

**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-54799, Water Right Application S-87734) FINAL
in the name of Robert L. and Leann R. McKee) ORDER

Permit Information

Application: S-87734
Permit: S-54799
Basin: Middle Willamette / Watermaster District 16
Date of Priority: July 6, 2011
Source of Water: Lower Reservoir and Upper Reservoir (to be constructed under Application R-87735), runoff, and two unnamed springs , tributaries to Salt Creek
Purpose or Use: Irrigation of 103.0 Acres and pond maintenance
Maximum Rate: 1.64 cubic feet per second (cfs), being 1.0 cfs for irrigation of 103.0 acres and 0.64 cfs for pond maintenance
Maximum Volume: 57.7 Acre Feet (AF), being 3.5 AF from Lower Reservoir and 54.2 AF from Upper Reservoir

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 complete construction of the water system from February 28, 2018, to October 1, 2023.
- Grant an extension of time to apply water to full beneficial use from February 28, 2018, to October 1, 2023.¹
- 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(5), 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
FOF – Finding of Fact
cfs – cubic feet per second
AF – acre feet

AUTHORITY

Generally, see ORS 537.230 and OAR Chapter 690 Division 315.

ORS 537.230(2) 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.

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 February 28, 2013 Permit S-54799 was issued by the Department. The permit authorizes the use of up to 1.64 cfs of water, being 1.0 cfs for irrigation of 103.0 acres and 0.64 cfs for pond maintenance; and 57.7 AF, being 3.5 AF from Lower Reservoir and 54.2 AF from Upper Reservoir (to be constructed under Application R-87735), runoff, and two unnamed springs, tributaries to Salt Creek. 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 February 28, 2018.

2. On February 27, 2018, Robert L. McKee, submitted an “Application for Extension of Time” (Application) to the Department, requesting the time to complete construction of the water system be extended from, February 28, 2018, to October 1, 2023, and the time to apply water to full beneficial use under the terms and conditions of Permit S-54799 be extended from February 28, 2018, to October 1, 2023. This is the first permit extension requested for Permit S-54799.
3. On March 12, 2018, the permit holder submitted additional information to supplement their Application. The additional information was to; clarify work accomplished towards development of the permit, correct estimates on the expected return on investments; and to provide descriptions of the photographs submitted with the Application.
4. On March 13, 2018, notification of the Application for Permit S-54799 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)]

5. On February 27, 2018, 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)]

6. Construction of Lower Reservoir, which serves as a source of water under this permit, began prior to permit issuance.
7. According to Application P-77020, the pond was in existence prior to January 1, 1993.

Based on Findings of Fact (FOF) 6, and 7, the Department has determined the permit holder began construction prior to February 28, 2018.

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

8. Construction of Lower Reservoir began prior to permit issuance.
9. During the original development time frame under Permit R-15005, work accomplished includes construction of the trench for diversion piping and force main installation.

The Application provides evidence that progress of physical work, enough to qualify as the minimum necessary, has been made towards completion of the water system for the Department to find good cause and reasonable diligence towards 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 or previous extension conditions.

10. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: the record does not show that (1) a meter or other suitable measuring device has been installed, and (2) annual reports of the amount of water used each month have not been received by the Department. The Department recognizes that it is the intent of the permit holder to comply with all permit conditions at the time the conditions become applicable.

Based on FOF 10, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit S-54799:

- “Before water use may begin under this permit, the permittee shall install a totalizing flow meter or other suitable measuring device as approved by the Director at each point of diversion. The permittee shall maintain the meter or measuring device in good working order”; and
- “The permittee shall keep a complete record of the amount of water diverted 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. Further, the Director may require the permittee to report general water-use information, including the place and nature of use of water under the permit.”

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.

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 or previous extension time limits.

11. No water has been used under Permit S-54799.

Based on FOF 10 and 11, the Department has determined that beneficial use of water has been demonstrated under Permit S-54799.

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

12. An approximate total of \$4,000 has been invested. The costs included items associated with maintenance which are not “actual construction” under this permit and therefore are not counted towards development. After deducting these costs, the approximate total investment for “actual construction” to date is approximately \$1,000 which is about 0.4 percent of the total projected cost for complete development of this project. An additional \$275,000 investment is needed to complete this project, which includes construction of Upper Reservoir, installation of the force main to deliver water from Lower Reservoir to Upper Reservoir, and the installation of associated pipes, pumps and valves.

Based on FOF 12, the Department has determined 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.

13. 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-54799; 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.
14. Current Water Availability Analysis for Salt Creek, tributary to Yamhill River, at the mouth (watershed ID 73562) shows that no water is available during the months of June through October at the 80% exceedance level.
15. Current Water Availability Analysis has determined that 57.7 AF of water, being 3.5 AF from Lower Reservoir and 54.2 AF from Upper Reservoir is available.

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).

16. The points of diversion are located on tributaries to Salt Creek, and are not located within a Withdrawn Area.
17. Salt Creek is not located within or above a state or federal scenic waterway.
18. The points of diversion are in a location listed by the Department of Environmental Quality as a water quality limited stream.
 - Salt Creek, River Mile 0.0 to 32.8 is listed under Water Quality Limited for Fecal Coliform, Phosphorus, Chlorophyll a, Dissolved Oxygen, and Temperature.

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.

19. Salt Creek is located within an area ranked “high” 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.

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

Economic interests dependent on completion of the project.

20. An approximate total of \$1,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

21. The farming operation employs farm labor, trucking labor, cleaning and storage services, and sales and office staff.

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

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

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. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date. The anticipated additional \$600 annual income per acre to be irrigated by water stored in there reservoirs would represent approximately an 18 percent annual return on investment.

Other Governmental Requirements [OAR 690-315-0042(2)(g)]

24. Delay in the development of this project that was caused by other governmental requirements have not been identified.

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

25. The Application identifies the purchase of the land that the farm has leased and the construction of a seed washing facility. These activities are considered to be business decisions and do not constitute an unforeseen event. Therefore, no unforeseen events were identified that extended the length of time needed to fully develop and perfect Permit S-54799.

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

26. A denial of the extension would not result in undue hardship.

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

27. The Application provides evidence of good faith of the appropriator under Permit S-54799.

Based on FOF 56, 7, 8, 9, 12, and 20, 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.

28. As of February 27, 2018, the permit holder states the remaining work to be completed consists of completing construction of the water system, which include construction of Upper Reservoir, and installing meters, irrigation equipment, pumps and valves; complying with all permit conditions, which includes submitting annual water use reports, 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, 2023, 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-54799 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).

LIMITATIONS AND CONDITIONS

1. 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. Based on FOF 11, the Department determined the need to place a “Water Use Condition” on this extension of time in order to ensure diligence is exercised in the development and perfection of water use permit. This condition, specified under Item 1 of the “Limitations and Conditions” section of this PFO, was determined to be necessary because no water has been stored in Upper Reservoir.

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 6 through 27, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2023³, 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 ensure future diligence 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, but the extension must be conditioned to ensure this is the last extension granted in order to ensure future diligence; OAR 690-315-0050(5).

continued on following page

³Pursuant to ORS 537.230(5), 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 complete construction of the water system under Permit S-54799 from February 28, 2018, to October 1, 2023.

Extend the time to apply water to beneficial use under Permit S-54799 from February 28, 2018, to October 1, 2023.

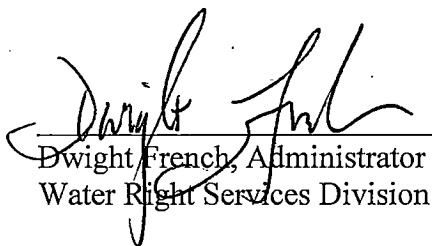
Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Water Use Condition**

If no water is applied to beneficial use under the terms and conditions of Permit S-54799 on or before October 1, 2023, this may be the be the last extension of time granted for Permit S-54799. Any future extensions of time request may be denied, unless the permit holder can provide the Department with evidence that beneficial use of the water is shown during this extension period. In addition, all normal extension standards and rules will be evaluated. ORS 539.010(5); OAR 690-315-0040.

DATED: April 24, 2018


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 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 **June 8, 2018**, 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>

