

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-11548, Water Right Application R-72926) FINAL
in the name of Tim Tarpley) ORDER DENIAL

Permit Information

Application	R-72926
Permit	R-11548
Basin	Middle Willamette / Watermaster District 16
Date of Priority	September 23, 1993
Source of Water	unnamed stream, a tributary of Salt Creek
Storage Facility	Reservoirs A, B, C, D, E, F, G, H, I, and J
Purpose or Use	To be appropriated under Application 72927, Permit 51613, for recreation and irrigation
Maximum Storage Volume	409.25 acre-feet (AF) each year

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, 2015, to October 1, 2029.
- Deny an extension of time to apply water to full beneficial use from October 1, 2016, to October 1, 2029.

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

COBU – Claim of Beneficial Use

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 April 12, 1995, Permit R-11548 was issued by the Department. The permit authorizes the storage of up to 409.25 AF of water annually from an unnamed stream, a tributary of Salt Creek, to be appropriated under Application 72927, Permit 51613, for recreation and irrigation. The permit specified actual construction was to begin by April 12, 1996, construction of the water system was to be completed by October 1, 1998, and complete application of water was to be made on or before October 1, 1999.
2. On July 7, 2015, the Department received a Claim of Beneficial Use report and map (COBU), detailing the extent to which Permit R-11548 had been developed, and a request for the issuance of a Certificate as described in ORS 537.230 and 537.250.
3. On July 28, 2015, an assignment from Tim Tarpley and Dong Keun Chaey to Tim Tarpley was recorded in the records of the Water Resources Department for R-11548.
4. Three prior permit extensions have been granted for Permit R-11548. The most recent extension resulted in the completion dates for construction being extended to October 1, 2015, and full application of water being extended to October 1, 2016.

5. On May 30, 2019, the permit holder, Tim Tarpley, submitted an “Application for Extension of Time” to the Department, requesting the time to complete construction of the water system extended from October 1, 2015, to October 1, 2029 and the time to apply water to full beneficial use under the terms of Permit R-11548 be extended from October 1, 2016, to October 1, 2029.
6. Notification of the Application for Extension of Time for Permit R-11548 was published in the Department’s Public Notice dated June 4, 2019.

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)]

7. On May 30, 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)]

8. Actual construction of the water system began prior to the April 12, 1996, deadline specified in the permit.

Based on FOF 8, the Department has determined the permit holder has satisfied the condition requiring beginning of construction of the water works.

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 or previous extensions.¹

9. The work was accomplished within the time allowed in the permit and the two extensions of time period ending October 1, 2006, is as follows:
 - a. During the original development time period, being from April 12, 1995, to October 1, 1999, includes construction of Reservoirs A, D, & E, and began construction on Reservoir B.
 - b. During the first Extension of Time period, being from October 1, 1999, to October 1, 2004, includes continued construction of Reservoir B.
 - c. During the second Extension of Time period, being from October 1, 2004, to October 1, 2006, construction of Reservoir B was completed.
 - d. During the most recent extension period, being from October 1, 2006, to October 1, 2016, the Application identifies that construction of Reservoirs C, D-1, and G was completed, and the permit holder submitted a COBU.
10. During the review of the Application for Extension of Time submitted on May 30, 2019, and the COBU previously submitted to the Department, it was discovered that Reservoir E, which was identified in previous Extension of Time Applications as well as in the current Application, was not identified in the COBU. This discrepancy prompted the Department to review satellite imagery of the project area to determine which reservoir have been constructed, and when.
11. The satellite imagery dated February 8, 2003, revealed that Reservoirs C, D-1, and G, as identified in the COBU, were existing at that time, and that the Reservoir G, as identified in the COBU, is Reservoir E as identified in previous Extension of Time Applications.

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 permit. 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-11548.

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.

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

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

12. The Department has considered the permit holder's compliance with conditions, and has not identified any concerns.

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.

13. A maximum volume of 166.7 AF of water has been stored, being 3.5 AF in Reservoir A, 146.0 AF in Reservoir B, 6.8 AF in Reservoir C, 5.4 AF in Reservoir D, 0.6 AF in Reservoir D-1, and 4.4 AF in Reservoir G, from the unnamed stream, a tributary of Salt Creek for recreation and irrigation.
14. The delay of full beneficial use of water under Permit R-11548 was due, in part, to the recession which began in 2008 rendered construction of the remaining reservoirs economically unfeasible.

Based on FOF 12 and 13, the Department has determined that beneficial use of water has been demonstrated under this permit.

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

15. The permit holder has invested approximately \$750,000, which is about 68 percent of the total projected cost for complete development of this project. An additional \$350,000 investment is needed for the completion of this project.

Based on FOF 15, the Department finds that there has been an investment towards the development of Permit R-11548

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

The application does not provide evidence that work has been accomplished towards completion of the water system during the most recent extension of time period; the permit holder has demonstrated compliance with permit conditions, and; beneficial use of water has been demonstrated. The Department has determined the applicant has not demonstrated reasonable diligence in previous performance under Permit R-11548.

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.

16. Current Water Availability Analysis for the Salt Creek, (Tributary to South Yamhill River) at the mouth (watershed ID 73562) show that no water is available during the months of July, August, September, and October, 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).

17. The points of diversion are located on a tributary of Salt Creek, and are not located within a Withdrawn Area.
18. Salt Creek is not located within or above a state or federal scenic waterway.
19. The points of diversion are in a location listed by the Department of Environmental Quality as a water quality limited stream.
 - Salt Creek, River Mile 0 to 32.8 listed under Water Quality Limited for Dissolved Oxygen, Temperature, Chlorophyll a, Phosphorus, and Fecal Coliform.

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. Salt Creek is located within an area ranked “high” for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife.

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

Economic interests dependent on completion of the project.

21. An approximate total of \$750,000 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 dependent on completion of the project have not been identified.

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

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

23. Permit R-11548 was issued on April 12, 1995, and has had three previous extensions of time, which have resulted in more than 21 years to develop the reservoirs authorized in the permit.

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 690-315-0040(2)(g)]

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

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

26. The Application identifies the recession of 2008 as an unforeseen event.

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

27. The Application identifies a denial would result in an undue hardship, in that, the permit holder would not be able to develop an additional 18 hole golf course.

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

28. The Application does not provide evidence of good faith of the appropriator under Permit R-11548 during the most recent extension of time period.

Based on Findings of Fact 9, 10, 11, 14, and 23, 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.

29. As of May 30, 2019, the permit holder states the remaining work to be completed consists of constructing Reservoirs H, I, and J, and storing the remaining 242.55 AF of water for beneficial use.

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 begin actual 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 reasonable diligence towards development of the remaining reservoirs during the most recent extension of time period, being from October 1, 2006, to October 1, 2016. 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-11548 from October 1, 2015 to October 1, 2029.

Deny the time to apply water to beneficial use under Permit R-11548 from October 1, 2016 to October 1, 2029.

DATED: August 20, 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 **October 4, 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:

