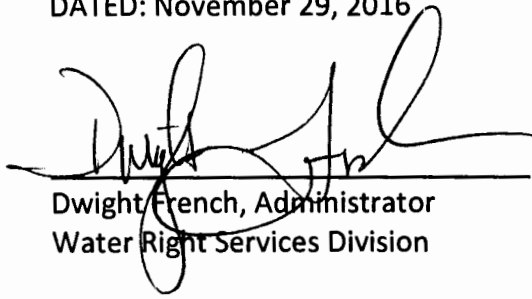
- (a) At each checkpoint, the permit holder shall submit and the Department shall review evidence of the permit holder's diligence towards completion of the project and compliance with terms and conditions of the permit and extension. If, after this review, the Department determines the permit holder 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.

2. Water Use Condition

If no water is applied to beneficial use under the terms and conditions of Permit R-14933 on or before October 1, 2026, this will be the be the last extension of time granted for Permit S-54741.

continued on following page

DATED: November 29, 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 **January 13, 2017**, 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>

-
- If you have any questions about statements contained in this document, please contact Jeffrey D. Pierceall at (503) 986-0802.
 - 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
Fax: 503-986-0901 Salem, OR 97301-1266
-