

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-53701, Water Right Application S-84230) FINAL
in the name of Whaleshead Beach Resort; RV Park, Andrew Cramer) ORDER

Permit Information

Application:	S-84230
Permit:	S-53701
Basin:	South Coast / Watermaster District 19
Date of Priority:	August 9, 1999
Source of Water:	3 unnamed springs, tributary of Whaleshead Creek
Purpose or Use:	Commercial use in an RV park
Maximum Rate/Volume:	0.51 cubic foot per second (cfs), being 0.002 cfs from unnamed spring 1, 0.022 cfs from unnamed spring 2, and 0.027 cfs from unnamed spring 3

Please read this Proposed Final Order in its entirety.

In summary, the Department proposes to:

- Grant an extension of time to apply water to full beneficial use from October 1, 2012, to October 1, 2019.¹

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
cfs - cubic foot per second

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.

FINDINGS OF FACT

1. On October 4, 2000, Permit S-53701 was issued by the Department. The permit authorizes the use of up to 0.51 cfs of water from the 3 unnamed springs, being 0.002 cfs from unnamed spring 1, 0.022 cfs from unnamed spring 2, and 0.027 cfs from unnamed spring 3, tributary of Whaleshead Creek, for commercial use in an RV park. The permit specified actual construction was to begin by August 15, 2001, and complete application of water was to be made on or before October 1, 2004.
2. One prior permit extension has been granted for S-53701. The extension request resulted in the completion date for full application of water being extended from October 1, 2004, to October 1, 2012.
3. On March 27, 2019, an assignment from Whaleshead Beach Resort; RV Park, Don McNeely, to Whaleshead Beach Resort; RV Park, Andrew Cramer was recorded in the records of the Water Resources Department.

4. On July 8, 2019, Andrew Cramer, manager for Whaleshead Beach Resort; RV Park, submitted an “Application for Extension of Time” (Application) to the Department, requesting the time to apply water to full beneficial use under the terms and conditions of Permit S-53701 be extended from October 1, 2012, to October 1, 2021.
5. On July 16, 2019, notification of the Application for Permit S-53701 was published in the Department’s Public Notice. No public comments were received.

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 July 8, 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. Actual construction of the water system or reservoir began prior to permit issuance.
8. According to the application actual construction began May 1, 1964.

Based on Findings of Fact (FOF) 7 and 8, the Department has determined the permit holder began construction prior to August 15, 2001.

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 extension.²

9. Construction of the water system or reservoir began prior to the August 15, 2001 deadline specified in the permit.
10. No other work was accomplished during the original development time frame under Permit S-53701, as a majority of the work was accomplished prior to permit issuance.
11. During the most recent extension period, being from October 1, 2004, to October 1, 2012, no work was accomplished.
12. Since October 1, 2012, totalizing flow meters were installed.

The Application provides evidence of progress of physical work made towards completion of the water system, enough to qualify as the minimum necessary for the Department to find good cause and reasonable diligence towards complete application of water to a beneficial use.

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

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

13. 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 meter or other suitable measuring device has been installed by October 1, 2012, and (2) annual reports of the amount of water used each month have not been received by the Department by October 1, 2012.

Based on FOF 13, the Department has determined that the permit holder has not demonstrated compliance with following (or any of the) permit conditions as required by Permit S-53701:

- “Before water use may begin under this permit, a totalizing flow meter must be installed in the pipe between the lowest spring and the holding tank.”;
- “The permittee shall keep a complete record of the amount of water used each month and shall submit a report which includes the recorded water use measurements to the Department annually.”

Failure to comply with permit conditions constitutes illegal use of water. Beneficial use of water under this permit, therefore, 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.

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.

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

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

14. A maximum rate of 0.49 cfs of water has been diverted from 3 unnamed springs, tributary of Whaleshead Creek for commercial use in an RV park.
15. The permit holder has offered no explanation why full beneficial use of water under Permit S-53701 has been delayed.

Based on FOF 13, 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, 2012.

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

16. The permit holder has invested approximately \$185,000, which is the total projected cost for complete development of this project. No additional investment is needed for the completion of the development of the water system.

Based on FOF 16, 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 of progress towards completion of the water system; a financial investment has been made; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use has not been demonstrated. The Department has determined the applicant has demonstrated the minimum necessary for the Department to find reasonable diligence towards complete application of water to a beneficial use.

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.

17. 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-53701; 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.
18. Current Water Availability Analysis for Whalehead Creek, (Tributary of Pacific Ocean) at the mouth (watershed ID 31731211) show that water is available year round at the 80% 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).

19. The points of diversion are located on tributaries of Whaleshead Creek, and are not located within a Withdrawn Area.
20. Whaleshead Creek is not located within or above a state or federal scenic waterway.
21. 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.

22. Whaleshead Creek 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.

23. An approximate total of \$185,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

24. Year round residents and vacation patrons rely on the water source.

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

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

25. 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)]

26. The use and income from the permitted water development has provided a fair and reasonable return on the investment.

Other Governmental Requirements [OAR 690-315-0042(2)(g)]

27. Delay in the development of this project that was not caused by other governmental requirements have not been identified.

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

28. No unforeseen events were identified that extended the length of time needed to fully develop and perfect Permit S-53701.

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

29. Whaleshead Beach Resort has relied on the water source since the beginning of the business. No other sources are reasonably available.

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

30. The Application provides evidence of good faith of the appropriator under Permit S-53701.

Based on FOF 7, 8, 9, 12, 14, 16, and 23, 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.

31. As of July 8, 2019, the permit holder states work is complete. The extension of time is necessary only to extend the completion date out beyond the date the compliance with permit conditions has been demonstrated.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2021, to accomplish the application of water to beneficial use under the terms and conditions of Permit S-53701 is not reasonable or necessary. Because no work is left to be accomplished, and the permit holder states that development is complete, and extension of time until October 1, 2019, is sufficient to allow for beneficial use to be demonstrated.

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).

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 actual 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 30, application of water to beneficial use can be accomplished by October 1, 2019³, as required by OAR 690-315-0040(1)(c).

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

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.

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 apply water to beneficial use under Permit S-53701 from October 1, 2012, to October 1, 2019.

DATED: August 27, 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 11, 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;

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.

Mailing List for Extension PFO Copies

PFO Date: August 27, 2019

Application: S-84230

Permit: S-53701

Copies Mailed

By: _____

On: _____

Original mailed to Applicant:

Whaleshead Beach Resort; RV Park, Andrew Cramer
19921 Whaleshead Rd
Brookings, OR 97415

Copies sent to:

1. WRD - App. File S-84230/ Permit S-53701
2. Marc VanCamp
PO BOX 995
Coos Bay, OR 97415
3. Other permit holders of record besides applicant

Fee paid as specified under ORS 536.050 to receive copy:

4. None

Receiving via e-mail (10 AM Tuesday of signature date)
(DONE BY EXTENSION SPECIALIST)

5. WRD - Watermaster District 19, Greg Wacker

CASEWORKER: JDP