

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-52650, Water Right Application S-71996,) FINAL
in the name of the City of Phoenix) ORDER

Permit Information

Application: S-71996
Permit: S-52650
Basin: 15 – Rogue / Watermaster District 13
Date of Priority: November 15, 1991
Source of Water: Lost Creek Reservoir, constructed under Permit R-8140, a tributary
of Rogue River
Purpose or Use: Municipal Use
Maximum Rate 3.1 cubic feet per second (cfs) not to exceed 600.0 acre-feet (AF)
and Volume: per year of stored water only (per contract)

**This Extension of Time request is being processed in accordance with Oregon
Administrative Rule Chapter 690, Division 315.**

*Please read this Proposed Final Order in its entirety as it contains
additional conditions not included in the original permit.*

This Proposed Final Order applies only to Permit S-52650, water right Application S-71996.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to complete construction from October 1, 1998, to October 1, 2030.
- Grant an extension of time to apply water to full beneficial use from October 1, 1999, to October 1, 2030.
- Make the extension of time subject to certain conditions as set forth below.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
City – City of Phoenix
UGB – Urban Growth Boundary
RPS – Regional Problem Solving
ODFW – Oregon Department of Fish and Wildlife
USACE – U.S. Army Corp of Engineers
PFO – Proposed Final Order
WMCP – Water Management and Conservation Plan

Units of Measure

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 and allow an extension to complete construction or perfect a water right. 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 690-315-0080 provides in pertinent part that the Department shall make findings to determine if an extension of time for municipal and/or quasi-municipal water use permit holders may be approved to complete construction and/or apply water to full beneficial use. Under specific circumstances, the Department may condition extensions of time for municipal water use permit holders to provide that use of the undeveloped portion of the permit maintains the persistence of listed fish species in the portions of the waterways affected by water use under the permit.

OAR 690-315-0050(5) authorizes the Department to include in an extension order, but is 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.

OAR 690-315-0090(3) authorizes the Department, under specific circumstances, to condition an extension of time for municipal and/or quasi-municipal water use permit holders to provide that diversion of water beyond the maximum rate diverted under the permit or previous extension(s) shall only be authorized upon issuance of a final order approving a WMCP Plan under OAR Chapter 690, Division 86 which grants access to water under this extended permit.

FINDINGS OF FACT

1. On August 21, 1996, Permit S-52650 was issued by the Department. The permit authorizes the use of up to 3.1 cfs not to exceed 600.0 AF per year of stored water only from the Lost Creek Reservoir, constructed under Permit R-8140, a tributary of the Rogue River, for municipal use. The permit specified that construction of the water development project was to be completed by October 1, 1998, and that complete application of water was to be made on or before October 1, 1999.
2. Due to an ongoing permit extension rulemaking, in 1998 the Department stopped processing pending Applications for Extension of Time for municipal and quasi-municipal permits, and did not require municipal and quasi-municipal water use permit holders to submit Applications for Extension of Time during the rulemaking process.
3. Municipal and quasi-municipal water use permit extension rules OAR 690-315-0070 through 690-315-0100 became effective on November 1, 2002. The rules were subsequently amended, and the amended rules became effective on November 22, 2005.
4. On March 20, 2003, City of Phoenix (City) submitted an “Application for Extension of Time” (Application) to the Department requesting the time to complete construction be extended from October 1, 1998, to October 1, 2010 and the time to apply water to full beneficial use under the terms and conditions of Permit S-52650 be extended from October 1, 1999, to October 1, 2010. This is the first extension of time request for Permit S-52650.
5. Notification of the City’s Application for Extension of Time for Permit S-52650 was published in the Department’s Public Notice dated March 25, 2003. No public comments were received regarding the extension application.
6. On February 7, 2005, the City submitted additional information to supplement their pending Application for Extension of Time.
7. On June 5, 2012, the permit holder submitted an updated Application for Extension of Time. The updated Application requested the extended time to complete construction be changed from October 1, 2010, to October 1, 2030, and the extended time to apply water to full beneficial use be changed from October 1, 2010, to October 1, 2030.
8. Effective August 15, 2017, HB 2099 (Chapter 704, 2017 Oregon Laws), modifies the definition of the undeveloped portion of a municipal water right permit for the purpose of determining the amount of water that may be subject to fish persistence conditioning and diversion limitations to specify that the undeveloped portion of a municipal permit is the

amount of water that has not been diverted as of the later of June 29, 2005, or the date specified in the permit or last approved extension.

Review Criteria for Municipal and Quasi-Municipal Water Use Permits [OAR 690-315-0080(1)]

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 690-315-0080(1). This determination shall consider the applicable requirements of ORS 537.230¹, 537.630² and/or 539.010(5)³

Complete Extension of Time Application [OAR 690-315-0080(1)(a)]

9. On March 20, 2003, the Department received a completed application for extension of time and the fee specified in ORS 536.050.

Start of Construction [OAR 690-315-0080(1)(b)]

10. Permit S-52650 was issued prior to June 29, 2005; therefore, the permit holder is not required to provide evidence of actions taken to begin actual construction of the project.⁴

Duration of Extension [OAR 690-315-0080(1)(c) and (1)(d)]

Under OAR 690-315-0080(1)(c) and (1)(d), in order to approve an extension of time for municipal and quasi-municipal water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

11. The remaining work to be accomplished under Permit S-52650 consists of completing construction and applying water to full beneficial use.
12. As of June 29, 2005, the permit holder had diverted 516.27 AF of the 600.0 acre-feet per year of stored water authorized under Permit S-52650 for municipal purposes. There is an undeveloped portion of 83.73 AF of stored water under Permit S-52650 as per ORS 537.230(1) and OAR 690-315-0010(6)(g).
13. In addition to the 600.0 acre-feet per year of stored water authorized under Permit S-52650 the City holds the following municipal use water right certificates and permits:
 - Ground Water registration GR-1906 for 0.4233 cfs of water from Well 2;
 - Ground Water Registration GR-1907 for 0.557 cfs of water from the a well;
 - Certificate 39059 for 0.58 cfs of water from the Well 4, Well 5, and Well 6;
 - Certificate 79220 for 0.1 cfs of water from the a well;
 - Permit S-47672 for 5.0 cfs of water from the Rogue River and 400 AF from Lost Creek Reservoir; and
 - Permit R-8806 for storage of 400 AF of water in Lost Creek Reservoir to be appropriated for municipal water supply.

¹ ORS 537.230 applies to surface water permits only.

² ORS 537.630 applies to ground water permits only.

³ ORS 537.010(5) applies to surface water and ground water permits.

⁴ Section 5, Chapter 410, Oregon Laws 2005 and OAR 690-315-0070(3)(d).

These water rights and permits total 6.6603 cfs, of live flow water, being 1.6603 cfs of ground water and 5.0 of surface water and the storage of 400.0 AF of water, and use of 1,000.0 AF of water. City of Phoenix has not yet made use of 83.73 AF of stored water under Permit S-52650.

14. The City is currently involved in Regional Problem Solving (RPS) process, where all communities within the Southern Oregon Bear Creek region jointly determine how and where each community will grow over the next 50 years. The RPS stakeholders have not completed the process, and the areas for future growth have not been identified, however, the process is to the point where the City is confident the future growth areas will include un-incorporated areas of the urban growth boundary (UGB) and RPS areas outside of the UGB, and most of the existing service area of the Charlotte Anne Water District. Land uses in the future growth areas are to include residential, commercial, industrial and park and open space uses.
15. According to the Application, in 2011, the population within the service boundary of City of Phoenix was 4,550. The City estimates the population will increase at a growth rate of 2.5 percent per year, reaching an estimated population of 7,127 by the year 2030.
16. The City's peak water demand within its service area boundaries was 7.46 cfs in 2011.
17. The City's peak day demand is projected to be approximately 8.20 cfs of water by the year 2030.
18. ORS 540.510(3)(a) allows water use under a permit issued to a municipality to be applied to beneficial use on lands to which the right is not appurtenant if the use continues to be for municipal purposes and would not interfere or impair prior vested water rights.
19. Full development of Permit S-52650 is needed to address the present and future water demand of City of Phoenix, including system redundancy and emergency use.

Based on Findings of Fact (FOF) 10-17, the Department finds that the City's request for an extension of time until October 1, 2030, to complete construction and to apply water to full beneficial use under the terms of Permit S-52650 is both reasonable and necessary.

Good Cause [OAR 690-315-0080(1)(e) and (3)(a-g)]

The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0080(3).

Reasonable Diligence and Good Faith of the Appropriator [OAR 690-315-0080(3)(a), (3)(c) and (4)]

Reasonable diligence and good faith of the appropriator must be demonstrated during the permit period or prior extension period as a part of evaluating good cause in determining whether or not to grant an extension. In determining the reasonable diligence and good faith of a municipal or quasi-municipal water use permit holder, the Department shall consider activities associated with the development of the right including, but not limited to, the items set forth under OAR 690-315-0080(4) and shall evaluate how well the applicant met the conditions of the permit or conditions of a prior extension period.

20. Prior to the issuance of Permit S-52650 on August 21, 1996, the City installed a pump station and approximately 6.5 miles of waterline to connect to the Medford Water Commission's water system.
21. Work was accomplished during the original development time frame which includes:
 - entering into the regional supply development agreement; and
 - development of a Water Management and Conservation Plan
22. Since October 1, 1999, the City has:
 - constructed additional connections to the MWC system;
 - installed the TAP line and Pump station;
 - constructed the 1.0 million gallon Eastside Reservoir;
 - installed the skyline pump station;
 - prepared a Water System Master Plan; and
 - constructed the Amerman Street High Zone pipeline.

Based on FOF 19, 20, and 21, the Department has determined that work was accomplished prior to permit issuance and within the time allowed in the permit, which provides evidence of reasonable diligence towards the completion of the water system.

23. According to the updated Application, as of June 5, 2012, the City has invested approximately \$6,405,000, which is about 62 percent of the total projected cost for complete development of this project. The City estimates a \$3,905,000 investment is needed for the completion of this project. The Department recognizes that while some of these investment costs are unique to construction and development solely under S-52650, other costs included in this accounting are not partitioned out for S-52650 because (1) they are incurred under the development of a water supply system jointly utilized under other rights held by the City, and/or (2) they are generated from individual activities counted towards reasonable diligence and good faith as listed in ORS 690-315-0080(4) which are not associated with just this permit, but with the development and exercise of all the City's water rights.
24. As of June 29, 2005, the City had diverted 516.27 cfs of the 600.0 acre-feet per year of stored water allowed for beneficial municipal purposes under the terms of this permit. October 1, 1999.
25. The Department has considered the City's compliance with conditions, and did not identify any concerns.

Financial Investment and Cost to Appropriate and Apply Water to a Beneficial Purpose
[OAR 690-315-0080(3)(b)]

26. According to the Application, as of March 20, 2003, they have invested approximately \$6,405,000, which is about 62 percent of the total projected cost for complete development of this project. The City estimates a \$3,905,000 investment is needed for the completion of this project.

The Market and Present Demands for Water [OAR 690-315-0080(3)(d)]

27. As described in Findings 11 through 18 above, the City has indicated, and the Department finds that the City must rely on full development of their Permit S-52650.
28. The City estimates an annual population growth rate of 2.5 percent per year over a 19 year period, being the years 2011 to 2030.
29. Given the current water supply situation of the City, including current and expected demands, the need for system redundancy, and emergency water supply, there is a market and present demand for the water to be supplied under Permit S-52650.
30. OAR 690-315-0090(3) requires the Department to place a condition on this extension of time to provide that diversion of water beyond 516.27 cfs (not to exceed the maximum amount authorized under this permit, being 600.0 acre-feet per year of stored water only shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan(s) (WMCP) under OAR Chapter 690, Division 86 that grants access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7). A “Development Limitation” condition” is specified under Item 1 of the “Conditions” section of this PFO to meet this requirement.

Fair Return Upon Investment [OAR 690-315-0080(3)(e)]

31. Use and income from the permitted water development project would result in reasonable returns upon the investment made in the project to date.
32. The City monitors water use on all its metered accounts and utilizes a base rate structure where all accounts are charged a monthly connection fee which includes the first 700 cubic feet of water used, and a progressive rate structure for water used beyond the first 700 cubic feet.

Other Governmental Requirements [OAR 690-315-0080(3)(f)]

33. Delays caused by any other governmental requirements in the development of this project have not been identified.

Events which Delayed Development under the Permit [OAR 690-315-0080(3)(g)]

34. Delay of development under Permit S-52650 was due, in part, to the size and scope of the municipal water system, which was designed to be phased in over a period of years.

Maintaining the Persistence of Listed Fish Species [OAR 690-315-0080(1)(f) and (2)]

The Department’s determination regarding maintaining the persistence of listed fish species shall be based on existing data and advice of the Oregon Department of Fish and Wildlife (ODFW). The determination shall be limited to impacts related to stream flow as a result of use of the undeveloped portion of the permit and further limited to where, as a result of use of the

undeveloped portion of the permit, ODFW indicates that stream flow would be a limiting factor for the subject listed fish species.

35. The pending municipal Application for Extension of Time for Permit S-52650 was delivered to ODFW on April 30, 2018, for ODFW's review under OAR-690-315-0080.
36. Notification that the pending municipal Application for Extension of Time for Permit S-52650 was delivered to ODFW for review was sent to the City on May 1, 2018.
37. Notification that the pending municipal Application for Extension of Time for Permit S-52650 was delivered to ODFW for review was published in the Department's Public Notice dated May 1, 2018. No public comments were received regarding this notice.
38. On November 14, 2018, the Department received ODFW's Division 315 Fish Persistence Evaluation for Permit S-52650.
39. Summary and Excerpts of Advice from ODFW:
 - Permit S-52650 is limited to the use of stored water from Lost Creek Reservoir under Permit R-8140 held by ODFW;
 - Permit R-8140 contains the condition: "In years of short water supply, all users will share the availability of stored water supply in the same portions that they would share the total full supply when it is available as provided by PL87-874";
 - storage conditions during all years are governed by reservoir operation guidelines, which are decided by ODFW and U.S. Army Corp of Engineers (USACE), primarily for the benefit of the fishery; and
 - Given the fact that water storage and flow management is governed by ODFW and USACE to meet the existing instream water right, fish persistence will be maintained with the development of the full amount of water authorized in Permit S-52650.
40. The Department finds, based on ODFW's advice, the use of the undeveloped portion of Permit S-52650 will maintain the persistence of listed fish species in the portions of the waterways affected by water use under the permit.
41. Based on ODFW's advice, the Department proposes not to require conditions to maintain, in the portions of the waterways affected by water use under Permit S-52650, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law.
42. On November 15, 2018, the Department notified the City as per OAR 690-315-0080(2)(f) of ODFW's written advice and the "Conditions to Maintain the Persistence of Listed Fish" proposed in this PFO for the pending municipal Application for Extension of Time for Permit S-52650.

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 under Permit S-52650 from October 1, 1998, to October 1, 2030.

Extend the time to apply the water to beneficial use under Permit S-52650 from October 1, 1999, to October 1, 2030.

Subject to the following conditions:

CONDITIONS

1. Development Limitations

A maximum diversion of 516.27 AF of water is currently allowed under Permit S-52650. Any diversion of water beyond 516.27 AF (not to exceed the maximum amount authorized under the permit, being 600.0 acre-feet per year of stored water only shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan (WMCP) under OAR Chapter 690, Division 86 that authorizes access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7). The required WMCP shall be submitted to the Department within 3 years of this Final Order. The amount of water used under Permit S-52650 must be consistent with this and subsequent WMCP's approved under OAR Chapter 690, on file with the Department.

The Development Limitation established in the above paragraph supersedes any prior limitation of the diversion of water under Permit S-52650 that has been established under a prior WMCP or Extension final order issued by the Department.

The deadline established in the Extension Final Order for submittal of a WMCP shall not relieve a permit holder of any existing or future requirement for submittal of a WMCP at an earlier date as established through other orders of the Department. A WMCP submitted to meet the requirements of the final order may also meet the WMCP submittal requirements of other Department orders.

DATED: December 11, 2018



Dwight French
Water Right Services Division Administrator

*If you have any questions,
please check the information
box on the last page for the
appropriate names and phone
numbers.*

CONCLUSIONS OF LAW

1. The City 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(2).
2. The City has submitted a complete extension application form and the fee specified under ORS 536.050(1)(k), as required by OAR 690-315-0080(1)(a).
3. Pursuant to Section 5, Chapter 410, Oregon Laws 2005, the permit holder is not required to demonstrate that actual construction of the project began within one year of the date of issuance of the permit, as otherwise required by OAR 690-315-0080(1)(b).
4. Pursuant to ORS 540.510(3)(a) and (b), water under Permit S-52650 may be applied to beneficial use on land to which the right is not appurtenant.
5. The time requested to complete construction and apply water to full beneficial use is reasonable, as required by OAR 690-315-0080(1)(c).
6. Completion of construction and full application of water to beneficial use can be completed by October 1, 2030⁵, as required by OAR 690-315-0080(1)(d).
7. 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 the fair return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the water right permit holder had no control, and the Department finds that the City has shown good cause for an extension of time to complete construction and to apply the water to full beneficial use pursuant to OAR 690-315-0080(1)(e).
8. As required by OAR 690-315-0090(3) and as described in Finding 29, above, and specified under Item 1 of the “Conditions” section of this PFO, the diversion of water beyond 516.27 AF (not to exceed the maximum amount authorized under this permit, 600.0 acre-feet per year of stored water only) under Permit S-52650 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan (WMCP) under OAR Chapter 690, Division 86 that grants access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7).
9. In accordance with OAR 690-315-0080(1)(f), and as described in Findings 38, 39, and 40, above, the use of the undeveloped portion of the permit will maintain the persistence of listed fish species in the portions of waterways affected by water use under the permit.

⁵ For permits applied for or received on or before July 9, 1987, upon complete development of the permit, you must notify the Department that the work has been completed and either: (1) hire a water right examiner certified under ORS 537.798 to conduct a survey, the original to be submitted as required by the Department, for issuance of a water right certificate; or (2) continue to appropriate water under the water right permit until the Department conducts a survey and issues a water right certificate under ORS 537.625.

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 **January 27, 2019**, 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>

continued on following page

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
