

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-14453, Water Right Application R-86195) PROPOSED FINAL
in the name of Ray C. Martin III and Northwest Farm Credit Services,) ORDER
FLCA

Permit Information

Application:	R-86195
Permit:	R-14453
Basin:	Willamette / Watermaster District 20
Date of Priority:	March 10, 2005
Source of Water:	Unnamed stream and runoff, tributary of/to Beaver Creek
Storage Facility:	Upper Pond – Pond 2
Annual Permitted Storage:	9.1 Acre Feet (AF)
Physical Capacity of the Reservoir:	9.1 Acre Feet (AF)

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, 2016, to September 6, 2017.¹
- 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

ODFW – Oregon Department of Fish and Wildlife

PFO – Proposed Final Order

AF – acre-feet

Reservoir 2 – Upper Pond–Pond 2

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

1. On September 6, 2007, Permit R-14453, consistent with the terms of a settlement agreement, was issued by the Department. The permit authorizes the storage of up to 9.1 AF of water in Upper Pond – Pond 2 (Reservoir 2) from an unnamed stream and runoff, tributary of/to Beaver Creek. The permit specified the reservoir was to be filled and complete application of the stored water was to be made on or before October 1, 2011. The permit further specified that the Department will not grant any extensions of time to complete the appropriation of water under this permit that extend the time to complete beyond ten (10) years from the date of issuance, being September 6, 2017.

2. On October 3, 2011, the Department received an Application for Extension of Time requesting the time to apply water to full beneficial use be extended from October 1, 2011, to October 1, 2016.
3. On July 13, 2012, the Department issued a Final Order approving the extension of time to make complete application of water under this permit to October 1, 2016.
4. On September 30, 2016, the permit holder, Ray C. Martin III, 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-14453 be extended from October 1, 2016, to September 6, 2017. This is the second permit extension requested for Permit R-14453.
5. On October 11, 2016, notification of the Application for Extension of Time for Permit R-14453 was published in the Department's Public Notice. Comments were received.
6. On November 10, 2016, comments were received from the attorney representing a party to the settlement agreement. The comments received requested the Department to evaluate the compliance with permit conditions as related to the metering of the inflow and outflow of water through the reservoir and of riparian restoration.
7. On October 31, 2016, the agent for the permit holder submitted additional information to supplement their Application for an Extension of Time. The additional information was to clarify the location of the metering device deployed by the permit holder.

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)]

8. On September 30, 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)]

9. Construction of Reservoir 2 began prior to October 1, 2011, as specified in the permit as being the date to apply water to full beneficial use. The permit holder states, construction began January 1, 2008.
10. According to the Application for Extension of Time received October 3, 2011, work was accomplished during the original permit development time line.

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.

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

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

- a. During the most recent extension period, being from October 1, 2011, to October 1, 2016, the following was accomplished:
 - additional riparian restoration;
 - installation of additional irrigation components; and
 - installation of a reservoir liner

The Department has determined that work has been accomplished within the time allowed in the most recent extension of time period, which provides evidence of good cause and reasonable diligence from the appropriator towards the complete application of water to a beneficial use.

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.

12. As of September 30, 2016, the permit holder states the remaining work to be completed consists of completing construction of the water system, which includes the installation of permanent measuring devices at all the required locations; 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 September 6, 2017, to accomplish the application of water to beneficial use under the terms and conditions of Permit R-14453 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:

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

13. The Department has considered the permit holder's compliance with conditions, and has identified the following concern; the record does not show that a totalizing flow meter or other suitable measuring device as approved by the Director has been installed at all the locations required by the permit and the settlement agreement.

Failure to comply with permit conditions constitutes illegal use of water. Beneficial use of water under this permit, therefore, has not yet been demonstrated. In order to legally perfect the use of water under this permit, the permit holder must demonstrate that all conditions of the permit have been satisfied.

The Department has determined, based on FOF 13, the permit holder has not demonstrated compliance with the following condition:

- Before water use may begin under the permit, the permittee shall install a totalizing flow meter or other suitable measuring device as approved by the Director sufficient to measure 1) the inflow to the Martin Property within the channel of the unnamed stream, 2) the amount of water stored in the Upper Pond – Pond 2, and 3) the outflow from the Martin property below Pond 1 (constructed under Permit R-14454). The meters or measuring devices will be located at three locations: 1) at a point immediately above the Upper Pond – Pond 2 within the channel of the unnamed stream (in order to measure the inflow to Martin property), 2), at the outlet of Pond 2 (to measure the amount of water stored in Pond 2), and 3) at the outlet of Pond 1 (to measure the outflow for purposes of complying with bypass requirements.

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

14. The Application states a maximum volume of 11.6 AF of water has been stored from the Unnamed stream and runoff, tributary of/to Beaver. This exceeds the physical capacity of the reservoir authorized under this permit. The authorized physical capacity of the reservoir is 9.1 AF.
15. According to the permit holder delay of full beneficial use of water under Permit R-14453 was due, in part, to economic impacts of the “Great Recession” on the nursery industry and the original measurement equipment installed did not provide the readings needed to comply with the measurement and reporting conditions.

The Department has determined based on FOF 13, beneficial use of water has not been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2016.

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 \$170,880, which is about 94 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$4,500 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 R-14453.

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-14453; 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. Current Water Availability Analysis for Willamette River, (Tributary to Columbia River) at the mouth (watershed ID 181), shows that water is available year round, at 50% exceedance level.
20. The point of diversion is located on an unnamed stream, tributary to Beaver Creek, and is not located within a Withdrawn Area.
21. Beaver Creek is not located within or above a state or federal scenic waterway.
22. Beaver 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.
23. 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)].

24. The Application does not identify other economic interests dependent on completion of the project.

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

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

26. 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 due to the permit specifying that no extension may be granted beyond ten years from the date of permit issuance.

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

27. 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)]

29. The Application did not state that delay in the development of this project was caused by any other governmental requirements.

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

28. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit R-14453, in that the installation of a Stingray Portable Level-Velocity Logger as the meter did not function as intended, and therefore does not satisfy the metering condition specified in the permit.

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

29. 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 9 through 18, full application of water to beneficial use can be accomplished by October 1, 2016⁵, as required by OAR 690-315-0040(1)(c).

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.

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 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 27, 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-14453.

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-14453 from October 1, 2016, to September 6, 2017.

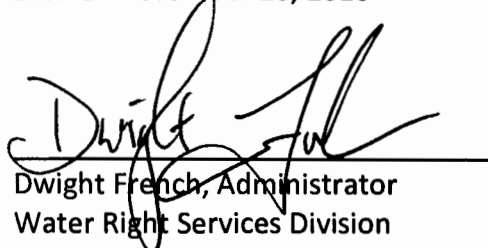
Subject to the following conditions:

CONDITIONS

1. Last Extension Condition

This is to be the last extension of time granted for Permit R-14453. Any future extensions of time requests shall be denied.

DATED: December 20, 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 **February 3, 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>

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- 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
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