

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-11248, Water Right Application R-70065
in the name of Taylor Westside Ranch Inc.

) PROPOSED
) FINAL
) ORDER TO
DENY

Permit Information

Application:	R-70065
Permit:	R-11248
Basin:	Goose and Summer Lakes / Watermaster District 12
Date of Priority:	September 14, 1989
Source of Water:	An unnamed stream, a tributary of North Fork Cox Creek
Storage Facility:	Taylor Reservoir
Purpose or Use:	Storage for supplemental irrigation under Permit S-51079
Maximum Volume:	993.0 acre feet (AF) each year

Please read this Proposed Final Order in its entirety.

In summary, the Department proposes to:

- Deny an extension of time to complete construction of the water system from October 1, 2010, to October 1, 2018.
- Deny an extension of time to apply water to full beneficial use from October 1, 2010, to October 1, 2018.

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

ACRONYM QUICK REFERENCE

Department – Oregon Water Resources Department

PFO – Proposed Final Order

AF – acre-feet

Agent – Darryl Anderson, Anderson Engineering

COBU – Claim of Beneficial Use

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) 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 therefor; and the income or use that may be required to provide fair and reasonable returns upon the investment.

OAR 690-315-0040 provides that in order to approve an application for an extension of time to complete construction or apply water to full beneficial use, the Department shall make the findings in OAR 690-315-0040(1) including a finding that there is “good cause” to approve the extension. OAR 690-315-0040(2)-(4) contain the factors that the Department must consider to make findings that support a “good cause” determination.

FINDINGS OF FACT

1. On September 24, 1990, Permit R-11248 was issued by the Department. The permit authorizes the storage of up to 993.0 AF of water in Taylor Reservoir from an unnamed stream, a tributary of North Fork Cox Creek, for supplemental irrigation under Permit S-51079. The permit specified actual construction was to begin by September 24, 1991, construction of the water system was to be completed by October 1, 1992, and complete application of water was to be made on or before October 1, 1993.
2. On March 19, 2001, an assignment from Taylor Ranch, Inc., to Taylor Westside Ranch, Inc. was recorded in the records of the Water Resources Department for R-11248.
3. On September 16, 2008, a Claim of Beneficial Use (COBU) was submitted to the Department, describing the completed development of Permit R-11248. On December 3, 2008, the Department sent a letter to Taylor Westside Ranch, Inc. stating that the Department cannot issue a Certificate for Permit R-11248 because the condition requiring

installation of a measuring device has not been complied with, and that an Extension of Time will be necessary to allow for installation of a measuring device.

4. One prior permit extension has been granted for Permit R-11248. The most recent extension resulted in the completion dates for construction being extended from October 1, 1992, to October 1, 2010 and full application of water being extended from October 1, 1993, to October 1, 2010. The Extension Application received in 2009 stated the only remaining work to be accomplished was installation of an in-line flow meter.
5. On April 20, 2017, Darryl Anderson (Agent), agent for Taylor Westside Ranch Inc., 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, 2010, to October 1, 2018, and the time to apply water to full beneficial use under the terms of Permit R-11248 be extended from October 1, 2010, to October 1, 2018.
6. On April 25, 2017, notification of the Application for Extension of Time for Permit R-11248 was published in the Department's Public Notice. No public comments were received regarding the extension application.

Review Criteria [OAR 690-315-0040]

In order to approve an Application for an Extension of Time to complete construction and/or apply water to full beneficial use pursuant to ORS 537.230 or 537.630, or to begin construction, pursuant to ORS 537.248, the Department must make the findings in OAR 690-315-0040(1)(a) – (d).

Complete Extension of Time Application [OAR 690-315-0040(1)(a)]

7. On April 20, 2017, 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)]

8. Actual construction of the water system began prior to the September 24, 1991 deadline specified in the permit. The Application states, construction of Taylor reservoir, authorized under Permit R-11248, began in 1991 with construction of diversions and outlet structures.
9. According to the Notice of Beginning Construction (FORM A) submitted to the Department on December 2, 1991, construction of Taylor Reservoir began September 15, 1990.

Based on Findings of Fact (FOF) 8 and 9, the Department has determined the permit holder has complied with the actual construction timeline requirement for beginning of construction of the water works.

Good Cause [OAR 690-315-0040(1)(d)]

The Department must find that there is “good cause” to approve the extension. In making a “good cause” finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).

Reasonable Diligence of the Appropriator [OAR 690-315-0040(2)(a)]

In order to make a finding of “good cause” to approve the extension, the Department shall consider whether the applicant has demonstrated “reasonable diligence” in previous performance under the permit. OAR 690-315-0040(2)(a). In determining “reasonable diligence”, the Department shall consider, but is not limited to, the following factors: a) The amount of construction completed within the time allowed in the permit or previous extension; b) The amount of beneficial use made of the water during the permit or previous extension time limits; c) Water right holder conformance with the permit or previous extension conditions; and d) Financial investments made toward developing the beneficial use of water.

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

The amount of construction completed within the time allowed in the previous extension.¹

10. The Application identifies work was accomplished during the original development time period, being September 24, 1990, to October 1, 1993. The work included construction of Taylor Reservoir and installation of diversions and outlet structures.
11. The COBU that was submitted on September 18, 2008, acknowledged that Permit R-11248 contains the condition requiring installation of an in-line flow meter, weir or other suitable measuring device and that one has not been installed.
12. The Department sent a letter to the permit holder informing them that a Certificate cannot be issued for Permit R-11248 because the condition requiring the installation of an in-line flow meter, weir or other suitable measuring device has not been complied with. The permit holder was instructed to submit an Application for Extension of Time and to contact the watermaster to discuss measuring device requirements.
13. The previous Application for Extension of Time, received by the Department on January 20, 2009, identified the only remaining work to be accomplished under Permit R-11248 consisted of installation of an inline flow meter, weir or other suitable measuring device and that it would be installed by June 2009.
14. The Application does not provide evidence of progress made towards completion of construction of the water development, which includes the installation of an in-line flow meter, weir or other suitable measuring device, and application of water to full beneficial use as allowed in the time period specified in the previous extension time period, being October 1, 1993, to October 1, 2010.

¹ “Actual Construction” is defined in OAR 690-315-0020(3)(d)(A) and (B) as physical work performed toward completion of the water system which demonstrates the water right permit holder’s good faith and intention to complete the project with reasonable diligence. Actual construction does not include planning a diversion system, formulating a business plan, securing financing, letting contracts, purchasing but not installing equipment, surveying, clearing land or planting crops.

Based on FOF 11 through 14, the Department cannot find evidence of work accomplished towards the complete application of water to beneficial use under Permit R-11248 during the most recent extension of time period, being October 1, 1993, to October 1, 2010. The Department has determined the permit holder has not been diligent in completing construction by not installing an in-line flow meter, weir or other suitable measuring device, or perfecting the water use permit.

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

The water right permit holder's conformance with the permit conditions.

15. In a letter dated December 3, 2008, the Department informed the permit holder of the need to install a measuring device as required by the conditions of Permit R-11248 and directed the permit holder to discuss measuring device options with the watermaster.
16. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the record does not show that an in-line flow meter, weir or other suitable measuring device has been installed.

Failure to comply with permit conditions constitutes illegal storage 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.

Based on FOF 11 through 16, the Department has determined the permit holder has not complied with all terms and conditions, as required by Permit R-11248, therefore, has not been diligent in developing or perfecting the water use permit.

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

The amount of beneficial use made of the water during the permit time limits.

17. The Application states a maximum volume of 993.0 AF of water has been stored in Taylor Reservoir from an unnamed stream, a tributary of North Fork Cox Creek.
18. According to the permit holder delay of full beneficial use of water under Permit R-11248 was due, in part, to confusion over the metering requirements.

Based on FOF 15, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2010.

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

19. The Applications states, from 1990 to 1993, the permit holder has invested about \$40,000, which is about 94 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$2,775 investment is needed for the completion of this project.

20. The Application does not identify any financial investment made in the development of the permit during the previous Extension of Time period, being October 1, 1993, to October 1, 2010.

Based on FOF 20, the Department has determined that no financial investment has been made towards the development of Permit R-11248 during the previous extension of time period, being October 1, 1993, to October 1, 2010.

Reasonable Diligence of the Appropriator [OAR 690-315-0040(2)(a)]

The Application does not provide evidence that work has been accomplished towards completion of the water system or a financial investment has been made during the previous extension of time period; the permit holder has not demonstrated compliance with permit conditions; and beneficial use of water has not been demonstrated. Based on FOF 11 through 16 and 20, the Department has determined the applicant has not demonstrated reasonable diligence in previous performance under Permit R-11248.

The Market and Present Demands for Water [OAR 690-315-0040(4)(a-f)]

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:

- *(a) The amount of water available to satisfy other affected water rights and scenic waterway flows;*
- *(b) 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);*
- *(c) The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife;*
- *(d) Economic investment in the project to date;*
- *(e) Other economic interests dependent on completion of the project; and*
- *(f) Other factors relevant to the determination of the market and present demands for water and power.*

The amount of water available to satisfy other affected water rights and scenic waterway flows [OAR 690-315-0040(4)(a)]

21. 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-11248; 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.

22. Current Water Availability Analysis for Cox Creek, (Tributary of Camp Creek) at the mouth (watershed ID 31300107) show that water is available during the months October through May at the 50% exceedance level.

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) [OAR 690-315-0040(4)(b)]

23. The point of diversion is located on an unnamed stream, a tributary of North Fork Cox Creek, and is not located within a Withdrawn Area.
24. North Fork Cox Creek is not located within or above a state or federal scenic waterway.
25. The point of diversion is in a location listed by the Department of Environmental Quality as a water quality limited stream; North Fork Cox Creek, River Mile 0 to 4.5 is listed under Water Quality Limited for temperature.

The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife [OAR 690-315-0040(4)(c)]

26. North Fork Cox Creek 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.

Economic interests dependent on completion of the project [OAR 690-315-0040(4)(d)]

27. The Application states an approximate total of \$40,000 has been invested in the project between September 24, 1990 and October 1, 1993.

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

28. The Application did not identify economic interests other than those of the applicant’s that may be 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)]

29. 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)]

30. The Application states that income or use of the water project will provide a fair and reasonable return on the investment.

Other Governmental Requirements [OAR 690-315-0040(2)(g)]

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

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

32. The Application did not identify unforeseen events.

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

33. The Application did state a denial of the extension would result in the ranching operation being severely impacted.

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

34. Based on Findings of Fact 11 through 16 and 20 above, the Department finds that the Applicant has not demonstrated good faith.

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.

35. As of April 20, 2017, the permit holder states the only remaining work to be completed consists of completing construction of the water system, which includes installation of an in-line flow meter, weir, or other suitable device, and applying water to full beneficial use. The permit holder requested the previous extension of time, which was approved October 6, 2009, to accomplish the installation of an in-line flow meter, weir, or other suitable device.

The Department cannot find that the applicant can complete the project or apply water to full beneficial use within the time requested for the extension because the applicant did not pursue application of the water to its beneficial use with due diligence during the previous Extension of Time period being October 1, 1993, to October 1, 2010.

Good Cause [OAR 690-315-0040(1)(d)]

The Department must find that there is "good cause" to approve the extension. In making a "good cause" finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).

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 not 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).

CONCLUSIONS OF LAW

1. 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).
2. The applicant complied with begin actual construction timeline requirements pursuant to ORS 537.230 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. The Application established that there has been no construction, no financial invest or reasonable diligence towards development of the permit during the previous Extension of Time period, being October 1, 1993, to October 1, 2010. The permit holder has not 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).

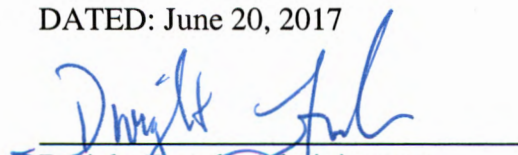
PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department proposes to issue an order to:

Deny the time to complete construction of the water system under Permit R-11248 from October 1, 2010, to October 1, 2018.

Deny the time to apply water to beneficial use under Permit R-11248 from October 1, 2010, to October 1, 2018.

DATED: June 20, 2017


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 **August 4, 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
-