

Oregon Water Resources Department
Water Right Services Division

Application for Extension of Time

In the Matter of the Application for an Extension of Time) PROPOSED
for Permit S-54563, Water Right Application S-87356) FINAL
in the name of Glenn and Susanne Howard) ORDER

Permit Information

Application: S-87356
Permit: S-54563
Basin: Middle Willamette / Watermaster District 16
Date of Priority: November 28, 2008

Source	Purpose or Use	Maximum Quantity
Falcon Glen Reservoir under Permit R-14584	Irrigation use on 20.4 acres	8.0 Acre Feet (AF) each year
Unnamed stream, tributary to Baker Creek	Pond maintenance for domestic and livestock use	0.08 cubic foot per second (cfs)

Please read this Proposed Final Order in its entirety.

In summary, the Department proposes to:

- Grant an extension of time to complete construction of the water system from June 11, 2014, to October 1, 2019.
- Grant an extension of time to apply water to full beneficial use from June 11, 2014, to October 1, 2019.¹

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

Application – Application for Extension of Time
Department – Oregon Water Resources Department
ODFW – Oregon Department of Fish and Wildlife
PFO – Proposed Final Order
AF – acre-feet
cfs – cubic feet per second
FOF – Finding of Fact
Falcon Glen – Falcon Glen Reservoir
ODFW – Oregon Department of Fish and Wildlife

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) contains the factors that the Department must consider to make findings that support a “good cause” determination.

FINDINGS OF FACT

1. On June 11, 2009, Permit S-54563 was issued by the Department. The permit authorizes the use of up to 8.0 AF of water each year from Falcon Glen Reservoir under Permit R-14584, for irrigation use on 20.4 acres, and 0.08 cfs of water from an unnamed stream, tributary to Baker Creek, for pond maintenance for domestic and livestock use. The permit specified completion of construction and application of the water was to be made within five years of the date of permit issuance, being June 11, 2014.
2. On September 11, 2017, the permit holder, Glenn Howard, submitted an “Application for Extension of Time” (Application) to the Department, requesting the time to complete construction of the water system be extended from June 11, 2014, to October 1, 2019, and the time to apply water to full beneficial use under the terms and conditions of Permit

S-54563 be extended from June 11, 2014, to October 1, 2019. This is the first permit extension requested for Permit S-54563.

3. On September 19, 2017, notification of the Application for Permit S-54563 was published in the Department's Public Notice. No public comments were received.

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)]

4. On September 11, 2017, the Department received a completed Application 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)]

5. Construction of the water system began prior to permit issuance. The permit holder states, construction of Falcon Glen Reservoir (Falcon Glen), a source for Permit S-54563, began May 1, 2008, with the excavation of Falcon Glen.

Based on Finding of Fact (FOF) 5, the Department has determined 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 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 permit.²

6. Construction of the water system began prior to June 11, 2014.
7. Work was accomplished during the original development time frame under Permit S-54563 is as follows:
 - Installed a pump and water tank on a portable trailer;
 - Installed PVC piping and fittings; and
 - Installed a water pump at the unnamed stream.
8. No other work has been accomplished since June 11, 2014.

The Department has determined based on FOF 5, 6, and 7, that work has been accomplished prior to permit issuance and within the time allowed in the permit, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

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

9. The Department has considered the permit holder's compliance with conditions, and has identified the following concern: the record does not show that written approval from the Oregon Department of Fish and Wildlife (ODFW) regarding the installation of fish screening and by-pass devices consistent with current ODFW standards had been received by June 11, 2014.
10. The permit holder obtained written documentation, dated March 21, 2017 from ODFW approving the current fish screening, and waiving the condition to install bypass devices, as they are not required for Permit S-54563. This letter is in the file for Permit S-54563.

The Department has determined based on FOF 10, that the permit holder has demonstrated compliance with following permit conditions after June 11, 2014, as required by Permit S-54563:

- “The permittee shall install, maintain, and operate fish screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards...The required screen and by-pass devices are to be in place and functional, and approved in writing by ODFW prior to diversion of any water. The permittee may submit evidence in writing that ODFW has determined screens and/or by-pass devices are not necessary.”

² “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.

11. 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 has been installed at each point of diversion.

The Department has determined based on FOF 11, that the permit holder has not demonstrated compliance with following permit conditions as required by Permit S-54563:

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

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.

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

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

12. The Application states a maximum volume of 6.3 AF of water has been diverted from Falcon Glen under Permit R-14584 for irrigation use on 12.4 acres, and 0.0134 cfs of water has been diverted from an unnamed stream, tributary to Baker Creek for pond maintenance for domestic and livestock use.

The Department has determined based on FOF 9, 10, and 11, that beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by June 11, 2014.

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 approximately \$3,038, which is about 48 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$3,340.00 investment is needed for the completion of this project.

The Department has determined based on FOF 13, that the permit holder had made an investment, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

The Application provides evidence of progress towards completion of the water system; a financial investment has been made; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use has not been demonstrated. The Department has determined the applicant has demonstrated the minimum necessary for the Department to find reasonable diligence towards complete application of water to a beneficial use.

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.*

OAR 690-315-0040(4)(a)

The amount of water available to satisfy other affected water rights and scenic waterway flows.

14. 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-54563; 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.
15. Current Water Availability Analysis for Panther Creek, (Tributary of North Yamhill River) at the mouth (watershed ID 70745) shows that no water is available during the months of June through November at the 80% exceedance level.
16. Current Water Availability Analysis has determined that 8.0 AF of water is available from Falcon Glen Reservoir, constructed under R-14584.

OAR 690-315-0040(4)(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).

17. The points of diversion are located on Panther Creek, a tributary to Baker Creek and are not located within a Withdrawn Area.
18. Panther Creek is not located within or above a state or federal scenic waterway.
19. The points of diversion are in a location listed by the Department of Environmental

Quality as a water quality limited stream.

- a. Baker Creek, River Mile 4.2 to 14.3 listed under Water Quality Limited for Dissolved Oxygen;
- b. Baker Creek, River Mile 0 to 14.2 listed under Water Quality Limited for Temperature and Biological Criteria.

OAR 690-315-0040(4)(c)

The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife.

20. Panther Creek is located within an area ranked “moderate” for stream flow restoration needs as determined by the Department in consultation with the ODFW, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with ODFW.

OAR 690-315-0040(4)(d)

Economic interests dependent on completion of the project.

21. The Application states an approximate total of \$3,038 has been invested in the project.

OAR 690-315-0040(4)(e)

Other economic interests dependent on completion of the project.

22. The Application states that Falcon Glen will also serve as a source of fire suppression for the permit holder and 2 neighboring land owners if needed.

OAR 690-315-0040(4)(f)

Other factors relevant to the determination of the market and present demand for water and power.

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

OAR 690-315-0040(2)(f)

Fair Return Upon Investment

24. The Application states the ability to irrigate the grapes allows for a more consistent and abundant crop, resulting in a higher price in the market place.

OAR 690-315-0040(2)(g)

Other Governmental Requirements

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

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

26. The Application did not identify any unforeseen events.

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

27. The Application states a denial of the extension would result in undue hardship, as the lack of watering would not produce the desired fruit expected by the wineries.

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

28. The Department has found good faith of the appropriator under Permit S-54563.

Based on FOF 5, 6, 7, 10, 12, 13, and 21, the Department has determined that the applicant has shown good faith and reasonable diligence.

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.

29. As of September 11, 2017, the permit holder states the remaining work to be completed consists of completing construction of the water system; meeting all permit conditions, including installing 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, 2019, 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-54563 is both reasonable and necessary.

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 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 construction timeline requirements to begin construction as required by ORS 537.230, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. Based on Finding of Facts 5 through 28, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2019³, as required by OAR 690-315-0040(1)(c).
4. The Applicant can complete the project within the time period requested for the extension on the project, but the extension is conditioned to mitigate the effects of the subsequent development on competing demands on the resource and is granted only for the reasonable time necessary to complete water development and apply water to beneficial use. OAR 690-315-0050(5).
5. The Applicant has demonstrated good cause for the extension. OAR 690-315-0050(5).

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-54563 from June 11, 2014, to October 1, 2019.

Extend the time to apply water to beneficial use under Permit S-54563 from June 11, 2014, to October 1, 2019.

DATED: October 24, 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.*

³Pursuant 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 Final Order Hearing Rights

1. Under the provisions of OAR 690-315-0100 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 **December 8, 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 Corey A 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
Fax: 503-986-0901 Salem, OR 97301-1266
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