

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 R-14616, Water Right Application R-87130) FINAL
in the name of Mark Spitsbergen) ORDER DENIAL

Permit Information

Application:	R-87130
Permit:	R-14616
Basin:	Klamath / Watermaster District 17
Date of Priority:	March 17, 2008
Source of Water:	Ish Tish Creek, tributary to South Fork Sprague River
Storage Facility:	Baio #1
Purpose of Use:	Multiple Purpose Use
Maximum Volume:	28.4 acre-feet (AF)

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, 2018, to October 1, 2020.
- Deny an extension of time to apply water to full beneficial use from October 1, 2018, to October 1, 2020.

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

ODFW - Oregon Department of Fish and Wildlife
Department – Oregon Water Resources Department
PFO – Proposed Final Order
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) contain the factors that the Department must consider to make findings that support a “good cause” determination.

FINDINGS OF FACT

1. On June 22, 2008, Permit R-14616 was issued by the Department. The permit authorizes the storage of up to 28.4 AF of water in Baio #1 Reservoir from Ish Tish Creek, tributary to South Fork Sprague River, for multiple purpose use. The permit specified the reservoir was to be filled and application of the stored water was to be made on or before October 1, 2012.
2. On September 19, 2013, an assignment from Leonard Baio, to Mark Spitsbergen, was recorded in the records of the Water Resources Department for R-14616.
3. One prior permit extension has been granted for Permit R-14616. The extension resulted in the completion dates for construction being extended to October 1, 2018 and full application of water being extended to October 1, 2018.
4. The permit holder, Mark Spitsbergen, submitted an “Application for Extension of Time” to the Department on November 2, 2018, requesting the time to complete construction of the water system be extended from October 1, 2018, to October 1, 2020 and the time to apply water to full beneficial use under the terms of Permit R-14616 be extended from October 1, 2018, to October 1, 2020.

5. Notification of the Application for Extension of Time for Permit R-14616 was published in the Department's Public Notice dated November 13, 2018. On November 5, 2018, Oregon Department of Fish and Wildlife (ODFW) submitted a comment requesting that ODFW be kept informed about Permit R-14616 through the Extension of Time process.

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)]

6. On November 2, 2018, 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)]

7. Construction of the Baio #1 Reservoir, authorized under Permit R-14616, began prior to permit issuance.
8. According to the Application for a Permit to Store Water in a Reservoir, submitted to the Department on March 17, 2008, the reservoir has been in place for fifty years.

Based on Finding of Fact (FOF) 7, and 8, the Department has determined that construction of the reservoir began prior to October 1, 2012.

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

9. The work was accomplished within the time allowed in the previous extension as follows:
 - a. Construction of the water system began prior to permit issuance.
 - b. During the most recent extension period, being from October 1, 2012, to October 1, 2018, no work was accomplished towards the completion of the reservoir.

The Application does not provide evidence of progress made towards completion of the water development and application of water to full beneficial use as allowed in the time period specified in the in the previous extension time period. Therefore, the Department cannot find good cause or reasonable diligence towards the complete application of water to beneficial use under work has been accomplished within the time allowed in Permit R-14616.

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

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

10. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) the record does not show that a totalizing flow meter or other suitable measuring device has been installed, (2) the record does not show that an outlet pipe has been installed, or other means to evacuate the water has been provided, (3) the permit holder has not provided written documentation from the Oregon Department of Fish and Wildlife approving the installation of fish screens on by-pass devices, and have not provided documentation from ODFW that fish screens and by-pass devices are not necessary, (4) the permit holder has not provided evidence that the existing reservoir has been drained, or that they have obtained a fish transport permit from ODFW, (5) the permit holder has not provided evidence of a fish passage waiver from the ODFW Commission for the construction and operation of a dam or artificial obstruction to fish passage in the subject stream.

Failure to comply with permit conditions constitutes illegal storage of water.

Based on FOF 9, and 10, the Application does not provide evidence toward perfecting the water right under the terms and conditions of the permit. Therefore, the Department has determined the permit holder has not been diligent in developing or perfecting the water use permit, and has not complied with the terms and conditions, as required by Permit R-14616.

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 10, the Department has determined that the permit holder has not complied with the following conditions as required by Permit R-14616:

- “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 storage of water allowed herein is subject to the installation and maintenance of an outlet pipe, or the provision of means to evacuate water when determined necessary by the Water Resources Director to satisfy prior downstream rights.”
- “The permittee shall install, maintain, and operate fish-screening and by-pass devices consistent with current Oregon Department of Fish and Wildlife (ODFW) standards. Fish screening is to prevent fish from entering the proposed diversion, while by-pass devices are to provide adequate upstream and downstream passage for fish. The required screen and by-pass devices are to be in place and functional prior to diversion of any water. Permittee shall obtain written approval from ODFW that the installation of the required screen and by-pass devices meets the state’s criteria, or the permittee shall submit documentation that ODFW has determined screens and/or by-pass devices are not necessary.”
- “The permittee shall drain the existing reservoir to remove unauthorized fish species, such as largemouth bass, unless the permittee obtains a fish transport permit from ODFW.” and
- “The permittee shall not construct, operate or maintain any dam or artificial obstruction to fish passage in the channel of the subject stream without providing a fishway to ensure adequate upstream and downstream passage for fish, unless the permittee has requested and been granted a fish passage waiver by the Oregon Fish and Wildlife Commission.”

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

The amount of beneficial use made of the water during the permit or previous extension conditions.

11. A maximum volume of 28.0 AF of water has been stored from Ish Tish Creek, tributary to South Fork Sprague River, in Baio #1 Reservoir.
12. The delay of full beneficial use of water under Permit R-14616 was due, in part, difficulty in developing the design for fish passage.

Based on FOF 10, 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, 2018.

Based on FOF 10, and 11, the Department has determined that the permit holder has diverted water prior to the installation of fish-screening and by-pass devices. Failure to comply with permit conditions that require installation of fish-screens and by-pass devices, prior to the diversion of water, raises a concern of harm to the public interest, as fish may have been killed as a result of the failure to install the required fish-screen and by-pass device.

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

13. The amount of financial investment to date is unknown. During the most recent Extension of Time period, the permit holder invested approximately \$1,000 to retain the services of an engineer for design of fish passage and outlet pipe. No investment has been made in physical construction of the reservoir during the most recent extension of time period. An additional \$50,000 investment is needed for the completion of this project.

Based on FOF 13, the Department cannot find that there has been an investment towards the development of Permit R-14616 during the most recent extension of time period.

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

The application provides evidence that no work has been accomplished towards completion of the water system during the most recent extension of time period; the permit holder has not demonstrated compliance with permit conditions, and; beneficial use of water has not been demonstrated. The Department has determined the applicant has not demonstrated reasonable diligence in previous performance under Permit R-14616.

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 G-14616; 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 the South Fork Sprague River, (Tributary to Sprague River) at the mouth (watershed ID 70802) show that water is available during the months of March, April, and May at the 50% exceedance level.

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 point of diversion is located on Ish Tish Creek, tributary to South Fork Sprague River, and is not located within a Withdrawn Area.
17. Ish Tish Creek, tributary to South Fork Sprague River, is located above Klamath Scenic Waterway.
18. The point of diversion is not in a location listed by the Department of Environmental Quality as a water quality limited stream.

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. Ish Tish Creek, tributary to South Fork Sprague River is located within an area ranked “low” for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife.

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

Economic interests dependent on completion of the project.

20. The investment that has been made to date is unknown.

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

Other economic interests dependent on completion of the project.

21. No other economic interests dependent on completion of the project have been identified.

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.

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

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

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

25. No unforeseen events were identified that extended the length of time needed to fully develop and perfect Permit R-14616.

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 does not provide evidence of good faith of the appropriator under Permit R-14616.

Based on Findings of Fact 9, 10, 11, and 13, 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.

28. As of November 2, 2018, the permit holder states the remaining work to be completed consists of completing construction of the reservoir, which include installation of the outlet pipe, totalizing flow meter, and fish passage; and applying water to full beneficial use.

Based on FOF 9, 10, 11, and 13, 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 has diverted water for storage in the reservoir prior to installation of the required fish-screen, by-pass devices, and fish passage; and has not been diligent in the development of the reservoir during the most recent extension of time period.

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 did comply with begin 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 during the most recent extension of time period. 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).

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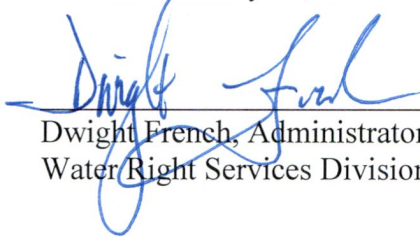
PROPOSED ORDER

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-14616 from October 1, 2018, to October 1, 2020.

Deny the time to apply water to beneficial use under Permit R-14616 from October 1, 2018, to October 1, 2020.

DATED: January 15, 2019


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 **March 1, 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>

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- 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
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Salem, OR 97301-1266
Fax: 503-986-0901
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