

**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-54321, Water Right Application S-86302 ) PROPOSED FINAL  
in the name of Jerry Bitner ) ORDER

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**Permit Information**

Application: S-86302  
Permit: S-54321  
Basin: Umpqua / Watermaster District 15  
Date of Priority: May 11, 2005  
Source of Water: North Umpqua River, a tributary of Umpqua River  
Purpose of Use: Domestic use for one household and Irrigation use of 1.0 acre  
Maximum Rate: 0.17 cubic foot per second (cfs), being 0.005 cfs for domestic use and  
0.012 cfs for irrigation

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***Please read this Proposed Final Order in its entirety.***

*In summary, the Department proposes to:*

- Grant an extension of time to apply water to full beneficial use from October 1, 2010, to October 1, 2021.<sup>1</sup>

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

## **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. On July 21, 2006, Permit S-54321 was issued by the Department. The permit authorizes the use of up to 0.17 cfs of water from the North Umpqua River, a tributary of Umpqua River, being 0.005 cfs for domestic use for one household and 0.012 cfs for irrigation use of 1.0 acre. The permit specified complete application of water was to be made on or before October 1, 2010.
2. On July 26, 2016, 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-54321 would begin.
3. On September 6, 2016, the permit holder, Jerry Bitner, submitted an “Application for Extension of Time” to the Department on, requesting the time to apply water to full beneficial use under the terms of Permit S-54321 be extended from October 1, 2010 to October 1, 2021. This is the first permit extension requested for Permit S-54321.

4. On September 12, 2016, the permit holder submitted additional information to supplement their Application for an Extension of Time. The additional information was to clarify the use of a temporary fish screen was in place for all diversions made to date; and submittal of a letter from Oregon Department of Fish and Wildlife confirming that the fish screen condition has been met.
5. On September 15, 2016, the permit holder submitted additional information to supplement their Application for an Extension of Time. The additional information was to clarify the water used to date was for system testing after installation.
6. Notification of the Application for Extension of Time for Permit S-54321 was published in the Department's Public Notice dated September 20, 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 September 6, 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. The permit holder states construction of the water system began prior to October 1, 2010, as specified in the permit as being the date to apply water to full beneficial use. The permit holder states, construction of the water system began June 1, 2007.

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 September 6, 2016, the permit holder states the remaining work to be completed consists of procurement and installation of a (permanent) fish screen and extending PVC line to location for domestic use; 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, 2021, to accomplish the application of water to

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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.

beneficial use under the terms and conditions of Permit S-54321 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 October 1, 2010.
  - b. Work was completed during the original development time frame under Permit S-54321. The Application states the work accomplished consists of installation of 600 feet of buried 1-1/4" PVC pipe with multiple irrigation/water use outlets extending from near the point of diversion to the place of use and to the end of the property.
  - c. Since October 1, 2010, the permit holder has installed electrical service to the pump location.

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 rate of 0.01 cfs of water has been diverted from the North Umpqua River, a tributary of Umpqua River. The permit holder states this water was used in a limited amount for both pressure testing the system before backfilling the trenches and to run a flow test to verify pump and system capacity.
12. Beneficial use of water has not yet been demonstrated under this permit because no water was used for the purpose of domestic or irrigation.
13. According to the permit holder delay of full beneficial use of water under Permit S-54321 was due, in part, to finances not being available to complete the project.

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

14. 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. On June 12, 2006, the permit holder submitted a Small Pump Screen Self Certification form certifying that the installed fish screen meets ODFW's fish screening requirements.
  - c. On September 13, 2016, the permit holder submitted written documentation from Oregon Department of Fish and Wildlife that the condition fish screening at the point of diversion has been met and that a fish bypass device is not required. A copy of this letter is in the Department file for Permit S-54321.

The Department determined the permit holder has complied with conditions of the permit, as required by Permit S-54321.

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

15. The Applications states the permit holder has invested about \$2,100, which is about 57 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$1,600 investment is needed for the completion of this project.

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

16. The Department has found good faith of the appropriator under Permit S-54321.

**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)].*

17. 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 S-54321;

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. This Permit was issued under the North Umpqua Settlement Agreement which set aside a total of 7.0 cfs of water from the North Umpqua River for future allocations, being 1.5 cfs for agriculture and irrigation use; 1.5 cfs for commercial and industrial use; and 4.0 cfs for domestic and human consumptive uses.

18. A current water availability analysis for the North Umpqua River Settlement Agreement allocations show that 99.9% of the 1.5 cfs for agriculture and irrigation use has been allocated; 100% of the 1.5 cfs for commercial and industrial use has been allocated; and 32.3% of the 4.0 cfs for domestic and human consumptive uses has been allocated.
  - A. The point of diversion is located on North Umpqua River, a tributary of Umpqua River, and is not located within a Withdrawn Area.
  - B. The North Umpqua River is not located within or above a state or federal scenic waterway.
  - C. North Umpqua River 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.
  - D. The point of diversion is in a location listed by the Department of Environmental Quality as a water quality limited stream.
    - a. North Umpqua River, River Mile 0 to 52.3 is listed under Water Quality Limited for Flow Modification.
    - b. North Umpqua River, River Mile 0 to 68.9 is listed for Water Quality Limited for Temperature.
    - c. Clover Creek, River Mile 0 to 4.2 is listed for Water Quality Limited for Temperature.

**Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].**

19. No other economic interests dependent on completion of the project have been identified.

**Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].**

20. 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)]**

21. 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)]**

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

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

23. Application did not identify unforeseen events.

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

24. The Application did not state if a denial of the extension would result in undue hardship.

**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 timeline requirements to begin construction 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 16, full application of water to beneficial use can be accomplished by October 1, 2021<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 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 apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

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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.

## 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 water to beneficial use under Permit S-54321 from October 1, 2010 to October 1, 2021.

DATED: October 25, 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 **December 2, 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 Jeffrey D. Pierce at (503) 986-0802.
  - 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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