

**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-54967, Water Right Application S-87531 ) PROPOSED FINAL  
in the name of Morningstar 2006, LLC ) ORDER

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**Permit Information**

Application:	S-87531
Permit:	S-54967
Basin:	Middle Willamette / Watermaster District 16
Date of Priority:	September 23, 2009
Source of Water:	Willamette Basin Project Reservoirs (constructed under Permits R-1625 and R-5363)
Purpose or Use:	Irrigation of 153.5 acres and supplemental irrigation of 16.5 acres
Maximum Volume:	425.00 Acre-Feet (AF)

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

*In summary, the Department proposes to:*

- Grant an extension of time to complete construction of the water system from May 12, 2016 to October 1, 2023.
- Grant an extension of time to apply water to full beneficial use from May 12, 2016 to October 1, 2023.<sup>1</sup>
- Make the extension subject to certain conditions set forth below.

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

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<sup>1</sup> 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.

## **ACRONYM QUICK REFERENCE**

Department – Oregon Water Resources Department

PFO – Proposed Final Order

cfs – cubic feet per second

gpm – gallons per minute

AF – acre-feet

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.

**OAR 690-315-0050(6)** requires the Department, for extensions exceeding five years, to establish checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between checkpoints will not exceed five year periods.

## **FINDINGS OF FACT**

### **Background**

1. Permit S-54707 was issued by the Department on May 12, 2011. The permit authorizes the use of up to 425.00 AF of water from the Willamette Basin Project Reservoirs (constructed under Permits R-1625 and R-5363), for irrigation of 153.5 acres and supplemental irrigation of 16.5 acres. The permit specified construction of the water system was to be completed by May 12, 2016, and complete application of water was to be made on or before May 12, 2016.

2. On March 29, 2010, the Department issued Final Order Approving the Use of Stored Water, in the matter of Water Rights Application S-87531, Clackamas County.
3. On September 15, 2015, the Department approved Permit Amendment T-11997 (Special Order Volume 96, Page 911) authorizing a change in the place of use, partial diminution and partial cancellation of a water right permit under Permit S-54707.
4. On September 15, 2015, Permit S-54967 was issued to describe an amendment for a change in place of use, partial diminution and partial cancellation proposed under Permit Amendment T-11997 (Special Order Volume 96, Page 911). This permit supersedes Permit S-54707, and here forward will be referred to simply as Permit S-54967. Permit S-54967 authorizes the use of up to 425.00 AF of water from the Willamette Basin Project Reservoirs (constructed under Permits R-1625 and R-5363), for irrigation of 153.5 acres and supplemental irrigation of 16.5 acres.
5. On behalf of the permit holder, James A. Bisenius of Morningstar 2006, LLC, submitted an "Application for Extension of Time" to the Department on May 26, 2016, requesting the time to complete construction of the water system extended from May 12, 2016 to October 1, 2023 and the time to apply water to full beneficial use under the terms of Permit S-54967 be extended from May 12, 2016 to October 1, 2023. This is the first permit extension requested for Permit S-54967.
6. Notification of the Application for Extension of Time for Permit S-54967 was published in the Department's Public Notice dated May 31, 2016. 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 537.230<sup>2</sup>, 537.248<sup>3</sup> and/or 539.010(5)<sup>4</sup>.*

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

7. On May 26, 2016, 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. Construction of the water system began prior to May 12, 2016, as specified in the permit as being the date to apply water to full beneficial use. The permit holder states, construction began June 16, 2012.

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<sup>2</sup>ORS 537.230 applies to surface water permits only.

<sup>3</sup>ORS 537.248 applies to reservoir permits only.

<sup>4</sup>ORS 539.010(5) applies to surface water and ground water permits.

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 May 26, 2016, the permit holder states the remaining work to be completed consists of completing the irrigation system to the undeveloped 103.5 acres of primary irrigation, and 16.5 acres of supplemental irrigation; 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, 2023, 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-54967 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. Construction of the water system began prior to May 12, 2016.
  - b. Work was completed during the original development time frame under Permit S-54967. A replacement dock on the Willamette River was permitted and rebuilt after an original dock was lost to flooding in January 2012. The permit holder installed a 100 HP submersible pump with fish screen, and electrical controls. The permit holder constructed a trench extending from the dock ramp to the site excavated in an easement at the neighboring property, and an 8 inch mainline was buried in the trench. The mainline was extended into the southern quarter of the site. An 8 inch diameter flowmeter was also installed.

From January to October 2013, the permit holder installed laterals and drip irrigation equipment and controls in Fields 1 and 2 (20 acres).

From January to October 2014, the permit holder installed laterals and drip irrigation equipment and controls in Field 3 (11.7 acres).

From January to October 2015, the permit holder installed laterals and drip irrigation equipment and controls in Fields 4 and 5 (18.3 acres).

The Department has determined that work has been accomplished 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 volume of 58.55 AF of water has been diverted from the Willamette Basin Project Reservoirs for irrigation of 50.0 acres.

The application states the permit holder had beneficially used the water for primary irrigation on 20.0 acres in 2013, an additional 11.7 acres in 2014, and 18.3 acres in 2015, totaling 50.0 acres.

12. Beneficial use of water has been demonstrated under this permit, as all permit conditions were satisfied by May 12, 2016.

The Department has determined that this extension will allow the permit holder to complete construction of the water system, and to apply the water to full beneficial use on the remaining 103.5 acres for primary irrigation and 16.5 acres for supplemental irrigation.

**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.
- b. The record does show the permit holder installed a totalizing flow meter in July 2012, submitted the annual water use records (2013-2015), and submitted required documentation from ODFW on approval of fish screen.

The permit holder obtained written documentation, dated February 27, 2013, from the Oregon Department of Fish and Wildlife that fish screen conditions have been met, and a by-pass device is not necessary for Permit S-54967. This letter is in the Department's file for Permit S-54967.

The permit holder obtained a Contract for Water Service with the United States Department of Interior, Bureau of Reclamation (BOR), dated April 20, 2011. Contract No. 119E101740 is in the Department's file for Permit S-54967.

**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 about \$1,134,500, which is about 45 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$1,400,000 investment is needed for the completion 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-54967.

**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-54967; 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 of diversion is located on Willamette River, and is located within the Sherwood-Dammasch-Wilsonville Limited Area. The Willamette River is not located within or above a state or federal scenic waterway, however, it is located within an area ranked "low" 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 of diversion is in a location listed by the Department of Environmental Quality as a water quality limited stream for Biological Criteria (River Mile (RM) 24.8 to 54.8), Chlorophyll a (RM 0 to 54.8), and Iron (RM 24.8 to 54.8).
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.
19. OAR 690-315-0050(6) requires the Department to place a checkpoint condition on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. A “Checkpoint Condition” is specified under Item 1 of the “Conditions” section of this PFO to meet this condition.

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

20. 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)]**

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

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

22. 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 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, 2023<sup>5</sup>, 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

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<sup>5</sup>Pursuant 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.

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).

6. As required by OAR 690-315-0050(6) and as described in Finding 19, above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit S-54967.

### **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-54967 from May 12, 2016 to October 1, 2023.

Extend the time to apply water to beneficial use under Permit S-54967 from May 12, 2016 to October 1, 2023.

Subject to the following conditions:

### **CONDITIONS**

1. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2021**. ***A form will be enclosed with your Final Order.***

- (a) At each checkpoint, the permit holder shall submit and the Department shall review evidence of the permit holder's diligence towards completion of the project and compliance with terms and conditions of the permit and extension. If, after this review, the Department determines the permit holder has not been diligent in developing and perfecting the water use permit, or complied with all terms and conditions, the Department shall modify or further condition the permit or extension to ensure future compliance, or begin cancellation proceedings on the undeveloped portion of the permit pursuant to ORS 537.260 or 537.410, or require submission of a final proof survey pursuant to ORS 537.250;

**Continued on the following page**



(b) The Department shall provide notice of receipt of progress reports in its weekly notice and shall allow a 30 day comment period for each report. The Department shall provide notice of its determination to anyone who submitted comments.

DATED: July 12, 2016



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(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 **August 26, 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>

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- If you have any questions about statements contained in this document, please contact Corey Courchane at (503) 986-0825.
  - 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
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