

**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-15050, Water Right Application R-87489	) FINAL ORDER
in the name of 4-DSD, LLC	) TO DENY

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**Permit Information**

Application:	R-87489
Permit:	R-15050
Basin:	John Day / Watermaster District 4
Date of Priority:	June 30, 2009
Source of Water:	runoff, unnamed tributary, Low Gilchrist Spring, and High Gilchrist Spring, tributaries of Sixshooter Creek
Storage Facility:	Pond A
Purpose or Use of the Stored Water:	irrigation and livestock
Maximum Rate/Volume:	200.0 acre feet (AF) each year

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***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 January 24, 2019, to October 1, 2024.
- Deny an extension of time to apply water to full beneficial use from January 24, 2019, to October 1, 2024.

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.230 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315

## **ACRONYM QUICK REFERENCE**

Department – Oregon Water Resources Department

PFO – Proposed Final Order

AF - acre feet

## **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 January 24, 2014, Permit R-15050 was issued by the Department. The permit authorizes the storage of up to 200.0 AF of water in Pond A from runoff, unnamed tributary, Low Gilchrist Spring, and High Gilchrist Spring, tributaries of Sixshooter Creek, for the purpose of irrigation and livestock. The permit construction was to be completed, and the permitted volume of water was to be stored within five years of permit issuance, being January 24, 2019.
2. On May 6, 2019, D. C. Safreno, general manager of 4-DSD, LLC, submitted an “Application for Extension of Time” to the Department requesting the time to complete construction of the water system extended from January 24, 2019, to October 1, 2024, and the time to apply water to full beneficial use under the terms of Permit R-15050 be extended from January 24, 2019, to October 1, 2024. This is the first permit extension requested for Permit R-15050.
3. Notification of the Application for Extension of Time for Permit R-15050 was published in the Department’s Public Notice dated May 7, 2019. No public comments were received regarding the extension application.

## **Review Criteria [OAR 690-315-0040]**

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

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

4. On May 6, 2019, 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)]**

ORS 537.230 (2) states in part that “Except for a holder of a permit for municipal use, the holder of a water right permit shall prosecute the construction of any proposed irrigation or other work with reasonable diligence and complete the construction within a reasonable time, as fixed in the permit by the Water Resources Department, not to exceed five years from the date of approval” [emphasis added]. R-15050 was issued pursuant to ORS 537.625. The application states that construction of the reservoir has not yet begun. An extension cannot be approved to begin construction.

OAR 690-315-0040(5) states “if the extension is requested pursuant to ORS 537.230, the applicant must have begun actual construction work, as defined in OAR 690-315-0020(3)(d)(A) and (B), during the period required by statute. If the Department finds the applicant did not begin construction by that date, the permit cannot be extended and the Department may begin cancellation proceeding pursuant to ORS 537.260.”

5. Construction of the reservoir authorized under Permit R-15050, did not began on or before January 24, 2019.

Based on Finding of Fact (FOF) 5, the Department cannot find that construction of the reservoir authorized under Permit R-15050 began within five years of permit issuance, being by January 24, 2019, as required by ORS 537.230.

### **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.<sup>1</sup>*

6. The Application identifies work associated with the development of the water system authorized under Permit G-16352, which includes construction of wells, irrigation mainline, pivots, and wheel lines.
7. The Application does not provide evidence of work towards the construction of the reservoir.

Based on FOF 5, and 7, the Department has determined that construction of Pond A did not begin within the time required under Permit R-15050, or as required under ORS 537.230(2). The Department recognizes that the permit holder invested in the water system associated with the irrigation of land on their ranch, which Pond A is intended to be a component of. However, the Department must evaluate work under each permit individually. The Application does not identify any work accomplished in the construction of Pond A, or improvements to any of the water sources authorized under Permit R-15050, therefore, the Department cannot determine that any construction was accomplished under Permit R-15050.

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

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

8. The Department has considered the permit holder's compliance with conditions, and has identified the following concern; construction of the reservoir did not begin within the time authorized. The Department recognizes that it is the intent of the permit holder to comply with the remaining permit conditions at the time the conditions become applicable.

Based on FOF 5, 7, and 8, 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 all terms and conditions, as required by Permit R-15050.

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

*The amount of beneficial use made of the water during the permit.*

9. No water has been stored under Permit R-15050.

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<sup>1</sup> "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.

10. The delay of full beneficial use of water under Permit R-15050 was due to the permit holder's decision to develop the irrigation system for use under Permit G-16352.

Based on FOF 9, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because no water has been stored under Permit R-15050.

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

11. An approximate investment of \$1,183,000, has been made in the development of the water system authorized by Permit G-16352, which are not "Actual Construction" under Permit R-15050, and therefore are not counted towards development of the reservoir. After deducting these costs, no investment has been made in the construction of the Pond A. An investment of \$274,500 is needed to construct Pond A.

Based on FOF 11, the Department finds that there has been no investment towards the development of Permit R-15050.

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

The application does not provide evidence of work accomplished towards construction of the reservoir; 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-15050.

**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.

12. A review of the amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit R-15050; 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.
13. Current Water Availability Analysis for Mountain Creek, (Tributary to Rock Creek) at the mouth (watershed ID 30620103) show that no water is available during the months of July through December 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).

14. The points of diversion located on tributaries of Sixshooter Creek, and are not located within a Withdrawn Area.
15. Sixshooter Creek is located above John Day Scenic Waterway.
16. The points of diversion are 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.

17. Sixshooter 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.

18. An approximate total of \$1,183,000 has been invested in the project, however, no investment has been made in the construction of the reservoir authorized under Permit R-15050.

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

Other economic interests dependent on completion of the project.

19. The Application identifies the ranch as being important to the local economy.

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

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

20. 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)]**

21. No investment has been made in the construction of the reservoir authorized under Permit R-15050. The investment of \$1,183,000, identified in the Application is in the development of Permit G-16352.

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

22. 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)]**

23. The Application identifies the "Great Recession" as being a factor that contributed to the delay in the development of the project.

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

24. The permit holder identifies that a denial of the extension of time would result in an undue hardship in that they have developed the irrigation system under permit G-16352, which Pond A is intended to be an integral part of the system to act as a "bulge" to reduce the pumping stress on the wells, as well as supply water from the source streams.

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

25. The Application provides evidence of development of Permit G-16352, however, the Application does not identify any work accomplished towards the construction of the reservoir authorized under Permit R-15050. Though the Applicant planned to utilize Pond A as a component of the larger irrigation system, Permit R-15050 authorizes the storage of water with no secondary permit authorizing the use of the stored water. Development of the water system authorized under Permit G-16352 to use ground water for irrigation cannot be considered development under Permit R-15050.

Based on Findings of Fact 5, above, the Department finds that the Applicant has not demonstrated good faith because the Department cannot find that the Applicant began construction as required by ORS 537.230(2) and OAR 690-315-0040(b).

**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.*

26. As of May 6, 2019, the permit holder states the remaining work to be completed consists beginning construction of the reservoir, and storing water for beneficial use.

Based on FOF 5, the Department cannot find that the applicant can complete the reservoir within the time requested for the extension because the applicant did not begin construction within the time allowed in the permit (5 years).

**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 not 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. 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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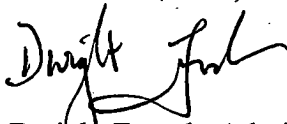
## PROPOSED ORDER

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-15050 from January 24, 2019, to October 1, 2024.

Deny the time to apply water to beneficial use under Permit R-15050 from January 24, 2019, to October 1, 2024.

DATED: June 25, 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 **August 9, 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 TO ACTIVE DUTY SERVICEMEMBERS:** Active duty Servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

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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  
725 Summer St NE, Suite A  
Salem, OR 97301-1266
- Fax: 503-986-0901
-