

**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-52788, Water Right Application S-71332) PROPOSED FINAL
in the name of Paul and Robert Wampler, Inc.) ORDER

Permit Information

Application:	S-71332
Permit:	S-52788
Basin:	Klamath / Watermaster District 17
Date of Priority:	March 4, 1991
Source of Water:	Fort Creek, via Fort Creek Canal, a tributary of Wood River
Purpose or Use:	Irrigation of 17.0 acres
Maximum Rate:	0.34 cubic foot 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, 1998 to October 1, 2016.
- Grant an extension of time to apply water to full beneficial use from October 1, 1999 to October 1, 2016.¹

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(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
COBU – Claim of Beneficial Use
ODFW – Oregon Department of Fish and Wildlife

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-52788 was issued by the Department on September 30, 1996. The permit authorizes the use of up to 0.34 cfs of water from Fort Creek, via Fort Creek Canal, a tributary of Wood River, for irrigation of 17.0 acres. The permit specified actual construction was to begin by September 30, 1997, construction of the water system was to be completed by October 1, 1998, and complete application of water was to be made on or before October 1, 1999.
2. On August 6, 2010, the Department issued a letter by certified mail, requesting either a Claim of Beneficial Use or an extension of time be submitted, or cancellation proceedings for Permit S-52788 would begin.

3. On January 16, 2014, the Department issued an Order in the Matter of the Cancellation of Certain Permit(s) to Appropriate Water, Special Order Volume 91, Page 686, under the provisions of ORS 537.260 for Permit S-52788, for failure to make proof of appropriation of water under the terms and conditions of the permit.
4. On February 6, 2014, on behalf of the permit holder, Adkins Consulting Engineering LLP, agent for Paul and Robert Wampler, Inc., submitted a request for reinstatement of Permit S-52788.
5. On February 13, 2014, the Department issued an Order in the Matter of Reinstatement of Permit S-52788, Special Order Volume 91, Page 800.
6. On August 29, 2014, a Claim of Beneficial Use (COBU) was submitted to the Department for review.
7. On October 16, 2015, the Department began a review of the COBU for Permit S-52788 for issuance of a water right certificate.
8. On November 23, 2015, the Department issued a Proposed Order of Certification to cancel Permit S-52788, for failure to comply with conditions of the permit, by not providing proof of complete application of the water to the use by October 1, 1999.
9. The permit holder, Robert Michael Wampler, owner of Paul and Robert Wampler, Inc., submitted an "Application for Extension of Time" to the Department on May 27, 2016, requesting the time to complete construction of the water system extended from October 1, 1998 to October 1, 2016 and the time to apply water to full beneficial use under the terms of Permit S-52788 be extended from October 1, 1999 to October 1, 2016. This is the first permit extension requested for Permit S-52788.
10. Notification of the Application for Extension of Time for Permit S-52788 was published in the Department's Public Notice dated June 7, 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 537.230², 537.248³ and/or 539.010(5)⁴.

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.

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

11. On May 27, 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)]

12. Actual construction of the water system began prior to the September 30, 1997 deadline specified in the permit. According to the permit holder, construction of the water delivery system began September 30, 1997.

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.

13. As of May 27, 2016, 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, 2016, 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-52788 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)]

14. 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 September 30, 1997 deadline specified in the permit. Construction of the water delivery system began September 30, 1997.
 - b. Work was completed during the original development time frame under Permit S-52788. The permit holder installed a diversion pipe with a head gate, and

began construction on the irrigation ditches.

- c. Since October 1, 1999, the permit holder has accomplished the following construction required under S-52788:
- Reconstructed an 18" diversion pipe with a slide gate from Fort Creek Canal;
 - Installed a stilling well and a steel plate with a 12"x12" contracted rectangular weir on the downstream end of the diversion pipe;
 - Reconstructed irrigation ditches;
 - Installed an outlet gate/pipe conduit;
 - Installed the required fish screen in June 2014; and
 - Received approval and documentation from Oregon Department of Fish and Wildlife (ODFW) regarding fish screen on June 16, 2014.

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)]

15. The application states a maximum rate of 0.34 cfs of water has been diverted from Fort Creek, via Fort Creek Canal, for irrigation of 15.3 acres.
16. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by the October 1, 1999.

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

17. 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.
18. The application states a meter or other suitable measuring device approved by the District 17 Watermaster was installed in June 2014.
19. The permit holder obtained written documentation, dated June 16, 2014, from ODFW that the condition for fish screening at the point of diversion for Permit S-52788 has been met, and has determined that a fishway is not required. This letter is in the Department's file for Permit S-52788.
20. The application states that full beneficial use of the water took place in April 2015, not June 2014 as indicated in the COBU.

The Department has determined that this extension will allow the installation of a fish screen after October 1, 1999, to satisfy compliance of the condition of "The permittee shall install, maintain, and operate fish screening to prevent fish from entering the proposed diversion," and "The required screens and fishways are to be in place, functional, and approved by the Oregon Department of Fish and Wildlife before diversion of any water," to the Department, in an effort to make proof of beneficial use of the water as required by Permit S-52788.

The Department has also determined that this extension will allow the full beneficial use of water completed after October 1, 1999, to satisfy compliance of the condition of "Complete application of the water to the use shall be made on or before October 1, 1999," to the Department, in an effort to make proof of beneficial use of the water as required by Permit S-52788.

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

21. The applications states the permit holder has invested about \$10,000, which is the total projected cost for complete development of this project.

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

22. The Department has found good faith of the appropriator under Permit S-52788.

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)].

23. 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-52788; 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 Fort Creek, a tributary of Wood River, and is not located within a Withdrawn Area. Wood River is located above the Klamath Scenic Waterway state, and it 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. The point of diversion is not in a location listed by the Department of Environmental Quality as a water quality limited stream.

24. Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].
 - a. None have been identified.
25. 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)]

26. 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)]

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

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

28. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit S-52788, in that the permit holder was faced with serious health issues that restricted their ability to complete development of the project in a timely manner.

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 12 through 22, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2016⁵, as required by OAR 690-315-0040(1)(c).

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.

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).

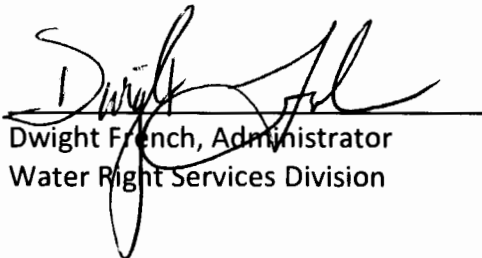
PROPOSED ORDER

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-52788 from October 1, 1998 to October 1, 2016.

Extend the time to apply water to beneficial use under Permit S-52788 from October 1, 1999 to October 1, 2016.

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;

