

**Oregon Water Resources Department  
Water Right Services Division**

**Application for Extension of Time**

In the Matter of the Application for an Extension of Time  
for Permit R-14080, Water Right Application R-85194  
in the name of Jonnie Justesen and Fred Justesen

) PROPOSED  
) FINAL  
) ORDER DENIAL

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**Permit Information**

Application: R-85194  
Permit: R-14080  
Basin: Deschutes / Watermaster District 3  
Date of Priority: June 13, 2002  
Source of Water: an unnamed stream, tributary of Threemile Creek  
Storage Facility: Justesen #1  
Purpose of Use: to be appropriated under Application S-85195, Permit S-54136,  
for storage for supplemental irrigation of 130.2 acres, aquatic  
life, wildlife and recreation  
Maximum Volume: 280 acre-feet (AF)

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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 apply water to full beneficial use from October 1, 2013 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 November 12, 2004, Permit R-14080 was issued by the Department. The permit authorizes the storage of up to 280 AF of water in Justesen #1 from an unnamed stream, tributary of Threemile Creek, to be appropriated under Application S-85195, Permit S-54136, for storage for supplemental irrigation of 130.2 acres, aquatic life, wildlife and recreation. The permit specified the reservoir shall be filled and complete application of water was to be made on or before October 1, 2009.
2. One prior permit extension has been granted for Permit R-14080. The most recent extension resulted in the completion dates for construction being extended to October 1, 2009 and full application of water being extended to October 1, 2013.
3. The permit holders, Jonnie Justesen and Fred Justesen, submitted an “Application for Extension of Time” to the Department on August 18, 2021, requesting the date by which the water development will be completed and water put to full beneficial use be extended from October 1, 2013 to October 1, 2024.
4. Notification of the Application for Extension of Time for Permit R-14080 was published in the Department’s Public Notice dated September 14, 2021. 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)]**

5. Construction of the water system began prior to permit issuance.
6. According to the Application for a Permit to Construct a Reservoir, submitted June 3, 2002, identifies the reservoir as existing

Based on FOF 5, and 6, 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 previous extension.<sup>1</sup>*

7. During the most recent extension period, being from October 1, 2009, to October 1, 2013, no additional work was accomplished towards the completion of the reservoir.
8. The Application does not identify work accomplished to complete construction of the dam, or to store water in the reservoir in compliance with the terms and conditions of the permit since 2008.

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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.

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-14080.

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

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

9. 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, (2) annual reports of the amount of water used each month have not been received by the Department, (3) water has been stored prior to written certification from the engineer of record.

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-14080.

**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.*

10. The Application does not identify water has been stored under this permit, however, the attachment to the Application identifies work to be accomplished includes digging a trench on the front side of the reservoir "when the reservoir is empty".
11. A review of aerial photography from Google Earth Pro show a reservoir with water impounded at the location Permit R-14080 is authorized.

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 the October 1, 2013.

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

12. An approximate total of \$90,000 has been invested. The costs included items associated with engineering prior to permit issuance, inspection, and seeding the embankment of the dam, which are not "actual construction" towards the development of the storage system under this permit and therefore are not counted towards development. After deducting these costs, invested approximately \$67,000, which is about 52 percent of the total projected cost for complete development of this project. An additional \$62,000 investment is needed for the completion of this project.

The Department finds that there has been no investment towards the development of Permit R-14080

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

The application provides evidence that no work has been accomplished towards completion of the water system; the permit holder has demonstrated noncompliance 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-14080.

**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.

13. 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 G-14080; 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.
14. Current Water Availability Analysis for the White River, (Tributary to Deschutes River) at the mouth (watershed ID 70088) show that water is available during the months of January through June 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).

15. The point of diversion is located on an unnamed stream, tributary of Threemile Creek, and is not located within a Withdrawn Area.
16. Threemile Creek is located above Deschutes Scenic Waterway.
17. The point of diversion is in a location listed by the Department of Environmental Quality as a water quality limited stream for 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.

18. Threemile 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.

19. An approximate total of \$67,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

20. The Application identifies a proposed subdivision nearby which may benefit from the development of the reservoir.

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

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

21. 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)]**

22. 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)]**

23. 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)]**

24. The Application identifies weather events and health issues which contributed to the delayed development of the reservoir.

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

25. The Application identifies denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs. The Application also identifies that a denial may result in the need to remove the existing structure.

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

26. The Application provides evidence of good faith of the appropriator under Permit

Based on Findings of Fact 7, 8, 9, 10, and 11, above, the Department finds that the Applicant has not demonstrated good faith. The Application does not establish the reasonable diligence has been demonstrated in the construction of the dam and reservoir, and the storage of water for the beneficial use.

**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.*

27. As of August 18, 2021, the permit holder states the remaining work to be completed consists of requesting approval of new design plans, installation of a siphon, and completion of placement of riprap, completing construction of the reservoir and storing the full volume of water for beneficial use.

The Department has determined the request to extend the date by which the water development will be completed, and water put to full beneficial use be extended from October 1, 2013, to October 1, 2024, is not reasonable or 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 not shown that good cause exists for an extension of time to apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

### CONCLUSIONS OF LAW

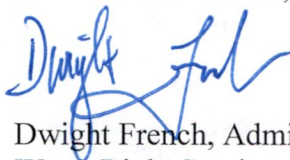
1. The applicant has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The applicant complied with begin construction timeline requirements pursuant to ORS 537.230 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. The application established that there has been no construction, no financial invest or reasonable diligence towards development during the most recent extension of time or in the eight years since the previously authorized date for complete application of water. 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).

### 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 apply water to beneficial use under Permit R-14080 from October 1, 2013 to October 1, 2024.

DATED: October 26, 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 **December 10, 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:



