

**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-51017, Water Right Application S-70272 ) PROPOSED FINAL  
in the name of Madison Ranches, INC and AXA Equitable Life Insurance ) ORDER  
Company

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**Permit Information**

Application: S-70272  
Permit: S-51017  
Basin: Umatilla / Watermaster District 5  
Date of Priority: April 2, 1990  
Source of Water: Columbia River, a tributary of Pacific Ocean  
Purpose or Use: Irrigation of 7597.9 acres and supplemental irrigation of 2047.3 acres  
Maximum Rate: 33.42 cubic feet per second (cfs)

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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 October 1, 2015, to October 1, 2020.
- Grant an extension of time to apply water to full beneficial use from October 1, 2015, to October 1, 2020.<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**

Agent - GSI Water Solutions  
Application – Application for Extension of Time  
Attorney – Michael Schultz  
CID – Columbia Improvement District  
Department – Oregon Water Resources Department  
FOF – Findings of Fact  
Plant - Lamb-Weston Potato Processing Plant  
ODFW – Oregon Department of Fish and Wildlife  
PFO – Proposed Final Order  
POD – Point of Diversion  
POU – Place of Use  
RM – river mile  
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)** 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 therefor; and the income or use that may be required to provide fair and reasonable returns upon the investment.

**OAR 690-315-0040** provides that in order to approve an application for an extension of time to complete construction or apply water to full beneficial use, the Department shall make the findings in OAR 690-315-0040(1) including a finding that there is “good cause” to approve the extension. OAR 690-315-0040(2)-(4) contains the factors that the Department must consider to make findings that support a “good cause” determination.

**OAR 690-315-0050(5)** states that extension orders may include, but are not limited to, any condition or provision needed to: ensure future diligence; mitigate the effects of the subsequent development on competing demands on the resource; and periodically document the continued need for the permit.

## FINDINGS OF FACT

1. On July 3, 1990, Permit S-51017 was issued by the Department. The permit authorizes the use of up to 33.42 cfs of from the Columbia River, a tributary of Pacific Ocean, for irrigation of 7,597.9 acres and supplemental irrigation of 2,047.3 acres. The permit specified actual construction was to begin by July 5, 1991; construction of the water system was to be completed by October 1, 1992, and complete application of water was to be made on or before October 1, 1993.
2. Permit S-51017 has been modified by the following Permit Amendments:
  - T-7442; Change in Place of Use (POU) approved December 18, 1995;
  - T-8068; Change in POU approved January 19, 2000;
  - T-8857; Change in POU and Additional Point of Diversion (POD) approved May 21, 2002;
  - T-9540; Change in POU approved January 12, 2004;
  - T-10320 Change in POU approved March 14, 2008; and
  - T-10768 Additional POD approved 2010.
3. As a result of the permit amendments above, Permit S-51017 now authorizes the use of up to a maximum of 33.42 cfs of water from the Columbia River, a tributary of Pacific Ocean from three PODs for irrigation of 7,597.9 acres and supplemental irrigation of 2,047.3 acres from three PODs.
4. On April 13, 2016, an Assignment from Kent R. and Shannon K. Madison to Madison Ranches, INC and AXA Equitable Life Insurance Co. was recorded in the records of the Water Resources Department.
5. Five prior permit extensions have been granted for S-51017. The most recent extension request resulted in the completion dates for construction and complete application of water being extended from October 1, 2010 to October 1, 2015.
6. On August 15, 2016, Jake Madison, owner of Madison Ranches, INC, submitted an "Application for Extension of Time" (Application) to the Department, requesting the time to complete construction of the water system and the time to apply water to full beneficial use under the terms and conditions of Permit S-51017 be extended from October 1, 2015, to October 1, 2020.
7. On August 30, 2016, notification of the Application for Permit S-51017 was published in the Department's Public Notice. No public comments were received.
8. On October 5, 2016, November 10, 2016, and January 24, 2017, GSI Water Solutions (Agent) submitted additional information to supplement the Application. The additional

information included a map of irrigated acres and documentation of fish screen installation and approval.

**Review Criteria [OAR 690-315-0040]**

*In order to approve an Application for an Extension of Time to complete construction and/or apply water to full beneficial use pursuant to ORS 537.230 or 537.630, or to begin construction, pursuant to ORS 537.248, the Department must make the findings in OAR 690-315-0040(1)(a) – (d).*

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

9. On August 15, 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)]**

10. Actual construction of the water system began prior to the July 5, 1991, deadline specified in the permit. According to the permit holder, the shared POD was constructed by Columbia Improvement District (CID) prior to permit application and 500.0 acres of supplemental irrigation was developed.
11. According to the Application for Permit to Appropriate Surface Water submitted to the Department June 28, 1990, actual construction of the CID pump station was complete prior to permit issuance.

Based on Findings of Fact (FOF) 10 and 11, the Department has determined the permit holder has satisfied the condition requiring beginning of construction of the water works.

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

*The Department must find that there is “good cause” to approve the extension. In making a “good cause” finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).*

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

*In order to make a finding of “good cause” to approve the extension, the Department shall consider whether the applicant has demonstrated “reasonable diligence” in previous performance under the permit. OAR 690-315-0040(2)(a). In determining “reasonable diligence”, the Department shall consider, but is not limited to, the following factors: a) The amount of construction completed within the time allowed in the permit or previous extension; b) The amount of beneficial use made of the water during the permit or previous extension time limits; c) Water right holder conformance with the permit or previous extension conditions; and d) Financial investments made toward developing the beneficial use of water.*

**Amount of Construction [OAR 690-315-0040(3)(a)]** (The amount of construction completed within the time allowed in the previous extension.<sup>2</sup>)

12. During the most recent extension period, being from October 1, 2010, to October 1, 2015, the following was accomplished:
- installation of more than eight miles of additional mainline;
  - installation of booster pumps;
  - installation of a generator;
  - installation of pivots; and
  - installation of a new pump station and trash screen.

Based on FOF 12, the Department has determined that work has been accomplished within the time allowed in the previous extension, which provides evidence of good cause and reasonable diligence from the appropriator towards the complete application of water to a beneficial use.

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

*The water right permit holder's conformance with the previous extension conditions.*

13. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns.

Based on FOF 13, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit S-51017.

**Beneficial Use of Water OAR 690-315-0040(3)(b):** *the amount of beneficial use made of the water during the permit or previous extension conditions.*

14. The Application states a maximum rate of 33.42 cfs of water has been diverted from the authorized PODs on the Columbia River, for irrigation of 9,615.0 acres, being 7,567.0 acres primary; and 2,047.0 acres supplemental irrigation.

The Department has determined that this extension will allow the permit holder to complete construction and to apply the water to full beneficial use on the remaining 30.9 acres of primary irrigation and 0.3 acres of supplemental irrigation.

15. According to the permit holder delay of full beneficial use of water under Permit S-51017 was due, in part, to economic factors which have required that capital improvements be phased in over time. Development was also delayed by the CID and Port of Morrow alluvial well source falling through. As a result, additional time is necessary to complete the development of this permit.

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<sup>2</sup> "Actual Construction" is defined in OAR 690-315-0020(3)(d)(A) and (B) as physical work performed toward completion of the water system which demonstrates the water right permit holder's good faith and intention to complete the project with reasonable diligence. Actual construction does not include planning a diversion system, formulating a business plan, securing financing, letting contracts, purchasing but not installing equipment, surveying, clearing land or planting crops.

Based on FOF 13 and 14, the Department has determined that beneficial use of water has been demonstrated under this permit, as all permit conditions were satisfied by October 1, 2015.

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

16. The Application states the permit holder has invested approximately \$7,800,000, which is about 64 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$4,300,000 investment is needed for the completion of this project.

Based on FOF 16, the Department has determined that the permit holder has made an investment, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

The Application provides evidence that work has been accomplished towards completion of the water system; the permit holder has demonstrated compliance with permit conditions; a financial investment has been made, and; beneficial use of water has been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit S-51017.

**The Market and Present Demands for Water [OAR 690-315-0040(4)(a-f)]**

*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:*

- *(a) The amount of water available to satisfy other affected water rights and scenic waterway flows;*
- *(b) 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);*
- *(c) The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife;*
- *(d) Economic investment in the project to date;*
- *(e) Other economic interests dependent on completion of the project; and*
- *(f) Other factors relevant to the determination of the market and present demands for water and power.*

**The amount of water available to satisfy other affected water rights and scenic waterway flows OAR 690-315-0040(4)(a)**

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-51017; 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.
18. A current Water Availability Analysis for the Columbia River, (Tributary to Pacific Ocean), based on the Columbia River Basin Plan (OAR 690-519) which allows for allocation of up to 30 million acre-feet annually of natural flows of the Columbia River, Division 33 Additional Public Interest Standards (OAR 690-033) which does not allow for diversion of live flow from the Mainstem Columbia River above Bonneville Dam during the period April 15 through September 30, and the 25-year average monthly discharge prepared by U.S. Geological Survey shows that water is not available for new allocations during the irrigation season.

**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) OAR 690-315-0040(4)(b)**

19. The points of diversion are located on Columbia River, a tributary of Pacific Ocean, and are not located within a Withdrawn Area.
20. The Columbia River, a tributary of Pacific Ocean is not located within or above a state or federal scenic waterway.
21. The points of diversion are in a location listed by the Department of Environmental Quality as a water quality limited stream.
  - Columbia River, River Mile (RM) 142 through 287.1, is listed for Mercury and Polychlorinated Biphenyls;
  - Columbia River, RM 213.7 through 303.9, is listed for Dioxin and Total Dissolved Gas; and
  - Columbia River, RM 0 through 303.9, is listed for Temperature.

**The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife OAR 690-315-0040(4)(c)**

22. Columbia River, a tributary of Pacific Ocean is located within an area that is 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.

**Economic interests dependent on completion of the project OAR 690-315-0040(4)(d)**

23. The Application states an approximate total of \$7,800,000 has been invested in the project.

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

24. The Application identifies that the completion of the development of this permit further serves to benefit CID and its patrons by the terms of the "Service Agreement" allowing the CID canals to operate at optimal capacity while distributing the operating and maintenance costs among a greater number of water users.
25. Information provided in previous extension applications identify economic benefit to the Lamb-Weston Potato Processing Plant (Plant) as this water is mixed with the waste water from the plant prior to field application which is a working solution for a long standing wastewater problem experienced by the Plant.

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

26. Permit S-51017 allows Columbia River water to be used for primary irrigation of lands which are currently authorized to be irrigated by water from Butter Creek and the Umatilla River as established by the Umatilla River Decree. Butter Creek and Umatilla River are withdrawn from future appropriations during the time period June 1 through October 31 by OAR 690-507-0080(2)(a). Additionally, Butter Creek is listed by the Department of Environmental Quality as a water quality limited stream.
- Butter Creek, river mile (RM) 0 – 18 is listed for Habitat Modification, pH, Flow Modification and iron; and
  - Butter Creek RM 0 – 65.7 is listed for pH.
27. Permit S-51017 allows Columbia River water for to be used for primary irrigation of lands which are currently authorized to be irrigated by water from wells in the Butter Creek basin, situated within the Butter Creek Critical Groundwater Area.

The Department has determined that the use of water under this permit offsets the use of water from other sources which have been identified as concerns. The use of water under Permit S-51017 contributes to management efforts in these difficult water management areas.



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

28. The Application did not identify that the 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)**

29. The Application identifies delay in the development of this project was caused in part by ongoing contract negotiations with the Port of Morrow to allow for the diversion from the Columbia River to be used for irrigation.

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

30. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit S-51017, in that the permit holders were negotiating with the Port of Morrow and CID to gain access to their alluvial wells as an alternative water source.

**Denial of the Extension Will Result in Undue Hardship OAR 690-315-0040(2)(i)**

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

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

32. Based on FOF 10 through 14, the Department has found good faith of the appropriator under Permit S-51017.

**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.*

33. As of August 15, 2016, the permit holder states the remaining work to be completed consists of submitting a Permit Amendment to change the place of use of approximately 900.0 acres previously developed on lands leased by the permit holder to lands owned by the permit holder; completing construction of the water system which includes installing an additional 40,000 feet of mainline, eleven new pivots and eight new booster pumps (most of which is necessary upon approval of the aforementioned Permit Amendment); and applying water to full beneficial use on the remaining undeveloped 31.2 acres.
34. On February 9, 2017, the Agent for the permit holder submitted information to explain the amount of work to be accomplished compared to the small acreage left to be developed. In the email, the Agent explained that it is the intention of the permit holder to file a Permit Amendment to move the POU under this permit for approximately 900 acres of land, which was held under lease by the permit holder and previously developed under this permit.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2020, 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-51017 is both reasonable and necessary.

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

*The Department must find that there is "good cause" to approve the extension. In making a "good cause" finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).*

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).

**LIMITATIONS AND CONDITIONS**

1. OAR 690-315-0050(5) provides for extension orders to include, but are not limited to, any condition or provision needed to ensure future diligence, and/or mitigate the effects of the subsequent development on competing demands on the resource. The Department determined the need to place a "Last Extension Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to this being the sixth extension requested under Permit S-51017 and the relatively small amount of the permit left to be developed.

**CONCLUSIONS OF LAW**

1. 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).
2. The Applicant complied with construction timeline requirements to begin actual construction as required by ORS 537.230, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).

3. Based on Finding of Facts 10 through 30, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2020<sup>3</sup>, as required by OAR 690-315-0040(1)(c).
4. The Applicant can complete the project within the time period requested for the extension on the project, but the extension is conditioned to mitigate the effects of the subsequent development on competing demands on the resource and is granted only for the reasonable time necessary to complete water development and apply water to beneficial use. OAR 690-315-0050(5).
5. The Applicant has demonstrated good cause for the extension, but the extension must be conditioned to ensure this is the last extension granted in order to ensure future diligence; OAR 690-315-0050(5).

### 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-51017 from October 1, 2015, to October 1, 2020.

Extend the time to apply water to beneficial use under Permit S-51017 from October 1, 2015, to October 1, 2020.

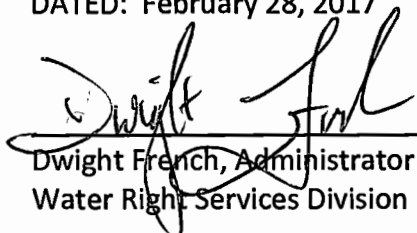
Subject to the following conditions:

### LIMITATIONS AND CONDITIONS

**1. Last Extension Condition**

This is to be the last extension of time granted for Permit S-51017. Any future extensions of time requests shall be denied.

DATED: February 28, 2017

  
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 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.*

<sup>3</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 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 **April 14, 2017**, 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. Pierceall 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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