

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-15108, Water Right Application R-86923) FINAL
in the name of Dog River Orchards, LLC) ORDER

Permit Information

Application:	R-86923
Permit:	R-15108
Basin:	Deschutes / Watermaster District 3
Date of Priority:	June 27, 2007
Source of Water:	unnamed stream, tributary of White River
Storage Facility:	a reservoir
Purpose or Use:	Stored water in - Irrigation of irrigation and livestock use Acres
Maximum Volume:	381.9 acre-feet (AF)

Please read this Proposed Final Order in its entirety.

In summary, the Department proposes to:

- Grant an extension of time to complete construction of the water system from October 9, 2019, to October 1, 2025.
- Grant an extension of time to apply water to full beneficial use from October 9, 2019, to October 1, 2025.¹

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
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.

FINDINGS OF FACT

1. On October 9, 2015, Permit R-15108 was issued by the Department. The permit authorizes the storage of up to 381.9 AF of water in a Reservoir from an unnamed stream, tributary of White River, for irrigation and livestock use. The permit specified construction of the water system and the permitted volume of water shall be stored within five years from the date of permit issuance, being October 9, 2019.
2. On February 22, 2021, Gorham Blaine, member of Dog River Orchards, LLC, submitted an “Application for Extension of Time” (Application) to the Department, requesting the time to complete construction of the water system be extended from, October 9, 2019, to October 1, 2025, and the time to apply water to full beneficial use under the terms and conditions of Permit R-15108 be extended from October 9, 2019, to October 1, 2025. This is the first permit extension requested for Permit R-15108.

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)]

3. On February 22, 2021, 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)]

4. Construction of the water system or reservoir began prior to October 9, 2019, as specified in the permit as being the date to apply water to full beneficial use. The permit holder states, construction began in 2015, with clearing of the reservoir and dm site.

The Department has determined the permit holder began construction prior to October 9, 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 or previous extension.²

5. During the original development time frame under Permit R-15108, the reservoir and dam site were cleared.

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.

The Department has determined that work has been accomplished prior to permit issuance and within the time allowed in the permit, which provides evidence of good cause and reasonable diligence towards the 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. If all conditions have been met.

6. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: the record does not show that compliance with permit conditions has been demonstrated. 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.

The Department has determined that the permit holder has not demonstrated compliance with permit conditions as required by Permit R-15108. The Department has determined that compliance with these conditions has not been necessary to date as construction of the dam has not yet begun, and no water has been stored.

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.

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.

7. No water has been stored under Permit R-15108.
8. A delay of beneficial use of water under Permit R-15108 was due, in part, the financial investment required to construct the reservoir, and updates to dam safety rules, which became effective July 1, 2020. The permit holder needs more time in which complete clearing the site of the reservoir and dam, stockpile materials, and construct the dam under the supervision of the engineer of record.

The Department has determined that beneficial use of water has not been demonstrated under Permit R-15108.

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

9. An approximate total of \$80,000 has been invested. The costs included items associated with engineering, soil testing, and road construction, which are not "actual construction" under this permit and therefore are not counted towards development. After deducting these costs, the approximate total investment for "actual construction" to date is approximately \$10,000 which is about 1 percent of the total projected cost for complete

development of this project. An additional \$827,000 investment is needed to complete this project, which includes developing the remaining acres for irrigation, installing new pivots in areas not previously irrigated, and a possible permit amendment.

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.

10. 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-15108; 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.

11. Current Water Availability Analysis for the White River, (Tributary of Deschutes River) at the mouth (watershed ID 70088) show that no water is available during the period of July through December of each year 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).

12. The point of diversion is located on unnamed stream, tributary of White River, and is not located within a Withdrawn Area.
13. The unnamed stream, tributary of White River is located above Deschutes Scenic Waterway.
14. 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.

15. White River is located within an area ranked “highest” 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.

16. An approximate total of \$80,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

17. Use of water under this permit allows continued full time employment for staff.

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

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

18. 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)]

19. 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)]

20. Updating of Dam Safety Rules during a portion of the development time frame under this permit contributed to delays in construction of the dam due to uncertainties that the work would be in compliance with the newly updated rules.

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

21. The COVID-19 pandemic created difficulties in obtaining a qualified contractor to complete the dam, as well as unexpected economic hardship which resulted from a hailstorm damaging the 2019 crop.

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

22. A denial of the extension would result in undue hardship, and there are no other reasonable alternatives exist for meeting water use needs. A significant amount of investment has been made in preparing for the construction of the dam, which could be lost if the extension of time is not granted. Additionally, the water stored in the reservoir authorized by Permit R-15108, is the authorized source of water for Permit S-55100.

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

23. The Application provides evidence of good faith of the appropriator under Permit R-15108.

Based on FOF 5, through 9, and 16, 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.

24. As of February 22, 2021, the permit holder states the remaining work to be completed consists of completing construction of the water system and applying 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 R-15108 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).

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 5, through 23, 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.

continued on following page

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.

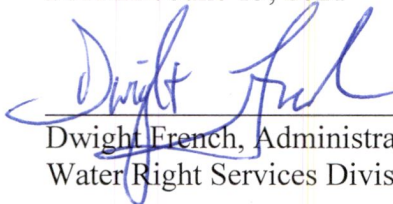
PROPOSED ORDER

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 R-15108 from October 9, 2019, to October 1, 2025.

Extend the time to apply water to beneficial use under Permit R-15108 from October 9, 2019, to October 1, 2025.

DATED: June 15, 2021


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 **July 30, 2021**, 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 :
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725 Summer St NE, Suite A
Salem, OR 97301-1266
Fax: 503-986-0901
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