

**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-53492, Water Right Application S-73332,	)	FINAL ORDER
in the name of the Arch Cape Water District	)	

Permit Information

Application File S-73332/ Permit S-53492

Basin 1 – North Coast Basin / Watermaster District 1

Date of Priority: April 6, 1993

Authorized Use of Water

Source of Water:	Asbury Creek, a tributary of Pacific Ocean
Purpose or Use:	Municipal Use for up to 750 Hookups
Maximum Rate:	3.0 Cubic Feet per Second (cfs)

**This Extension of Time request is being processed in accordance with Oregon
Administrative Rule Chapter 690, Division 315.**

***Please read this Proposed Final Order in its entirety as it contains
additional conditions not included in the original permit.***

This Proposed Final Order applies only to Permit S-53492, water right Application S-73332.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to apply water to full beneficial use from October 1, 2002 to October 1, 2022.
- Make the extension of time subject to certain conditions as set forth below.

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources

District – Arch Cape Water District

ODFW – Oregon Department of Fish and Wildlife

PFO – Proposed Final Order

WMCP – Water Management and Conservation Plan

Units of Measure

cfs – cubic feet per second

gpd – gallons per day

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 and allow an extension to complete construction or perfect a water right. 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 690-315-0080 provides in pertinent part that the Department shall make findings to determine if an extension of time for municipal and/or quasi-municipal water use permit holders may be approved to complete construction and/or apply water to full beneficial use. Under specific circumstances, the Department may condition extensions of time for municipal water use permit holders to provide that use of the undeveloped portion of the permit maintains the persistence of listed fish species in the portions of the waterways affected by

water use under the permit.

OAR 690-315-0090(3) authorizes the Department, under specific circumstances, to condition an extension of time for municipal and/or quasi-municipal water use permit holders to provide that diversion of water beyond the maximum rate diverted under the permit or previous extension(s) shall only be authorized upon issuance of a final order approving a WMCP Plan under OAR Chapter 690, Division 86 which grants access to water under this extended permit.

FINDINGS OF FACT

Background

1. On June 5, 1996, Permit S-52409 was issued by the Department for Application S-73332. The permit authorized the use of up to 0.3 cfs of water from Asbury Creek, a tributary of the Pacific Ocean, for municipal use for up to 750 hookups for residences and businesses.
2. On June 1, 1998, the Department approved Permit Amendment T-7981 (Special Order Volume 52, Page 547) authorizing a change in the point of diversion (POD) under Permit S-52409 from 970 Feet North and 540 Feet West from the S¼ Corner of Section 19, to 865 Feet North and 1290 Feet West From the S¼ Corner of Section 19; Township 4 North, Range 10 West, W.M. The purpose of this change in the point of diversion was to move the original POD downstream to just above HWY 101 to “insure minimal impact to fishery resources” as recommended by ODFW in a letter to OWRD dated January 14, 1998.
3. On August 12, 1998, Department issued superseding Permit S-53462 for Application S-73332 to reference a minimum stream flow requirement in Shark Creek, a tributary of Asbury Creek.
4. Permit S-53492 was issued by the Department on October 21, 1998 for Application S-73332, and superseded Permit S-53462. This superseding permit was issued to describe the POD change authorized in the Permit Amendment T-7981 and to lower the minimum flow requirement in Asbury Creek from 0.4 cfs to 0.1 cfs after the POD was moved downstream. The lower minimum flow in Asbury Creek was recommended by ODFW in a letter to OWRD dated January 14, 1998, and reaffirmed in a letter dated June 2, 1998.
5. Permit S-53492 authorizes the use of up to 0.3 cfs of water from Asbury Creek, a tributary of the Pacific Ocean, for municipal use for up to 750 hookups for residences and businesses. Diversion of any water under this permit is contingent upon the maintenance of a minimum flow of 0.1 cfs in Asbury Creek immediately downstream from the POD. The permit specified that complete application of water was to be made on or before October 1, 2002.

6. Due to an ongoing permit extension rulemaking, in 1998 the Department stopped processing pending Applications for Extension of Time for municipal and quasi-municipal permits, and did not require municipal and quasi-municipal water use permit holders to submit Applications for Extension of Time during the rulemaking process.
7. Municipal and quasi-municipal water use permit extension rules OAR 690-315-0070 through 690-315-0100 became effective on November 1, 2002. The rules were subsequently amended, and the amended rules became effective on November 22, 2005.
8. On February 19, 2003, Arch Cape Water District (District) 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-53492 be extended from October 1, 2002 to October 1, 2022. This is the first extension of time request for Permit S-53492.
9. Notification of the District's Application for Extension of Time for Permit S-53492 was published in the Department's Public Notice dated March 4, 2003. No public comments were received regarding the extension application.
10. On March 27, 2003, February 28, 2006, August 25, 2006, October 17, 2006, February 26, 2007, and August 5, 2014, the permit holder submitted additional information to supplement and/or update their Application for Extension of Time.

Review Criteria for Municipal and Quasi-Municipal Water Use Permits [OAR 690-315-0080(1)]

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 690-315-0080(1). This determination shall consider the applicable requirements of ORS 537.230¹, 537.630² and/or 539.010(5)³

Complete Extension of Time Application [OAR 690-315-0080(1)(a)]

11. On February 19, 2003, the Department received a completed application for extension of time and the fee specified in ORS 536.050.

Start of Construction [OAR 690-315-0080(1)(b)]

12. Permit S-53492 was issued prior to June 29, 2005; therefore, the permit holder is not required to provide evidence of actions taken to begin actual construction of the project.⁴

¹ ORS 537.230 applies to surface water permits only.

² ORS 537.630 applies to ground water permits only.

³ ORS 537.010(5) applies to surface water and ground water permits.

⁴ Section 5, Chapter 410, Oregon Laws 2005 and OAR 690-315-0070(3)(d).

Duration of Extension [OAR 690-315-0080(1)(c) and (1)(d)]

Under OAR 690-315-0080(1)(c) and (1)(d), in order to approve an extension of time for municipal and quasi-municipal water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

13. The remaining work to be accomplished under Permit S-53492 consists of applying water to full beneficial use.
14. As of October 1, 2002, the permit holder had diverted 0.145 cfs of the 0.3 cfs of water authorized under Permit S-53492 for municipal purposes. There is an undeveloped portion of 0.155 cfs of water under Permit S-53492 as per OAR 690-315-0010(6)(g).
15. In addition to the 0.3 cfs of water authorized from Asbury Creek under Permit S-53492 the District holds the following water right permit and certificates:
 - Permit S-53491 for 0.12 cfs of water from Shark Creek, tributary of Asbury Creek, and from a Reservoir for municipal use for up to 750 Hookups for Residences and Businesses;
 - Certificate 27506 for 0.05 cfs of water from North Fork Asbury Creek (a.k.a. Shark Creek) and from a Reservoir [*constructed under Permit R-1633/Certificate 27507 for storage of 1 AF of water from North Fork Asbury Creek*] for domestic use for 30 families;
 - Certificate 27508 for 0.2 cfs of water from an unnamed Stream (a.k.a. Dichter Creek), tributary of Arch Cape Creek, for domestic use and a mill pond; and
 - Certificate 27509 for 0.1 cfs of water from an unnamed Stream (a.k.a. Dichter Creek), tributary of Arch Cape Creek, for domestic use.

These water rights and permits total 0.77 cfs of live flow (surface) water and the storage of 1.0 AF of water. Arch Cape Water District has not yet made use of 0.155 cfs of water under Permit S-53492.

Use of .07 cfs water from Shark Creek is contingent on the maintenance of a minimum instream flow of 0.6 cfs in Shark Creek. Use of any water from Asbury Creek is contingent on the maintenance a minimum instream flow of 0.1 cfs in Asbury Creek. Under low flow conditions, the permitted sources of water supply can be reduced by as much as 90%. (2016 WMCP @ page 22.) During periods of low flow, the District's priority water source changes from Shark Creek to Asbury Creek. (2016 WMCP @ page 6). Although historically used, water is not currently being diverted from Dichter Creek to meet demands. (2016 WMCP @ page 25).

16. The District does not have any inter-ties with other water systems, but it does have a reciprocating agreement in place with Cannon View Park for supplying water to one another in the event of a major substantial disruption to one entity's water supply system. (2016 WMCP @ page 13.)
17. According to the 2016 WMCP, in 2014, water was provided to 289 Equivalent Dwelling Units (EDU) within the service boundary of Arch Cape Water District. The District estimates the population will increase at a growth rate of 0.7 percent per year, reaching an estimated 305 EDU by the year 2022. The District's service population is seasonally variable, escalating in the summer months.
18. According to the 2016 WMCP, the District's peak day water demand within its service area boundaries was 79,475 gallons per day (gpd) in 2014. The District's peak day demand is projected to be approximately 84,072 gpd of water by the year 2022. The District makes use of a 0.5 million gallon steel tank reservoir to manage peak demand.
19. Full development of Permit S-53492 is needed to address the present and future water demand of Arch Cape Water District, including system redundancy.
20. Based on Findings of Fact 13-19, the Department has determined that the District's request for an extension of time until October 1, 2022, to complete construction and to apply water to full beneficial use under the terms of Permit S-53492 is both reasonable and necessary.

Good Cause [OAR 690-315-0080(1)(e) and (3)(a-g)]

The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0080(3).

Reasonable Diligence and Good Faith of the Appropriator [OAR 690-315-0080(3)(a), (3)(c) and (4)]

Reasonable diligence and good faith of the appropriator must be demonstrated during the permit period or prior extension period as a part of evaluating good cause in determining whether or not to grant an extension. In determining the reasonable diligence and good faith of a municipal or quasi-municipal water use permit holder, the Department shall consider activities associated with the development of the right including, but not limited to, the items set forth under OAR 690-315-0080(4) and shall evaluate how well the applicant met the conditions of the permit or conditions of a prior extension period.

21. The following work was accomplished by the District prior to October 1, 2002:
 - Installed a staff gage on Asbury Creek;
 - Submitted base flow daily measurement records for Asbury Creek;
 - Submitted annual water use records to the Department;
 - Received approval of a permit amendment application to move the authorized POD downstream;
 - Completed the Asbury Creek screened water intake;

- Received Department approval of a 1998 WMCP; and
- Installed water lines.

22. After October 1, 2002, the District accomplished the following:

- Constructed a 0.5 million gallon glass-lined steel reservoir tank;
- Submitted annual water use records to the Department;
- Installed new radio-read meters throughout the District;
- Constructed a new membrane surface water treatment plant;
- Upgraded out-dated sections of distribution piping;
- Completed a Water Master Plan; and
- Submitted a 2016 WMCP to the Department.

The Department has determined that work has been accomplished since issuance of the permit, which provides evidence of good cause and reasonable diligence in developing the permit.

23. According to the Application, the District has invested approximately \$739,000. The District does not anticipate any additional costs for the completion of this project. The Department recognizes that while some of these investment costs are unique to construction and development solely under S-53492, other costs included in this accounting are not partitioned out for S-53492 because (1) they are incurred under the development of a water supply system jointly utilized under other rights held by the District, and/or (2) they are generated from individual activities counted towards reasonable diligence and good faith as listed in ORS 690-315-0080(4) which are not associated with just this permit, but with the development and exercise of all the District's water rights.
24. As of October 1, 2002, the District had diverted 0.145 cfs of the 0.3 cfs allowed for beneficial municipal purposes under the terms of this permit.
25. The Department has considered the District's compliance with conditions, and did not identify any concerns.

Financial Investment and Cost to Appropriate and Apply Water to a Beneficial Purpose

[OAR 690-315-0080(3)(b)]

26. According to the Application, as of February 19, 2003, they have invested approximately \$739,000. District does not anticipate any additional costs for the completion of this project.

The Market and Present Demands for Water [OAR 690-315-0080(3)(d)]

27. As described in Findings 14 through 19 above, the District has indicated, and the Department finds that the District must rely on full development of their Permit S-53492.
28. The District estimates an annual population growth rate of 0.7 percent per year over an eight year period, being the years 2014 to 2022.
29. Given the current water supply situation of the District, including current and expected demands, and the need for system redundancy, there is a market and present demand for the water to be supplied under Permit S-53492.
30. OAR 690-315-0090(3) requires the Department to place a condition on this extension of time to provide that diversion of water beyond 0.145 cfs (not to exceed the maximum amount authorized under this permit, being 0.3 cfs) shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan(s) (WMCP) under OAR Chapter 690, Division 86 that grants access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7). A "Development Limitation" condition" is specified under Item 1 of the "Conditions" section of this PFO to meet this requirement.

Fair Return Upon Investment [OAR 690-315-0080(3)(e)]

31. Use and income from the permitted water development project would result in reasonable returns upon the investment made in the project to date.

Other Governmental Requirements [OAR 690-315-0080(3)(f)]

32. Delays caused by any other governmental requirements in the development of this project have not been identified.

Events which Delayed Development under the Permit [OAR 690-315-0080(3)(g)]

33. Delay of development under Permit S-53492 was due, in part, to the size and scope of the municipal water system, which was designed to be phased in over a period of years.

Maintaining the Persistence of Listed Fish Species [OAR 690-315-0080(1)(f) and (2)]

The Department's determination regarding maintaining the persistence of listed fish species shall be based on existing data and advice of the Oregon Department of Fish and Wildlife (ODFW). The determination shall be limited to impacts related to stream flow as a result of use of the undeveloped portion of the permit and further limited to where, as a result of use of the undeveloped portion of the permit, ODFW indicates that stream flow would be a limiting factor for the subject listed fish species.

34. The pending municipal Application for Extension of Time for Permit S-53492 was delivered to ODFW on December 14, 2012, for ODFW's review under OAR-690-315-0080.

35. The District was notified by letter that the pending municipal Application for Extension of Time for Permit S-53492 was delivered to ODFW for review.
36. Notification that the pending municipal Application for Extension of Time for Permit S-53492 was delivered to ODFW for review was published in the Department's Public Notice dated December 18, 2012. No public comments were received regarding this notice.
37. On December 22, 2015, the Department received ODFW's Division 315 Fish Persistence Evaluation for Permit S-53492.
38. Summary and Excerpts of Advice from ODFW:
The District has obtained superseding permits for their Asbury Creek diversion consistent with ODFW recommendations made in 1998.

The conditions incorporated into Permit S-53492 consistent with ODFW's recommendations included the POD having being moved downstream to a new location just above the Highway 101 culvert and a minimum flow of 0.1 cfs below the new Asbury POD. In addition, a minimum flow of 0.6 in Shark Creek, tributary to Asbury Creek, below the Shark Creek POD was incorporated into a separate water right [Permit S-53491]. The minimum flow on Shark Creek helps protect habitat in the upper Asbury watershed.

ODFW concluded that with the above conditions having been incorporated into the permits referenced above, fish persistence will be maintained with the development of the undeveloped portion of 0.155 cfs from Asbury Creek.

39. The Department finds, based on ODFW's advice, that the use of the undeveloped portion of Permit S-53492 will maintain the persistence of listed fish species in the portions of the waterways affected by water use under the permit.

CONCLUSIONS OF LAW

1. The District 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(2).
2. The District has submitted a complete extension application form and the fee specified under ORS 536.050(1)(k), as required by OAR 690-315-0080(1)(a).
3. Pursuant to Section 5, Chapter 410, Oregon Laws 2005, the permit holder is not required to demonstrate that actual construction of the project began within one year of the date of issuance of the permit, as otherwise required by OAR 690-315-0080(1)(b).

4. The time requested to apply water to full beneficial use is reasonable, as required by OAR 690-315-0080(1)(c).
5. Full application of water to beneficial use can be completed by October 1, 2022⁵, as required by OAR 690-315-0080(1)(d).
6. 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 the fair return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the water right permit holder had no control, and the Department has determined that the District has shown good cause for an extension of time to apply the water to full beneficial use pursuant to OAR 690-315-0080(1)(e).
7. As required by OAR 690-315-0090(3) and as described in Finding 30, above, and specified under Item 1 of the "Conditions" section of this PFO, the diversion of water beyond 0.145 cfs (not to exceed the maximum amount authorized under this permit, being 0.3 cfs) under Permit S-53492 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan (WMCP) under OAR Chapter 690, Division 86 that grants access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7).
8. In accordance with OAR 690-315-0080(1)(f), and as described in Findings 34 through 39, above, the use of the undeveloped portion of the permit will maintain the persistence of listed fish species in the portions of waterways affected by water use under the permit.

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 the water to beneficial use under Permit S-53492 from October 1, 2002 to October 1, 2022.

⁵Pursuant 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.

Subject to the following conditions:

CONDITIONS

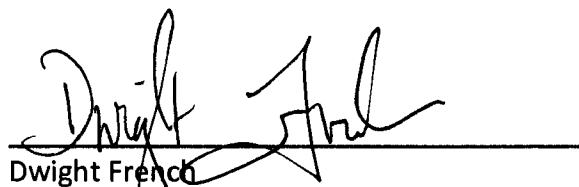
1. Development Limitations

A maximum diversion of 0.145 cfs of water is currently allowed under Permit S-53492. Any diversion of water beyond 0.145 cfs (not to exceed the maximum amount authorized under the permit, being 0.3 cfs) shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan (WMCP) under OAR Chapter 690, Division 86 that authorizes access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7). The required WMCP shall be submitted to the Department within 3 years of this Final Order. The amount of water used under Permit S-53492 must be consistent with this and subsequent WMCP's approved under OAR Chapter 690, on file with the Department.

The Development Limitation established in the above paragraph supersedes any prior limitation of the diversion of water under Permit S-53492 that has been established under a prior WMCP or Extension final order issued by the Department.

The deadline established in the Extension Final Order for submittal of a WMCP shall not relieve a permit holder of any existing or future requirement for submittal of a WMCP at an earlier date as established through other orders of the Department. A WMCP submitted to meet the requirements of the final order may also meet the WMCP submittal requirements of other Department orders.

DATED: March 22, 2016


Dwight French
Water Right Services Division Administrator

*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 **May 6, 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.
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 Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>

If you have any questions about statements contained in this document, please contact Ann L. Reece at 503-986-0834.

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: Water Right Services Division
725 Summer St NE, Suite A
Fax: 503-986-0901 Salem, OR 97301-1266
