

**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 S-51736, Water Right Application S-71160) PROPOSED FINAL ORDER
in the name of James Butsch)

Permit Information

Application:	S-71160
Permit:	S-51736
Basin:	2 – Middle Willamette / Watermaster District 16
Date of Priority:	February 1, 1991 for 0.37 cfs and February 8, 1991 for 4.51 cfs
Source of Water:	Butte Creek, a tributary of Pudding River
Purpose of Use:	Irrigation of 30.0 acres and Supplemental Irrigation of 360.7 acres
Maximum Rate:	4.88 cubic feet per second (cfs)

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 1, 1997 to October 1, 2012.
- Grant an extension of time to apply water to full beneficial use from October 1, 1998 to October 1, 2012.¹

This Extension of Time request is being processed in accordance with Oregon Revised Statute

¹ Pursuant to ORS 537.230(4), 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.

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

cfs – cubic feet per second

gpm – gallons per minute

AF – acre-feet

ODFW – Oregon Department of Fish and Wildlife

RM – River Mile

AUTHORITY

Generally, see ORS 537.230 and OAR Chapter 690 Division 315.

ORS 537.230(3) 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) provides in pertinent part that the Water Resources Director, for good cause shown, may extend the time within which the full amount of the water appropriated shall be applied to a beneficial use. This statute 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 therefore; and the income or use that may be required to provide fair and reasonable returns upon the investment.

OAR 690-315-0040 provides in pertinent part that the Water Resources Department shall make findings to determine if an extension of time may be approved to complete construction and/or apply water to full beneficial use.

FINDINGS OF FACT

Background

1. Permit S-51736 was issued by the Department on November 6, 1995. The permit authorizes the use of up to 4.88 cfs of water from Butte Creek, a tributary of Pudding River, for irrigation of 30.0 acres and supplemental irrigation of 360.7 acres. The permit specified actual construction was to begin by November 6, 1996, construction of the water system was to be completed by October 1, 1997, and complete application of water was to be made on or before October 1, 1998.
2. On September 24, 1999, a Claim of Beneficial Use (COBU) was submitted to the Department for review.

3. On April 17, 2015, the Department issued a Proposed Order of Certification to cancel Permit S-51736, for failure to submit annual water use reports prior to the complete application of water date, being October 1, 1998.
4. On December 8, 2015, the Department received a request to withdraw the COBU due to the report being incomplete, and the water user did not comply with conditions of the permit. The permit holder notified the Department an extension of time would be submitted to allow more time to bring the permit into compliance with conditions of Permit S-51736.
5. The permit holder, James Butsch, submitted an "Application for Extension of Time" to the Department on December 8, 2015, requesting the time in which to accomplish beneficial use of water to the full extend under the terms of Permit S-51736 be extended from October 1, 1997 to October 1, 2012. The extension application form clearly suggests that construction is not complete. The Department, therefore, determined that the permit holder's intent was to also request the time in which to complete construction of the water systems under Permit S-71160 to be extended from October 1, 1997, to October 1, 2012. This is the first permit extension request for Permit S-51736.
6. Notification of the Application for Extension of Time for Permit S-51736 was published in the Department's Public Notice dated December 15, 2015. No public comments were received regarding the extension application.

Review Criteria [OAR 690-315-0040]

The time limits to complete construction and/or apply water to full beneficial use may be extended if the Department finds that the permit holder has met the requirements set forth under OAR 690-315-0040. This determination shall consider the applicable requirements of ORS 537.230², 537.248³ and/or 539.010(5)⁴.

Complete Extension of Time Application [OAR 690-315-0040(1)(a)]

7. On December 8, 2015, 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 November 6, 1996 deadline specified in the permit. According to the permit holder, construction of the water system began prior to June 2, 1960.

The Department records show construction of Diversion Point #1 began and is currently in use under Certificate 28466. According to Certificate 28466, construction of the water system began July 23, 1959. The Department records also show construction of

²ORS 537.230 applies to surface water permits only.

³ORS 537.248 applies to reservoir permits only.

⁴ORS 539.010(5) applies to surface water and ground water permits.

Diversion Point #2 began and is currently in use under Certificate 33753, in which construction began August 1, 1962. The Department has determined the permit holder has satisfied the condition requiring beginning of construction of the water works.

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.

9. As of December 8, 2015, the permit holder states the remaining work to be completed consists of 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, 2012, 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-51736 is both reasonable and necessary.

Good Cause [OAR 690-315-0040(1)(d)]

The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0040(2).

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

The Department's determination of reasonable diligence shall consider the requirements set forth under OAR 690-315-0040(3)(a-d). In accordance with OAR 690-315-0040(3), the Department shall consider, but is not limited to, the following factors when determining whether the applicant has demonstrated reasonable diligence in previous performance under the permit:

Amount of Construction [OAR 690-315-0040(3)(a)]

10. The application states work was accomplished within the time allowed in the permit or previous extension as follows:

- a. Actual construction of the water system began prior to the November 6, 1996 deadline specified in the permit. Diversion point #1 pump site was developed and pipe installed July 23, 1959. Diversion point #2 pump site was developed and pipe installed August 1, 1961. The permit holder installed the irrigation system and 2 fish screens.
- b. Work was completed during the original development time frame under Permit S-51736. Additional hand line, sprinklers, and 6000 feet of pipeline were installed.
- c. Since October 1, 1998, the permit holder has replaced 2 fish screens required under S-51736.

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 from the appropriator towards the complete application of water to a beneficial use.

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

11. The application states a maximum rate of 2.70 cfs of water, being 1.42 cfs from Diversion Point #1, and 1.28 cfs from Diversion Point #2 has been appropriated, for irrigation of 30.0 acres and supplemental irrigation of 360.7 acres.
12. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 1998. Annual water use reports required by Permit S-51736 were not submitted to the Department by October 1, 1998.

The Department has determined that this extension will allow the annual water use reports submitted after October 1, 1998, to satisfy compliance of the condition of submitting annual water use reporting to the Department, in an effort to make proof of beneficial use of the water as required by Permit S-51736.

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

13. The water right permit holder's conformance with the permit or previous extension conditions.
 - a. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns. The record does show the permit holder submitted the annual water use records beginning with the 2009 irrigation season on December 8, 2015. The permit holder obtained written documentation, dated October 9, 2006 and November 7, 2012, from ODFW that the fish screens meets current state criteria for fish protection.

The Department determined the permit holder has complied with conditions of the permit, by submitting annual water use reports, as required by Permit S-51736.

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

14. The applications states the permit holder has invested approximately \$60,800, which is the total projected cost for complete development of this project.

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

15. The Department has found good faith of the appropriator under Permit S-51736.

The Market and Present Demands for Water [OAR 690-315-0040(2)(d-e)]

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:

The amount of water available to satisfy other affected water rights and scenic waterway flows; 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); or the habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife [OAR 690-315-0040(4)(a-c)].

16. 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-51736; 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. The point(s) of diversion are located on Butte Creek, a tributary of Pudding River, and are not located within a Withdrawn Area. Butte Creek, a tributary of Pudding River is not located within or above a state or federal scenic waterway, however, it 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. The point(s) of diversion are in a location listed by the Department of Environmental Quality as a water quality limited stream for Flow Modification (RM 0 to 18.7), and Biological Criteria (RM 0 to 19).
17. Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].
 - a. None have been identified.
18. Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].
 - a. None have been identified.

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

19. 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)]

20. Delay in the development of this project was not caused by any other governmental requirements.

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

21. None have been identified.

CONCLUSIONS OF LAW

1. The applicant is entitled to apply for an extension of time to complete construction and/or completely apply water to the full beneficial use pursuant to ORS 537.230(3).
2. 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).
3. The applicant complied with 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).
4. Based on Finding of Facts 8 through 15, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2012⁵, as required by OAR 690-315-0040(1)(c).
5. 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).

Continued on the following page

⁵Pursuant to ORS 537.230(3), 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.

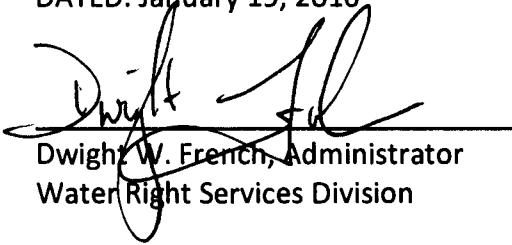
PROPOSED ORDER

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 S-51736 from October 1, 1997 to October 1, 2012.

Extend the time to apply water to beneficial use under Permit S-51736 from October 1, 1998 to October 1, 2012.

DATED: January 19, 2016


Dwight W. 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(1) 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 **March 4, 2016**, 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.

Mailing List for Extension PFO Copies

PFO Date: January 19, 2016

Copies Mailed

Application: S-71160

By: _____

Permit: S-51736

On: _____

Original mailed to Applicant:

James Butsch
15234 Butsch Lane
Mt. Angel, OR 97362

Copies sent to:

1. WRD - App. File S-71160/ Permit S-51736

2. BOATWRIGHT ENGINEERING, INC.
JEANNE BOATWRIGHT
2613 12TH ST SE
SALEM, OR 97302

Fee paid as specified under ORS 536.050 to receive copy:

3. None

Receiving via e-mail (10 AM Tuesday of signature date)

(DONE BY EXTENSION SPECIALIST)

4. WRD - Watermaster District 16, Joel Plahn

CASEWORKER: CAC