

**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-54463, Water Right Application S-86199	)	PROPOSED FINAL
in the name of Beaverlake Nursery LLC	)	ORDER

Permit Information

Application:	S-86199
Permit:	S-54463
Basin:	Willamette / Watermaster District 20
Date of Priority:	March 10, 2005
Source of Water:	Upper Pond (Permit R-14453); Lower Pond (Permit R-14454); Pond 3 (Permit R-14455); Pond 4 (Permit R-14456), Tributaries of Beaver Creek
Purpose or Use:	Nursery use on 21.4 Acres
Maximum Volume:	36.4 acre-feet (AF) each year, being 9.1 AF each from Upper Pond, Lower Pond, Pond 3, and Pond 4

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, 2016, to October 1, 2018.¹

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

AF – acre-feet

Agent – Steven Shropshire

Department – Oregon Water Resources Department

FOF – Finding of Fact

ODFW – Oregon Department of Fish and Wildlife

PFO – Proposed Final Order

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

1. On May 15, 2008, Permit S-54463 was issued by the Department. The permit authorizes the use of up to 36.4 AF, being 9.1 AF each from Upper Pond, Lower Pond, Pond 3, and Pond 4, tributaries of Beaver Creek, for nursery use on 21.4 acres. The permit specified complete application of water was to be made on or before October 1, 2012.
2. One prior permit extension has been granted for S-54463. The extension request resulted in the completion dates for full application of water being extended from October 1, 2012, to October 1, 2016.

3. On September 30, 2016, Ray C. Martin III, on behalf of Beaverlake Nursery LLC, 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-54463 be extended from October 1, 2016, to September 6, 2017.
4. On October 11, 2016, notification of the Application for Extension of Time for Permit S-54463 was published in the Department's Public Notice. Comments were received.
5. On November 10, 2016, comments were received from the attorney representing a party to the settlement agreement for related water right permits. 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.
6. On October 31, 2016, Steven Shropshire (Agent), agent for the permit holder submitted an amendment to 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 September 6, 2017, to October 1, 2018.
7. On December 15, and December 16, 2016, the Agent submitted additional information to supplement their Application for an Extension of Time. The additional information included documentation from Oregon Department of Fish and Wildlife (ODFW) pertaining to fish screen requirements; and to clarify the volume of water used to date and installation of totalizing flow meters.

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 the water system began prior to October 1, 2012, as specified in the permit as being the date to apply water to full beneficial use. The permit holder states, construction began June 1, 2008.
10. According to the Application for Extension of Time received January 4, 2013, work was

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.

accomplished during the original permit development time line.

The Department has determined, based on FOF 8 and 9, the permit holder has satisfied the condition requiring beginning of construction of the water works.

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)]

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:
 - completed additional riparian restoration;
 - installed additional irrigation components;
 - installed a larger outlet pipe on Reservoir 1; and
 - installed a liner in Reservoir 2

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 totalizing flow meters at each point of diversion; 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, 2018, to accomplish the application of water to beneficial use under the terms and conditions of Permit S-54463 is both reasonable and necessary.

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 concerns: the record does not show that (1) totalizing flow meters have been installed at each point of diversion, and (2) annual reports of the amount of water used each month have not been received by the Department.

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 conditions:

- Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each point of diversion.
- The permittee 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.

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

14. The Agent states a maximum volume of 11.6 AF of water has been diverted from Upper Pond (Permit R-14453); Lower Pond (Permit R-14454); Pond 3 (Permit R-14455); and Pond 4 (Permit R-14456) for nursery use on 15.0 acres.
15. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2016.

The Department has determined based on FOF 15, 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 \$98,005, which is approximately 96 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 S-54463.

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 S-54463; 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 80% exceedance level.
20. The points of diversion are located on an unnamed stream, tributary to Beaver Creek, and are 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 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)].

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.

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

26. 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)]

27. The Application does not identify that a delay in the development of this project was not caused by any other governmental requirements.

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

28. The Application did not identify unforeseen events.

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 17, full application of water to beneficial use can be accomplished by October 1, 2018⁵, 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 apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

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 apply water to beneficial use under Permit S-54463 from October 1, 2016, to October 1, 2018.

DATED: December 27, 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 10, 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.

- 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>

- Page 9 of 9