

**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-53746, Water Right Application S-84589 ) PROPOSED FINAL  
in the name of David McKibben and Lowell Ford ) ORDER

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**Permit Information**

Application:	S-84589
Permit:	S-53746
Basin:	Middle Willamette / Watermaster District 16
Date of Priority:	November 20, 2000
Source of Water:	Middle Fork Ash Creek and Mount Pisgah Reservoir, tributaries of Ash Creek
Purpose or Use:	Irrigation of 181.8 acres and maintenance of a reservoir, constructed under Application R-84588, Permit R-13073, for fish and wildlife uses
Maximum Rate/Volume:	45.0 Acre-Feet (AF) per year for irrigation and 0.45 cubic foot per second (cfs) for maintenance of a reservoir for fish and wildlife uses

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***Please read this Proposed Final Order in its entirety.***

*In summary, the Department proposes to:*

- Grant an extension of time to apply water to full beneficial use from October 1, 2005 to October 1, 2018.<sup>1</sup>

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

Agent – Boatwright Engineering, Inc.

ODFW – Oregon Department of Fish and Wildlife

PFO – Proposed Final Order

AF – acre-feet

cfs – cubic feet 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.

### **FINDINGS OF FACT**

#### **Background**

1. On August 23, 2001, Permit S-53746 was issued by the Department. The permit authorizes the use of up to 45.0 AF of water per year for irrigation of 181.8 acres, and 0.45 cfs of water for maintenance of a reservoir for fish and wildlife uses, from Middle Fork Ash Creek and Mount Pisgah Reservoir, tributaries of Ash Creek. The permit specified complete application of water to the use was to be made on or before October 1, 2005.

2. On October 26, 2016, the permit holders, David McKibben and Lowell Ford, 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 S-53746 be extended from October 1, 2005 to October 1, 2018. This is the first permit extension requested for Permit S-53746.
3. On November 1, 2016 notification of the Application for Extension of Time for Permit S-53746 was published in the Department's Public Notice. No public comments were received regarding the extension application.
4. On November 29, 2016, the permit holder submitted an authorization for Boatwright Engineering, Inc. (agent) to represent the permit holder as their agent.

**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)]**

5. On October 26, 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)]**

6. Construction of the water system began prior to October 1, 2005, as specified in the permit as being the date to apply water to full beneficial use. The permit holder states, construction of the water system began in 2002.
7. On February 5, 2010, photographic evidence was submitted to the Department, and is kept on file in the Department's Dam Safety section, file number M-7. The photographic evidence illustrates that construction of the water delivery system began in 2002. The Department has determined the permit holder has satisfied the condition requiring beginning of construction of the water system.

**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 26, 2016, the permit holder states the remaining work to be completed consists of meeting all permit conditions, including submitting annual water use reports, and applying water to full beneficial use.

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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.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2018, to accomplish the application of water to beneficial use under the terms and conditions of Permit S-53746 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 as follows:
  - a. Construction of the water system began prior to October 1, 2005.
  - b. Work was accomplished during the original development time frame under Permit S-53746. The work consisted of; installation of underground mainlines; irrigation components, drip irrigation lines, a pump, and big guns.
  - c. Since October 1, 2005, the permit holder has accomplished the installation of an irrigation system, a metering system, buried mainline to the far pasture, and drip irrigation lines.

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.

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

10. The Department has considered the permit holder's compliance with conditions, and has identified the following concern: the record does not show that (1) annual reports of the amount of water used each month have not been received by the Department.
11. The application states a metering system was installed in 2011.

The Department has determined that this extension will allow the annual water use reports be submitted after October 1, 2005, to comply with the condition of "The permittee shall maintain the meter or measuring device in good working order, shall keep a complete record of the amount of water used each month and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as may be required by the

Director," in an effort to make proof of beneficial use of the water as required by Permit G-53746.

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.

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

12. The application states a maximum volume of 45.0 AF of water for irrigation of 174.4 acres, and a maximum rate of 0.45 cfs of water for maintenance of Mount Pisgah Reservoir for fish and wildlife uses has been diverted from the Middle Fork Ash Creek and Mount Pisgah Reservoir, tributaries of Ash Creek.

Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2005.

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

13. The application states the permit holder has invested about \$198,664, which is the total projected cost for complete development of this project.

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

14. The Application has demonstrated good faith of the appropriator under Permit S-53746.

**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)].*

15. 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-53746; 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.
16. Current Water Availability Analysis for the Willamette River, (Tributary to Columbia River) at the mouth (watershed ID 183), shows that water is available at 80% exceedance.

17. The points of diversion are located on Middle Fork Ash Creek and Mount Pisgah Reservoir, and are not located within a Withdrawn Area.
18. Ash Creek is not located within or above a state or federal scenic waterway.
19. Ash 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.
20. 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. The application did not identify unforeseen events.

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

26. 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).

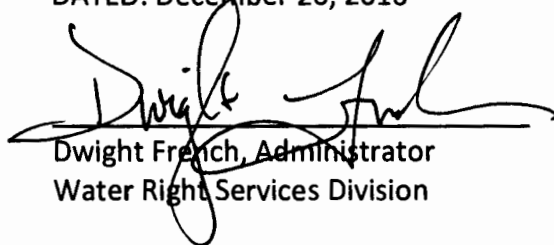
4. Based on Finding of Facts 6 through 14, full application of water to beneficial use can be accomplished by October 1, 2018<sup>5</sup>, as required by OAR 690-315-0040(1)(c).
5. The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply 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 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).

### 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 S-53746 from October 1, 2005 to October 1, 2018.

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.

<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.

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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