

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-54913, Water Right Application S-87674) FINAL
in the name of Antony Kreitz and Kelli Kay) ORDER

Permit Information

Application:	S-87674
Permit:	S-54913
Basin:	Upper Willamette / Watermaster District 2
Date of Priority:	January 3, 2011
Source of Water:	Willamette Basin Project Reservoirs, constructed under Permits R-1625 and R-5363, tributaries to McKenzie River
Purpose or Use:	irrigation of 8.0 acres
Maximum Volume:	20.0 acre-feet (AF)

***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 January 24, 2019, to October 1, 2025.
- Grant an extension of time to apply water to full beneficial use from January 24, 2019, to October 1, 2025.¹
- 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
Point of Re-Appropriation – LANE 75820
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(6) requires the Department, for extensions exceeding five years, to establish checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between checkpoints will not exceed five year periods.

FINDINGS OF FACT

1. On January 24, 2019 Permit S-54852 was issued by the Department. The permit authorizes the storage of up to 20.0 AF of water from Willamette Basin Project Reservoirs, constructed under Permits R-1625 and R-5363, tributaries to McKenzie River, for irrigation of 8.0 acres. The permit specified completion of construction, and application of water was to be made within five years of permit issuance, being January 24, 2019.
2. On February 19, 2015 the Department approved Permit Amendment T-11927 (Special Order Volume 95, Page 117) authorizing a change from a surface water point of

re-diversion to a ground water point of re-appropriation under Permit S-54852. Superseding Permit S-54913 was issued to reflect the changes.

3. On June 19, 2019, Jerome M. and Shirley J. McSilvers, submitted an “Application for Extension of Time” (Application) to the Department, requesting the time to complete construction of the water system be extended from, January 24, 2019, to October 1, 2025, and the time to apply water to full beneficial use under the terms and conditions of Permit S-54913 be extended from January 24, 2019, to October 1, 2025. This is the first permit extension requested for Permit S-54913.
4. On July 2, 2019, notification of the Application for Permit S-54913 was published in the Department’s Public Notice. No public comments were received.
5. On July 15, 2019, an assignment from Jerome M. and Shirley J. McSilvers, to Antony Kreitz and Kelli Kay, was recorded in the records of the Water Resources Department.

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 June 19, 2019, 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)]

7. Construction of the water system began prior to January 24, 2019, as specified in the permit as being the date to apply water to full beneficial use.
8. According to the well log received by the Department on April 6, 2018, construction of LANE 75820 (Point of Re-Appropriation) began on March 30, 2018.

Based on Findings of Fact (FOF) 7 and 8, the Department has determined the permit holder began construction prior to January 24, 2019.

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

9. Construction of the water system began prior to January 24, 2019.
10. No other work was accomplished during the original development time frame under Permit S-54913.

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.

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

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

11. No water has been used under Permit S-54913.
12. A delay of full beneficial use of water under Permit S-54913 was due, in part, to concerns of vandalism at the location of the original point of diversion, which was to be located adjacent to a public boat landing. The permit holder spent the first year after the permit was issued going through the process of a Permit Amendment to change the point of re-diversion from the location adjacent to the boat launch, to a well that was to be constructed on the permit holder’s property.

Based on FOF 11, the Department has determined that beneficial use of water has not yet been demonstrated under this.

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

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

13. The Department has considered the permit holder’s compliance with conditions, and has identified the following concern, the record does not show that a totalizing flow meter has been installed. 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.

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.

Based on FOF 11 and 13, the Department has determined that the permit holder has demonstrated compliance with following permit condition as required by Permit S-54913:

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

Because no water has been used under Permit S-54913, compliance with the condition requiring installation of a totalizing flow meter has not needed to be demonstrated. Prior to beginning use of water under Permit S-54913, installation of a totalizing flow meter is necessary to demonstrate compliance with the condition. Failure to comply with permit conditions would constitute illegal use of water. Beneficial use of water under this permit, 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.

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

14. The permit holder has invested \$5,159, which is about 15 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$30,000 investment is needed for the completion of this project.

Based on FOF 14, 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 that work has been accomplished towards completion of the water system; the permit holder has demonstrated compliance with permit conditions; a financial investment has been made, and; water has not been used, therefore beneficial use of water has been not demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit S-54913.

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.

15. 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-54913; 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.
16. Current Water Availability Analysis has determined that 20.0 of water is available from Willamette Basin Project Reservoirs, under contract 149E101830 with United States Department of Interior.

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

Special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d).

17. The point of re-appropriation is located within the McKenzie River Basin, and is not located within a Withdrawn Area.
18. McKenzie River is not located within or above a state or federal scenic waterway.
19. The point of re-appropriation is in a location listed by the Department of Environmental Quality as a water quality limited stream for:
 - a. McKenzie River, River Mile 0 to 84.8 is listed under Water Quality Limited for Mercury and Lead;
 - b. McKenzie River, River Mile 0 to 54.6 is listed under Water Quality Limited for Temperature; and
 - c. McKenzie River, River Mile 7.5 to 34.1 is listed under Water Quality Limited for 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.

20. McKenzie River is located within an area ranked “moderate” 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.

21. An approximate total of \$5,159 has been invested in the project.

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

Other economic interests dependent on completion of the project.

22. Other economic interests have been identified. The property was sold in March 2019, and the new owner may wish to develop the water use under the permit.

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

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

23. OAR 690-315-0050(6) requires the Department to place a checkpoint condition on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. A “Checkpoint Condition” is specified under Item 1 of the “Limitations and Conditions” section of this PFO to meet this condition.

Fair Return Upon Investment [OAR 690-315-0040(2)(f)]

24. 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 690-315-0042(2)(g)]

25. 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)]

26. Unforeseen events extended the length of time needed to fully develop and perfect Permit S-54913, in that the permit holders were faced with loss of employment and serious health issues that restricted their ability to complete development of the project in a timely manner.

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

27. A denial of the extension would result in undue hardship, and there are no other reasonable alternatives exist for meeting water use needs. The new owners of the property may choose to develop the water right.

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

28. The Application provides evidence of good faith of the appropriator under Permit S-54913.

Based on FOF, 7, 8, 9, 13, 14, and 21, the Department has determined that the applicant has shown good faith and reasonable diligence.

Duration of Extension [OAR 690-315-0040(1)(c)]

Under OAR 690-315-0040(1)(c), in order to approve an extension of time for water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

29. As of June 19, 2019, the permit holder states the remaining work to be completed is not known at this time. The new property owners will determine the work left to be accomplished under the permit, which will include completing construction of the water system; complying with all permit conditions, which include installation of a totalizing flow meter; and apply 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, 2025, 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-54913 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(6) requires a checkpoint condition on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. A "Checkpoint Condition" is specified under Item 1 of the "Conditions" section of this PFO to meet this condition.

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 7 through 28, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2025³, 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.
5. The Applicant has demonstrated good cause for the extension.
6. For extensions exceeding five years, the Department shall establish progress checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between progress check points will not exceed five years periods, as required by OAR 690-315-0050(6).

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-54913 from January 24, 2019, to October 1, 2025.

Extend the time to apply water to beneficial use under Permit S-54913 from January 24, 2019, to October 1, 2025.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. Checkpoint Condition

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2024**. *A form will be enclosed with your Final Order.*

- (a) At each checkpoint, the permit holder shall submit and the Department shall review evidence of the permit holder's diligence towards completion of the

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.

project and compliance with terms and conditions of the permit and extension. If, after this review, the Department determines the permit holder has not been diligent in developing and perfecting the water use permit, or complied with all terms and conditions, the Department shall modify or further condition the permit or extension to ensure future compliance, or begin cancellation proceedings on the undeveloped portion of the permit pursuant to ORS 537.260 or 537.410, or require submission of a final proof survey pursuant to ORS 537.250;

(b) The Department shall provide notice of receipt of progress reports in its weekly notice and shall allow a 30 day comment period for each report. The Department shall provide notice of its determination to anyone who submitted comments.

DATED: August 6, 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 **September 20, 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
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