

**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-36601, Water Right Application S-48840,
in the name of the City of Sandy

) PROPOSED
) FINAL
) ORDER

Permit Information

Application File S-48840/ Permit S-36601

Basin 3 – Sandy Basin / Watermaster District 20

Date of Priority: November 11, 1971

Authorized Use of Water

Source of Water:	Alder Creek
Purpose or Use:	Municipal
Maximum Rate:	4.0 Cubic Feet per Second (cfs)

**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**

***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-36601, water right Application S-48840

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to complete construction from October 1, 1996, to October 1, 2004.
- Grant an extension of time to apply water to full beneficial use from October 1, 1996, to October 1, 2004.
- Make the extension of time subject to certain conditions as set forth below.

ACRONYM QUICK REFERENCE

Department – Oregon Department of Water Resources
City – City of Sandy
District – Alder Creek Barlow 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
mgd – million gallons per day

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 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 537.230(3)(b)(Section 1, Chapter 704, Oregon Laws 2017), requires the Department, for extensions of time for Municipal water use to be conditioned to require that the permit holder submit, and obtain Department approval of, a water management and conservation plan (WMCP) under OAR Chapter 690, Division 86.

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.

FINDINGS OF FACT

1. On April 24, 1973, Permit S-36601 was issued by the Department. The permit authorizes the use of up to 4.0 cfs of water from the Alder Creek River, a tributary to the Sandy River for municipal use, of which 3.0 cfs has been perfected under Certificate 91176. The remaining authorized amount under the permit is 1.0 cfs. The permit specified that construction of the water development project was to be completed by October 1, 1975, and that complete application of water was to be made on or before October 1, 1976.

2. Four prior permit extensions have been granted for Permit S-36601. The most recent extension request resulted in the completion dates for construction and full application of water being extended to October 1, 1996.
3. 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.
4. 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.
5. On January 28, 2016, City of Sandy (City) submitted an “Application for Extension of Time” (Application) to the Department requesting the time to complete construction and the time to apply water to full beneficial use under the terms and conditions of Permit S-36601 be extended from October 1, 1996, to October 1, 2004.
6. Notification of the City’s Application for Extension of Time for Permit S-36601 was published in the Department’s Public Notice dated February 2, 2016. No public comments were received regarding the extension application.
7. On December 1, 2017, the City submitted additional information to supplement their Application for Extension of Time. The amendment was to correctly identify the rate the City diverted under the permit.

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)]

8. On January 28, 2016, 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)]

9. Permit S-36601 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), (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.

10. Complete construction and complete application of water under Permit S-36601 occurred on June 23, 2004. No remaining work is to be accomplished under Permit S-36601.
11. Permit S-36601 authorized the use of 4.0 cfs of water for municipal purposes, of which 3.0 cfs has been perfected under Certificate 91176. The remaining 1.0 cfs of water under Permit S-36601 was developed prior to June 29, 2005, therefore, there is no undeveloped portion of water under Permit S-36601 as per ORS 537.230(1)⁵ and OAR 690-315-0010(6)(g).
12. In addition to the remaining 1.0 cfs of water authorized under Permit S-36601 the City holds the following water right certificates and permits:
 - Certificate 5427 for 0.20 cfs of water from the Brownell Spring, a tributary of Sandy River (Beaver Creek) for municipal supply;
 - Certificate 26132 for 0.70 cfs of water from the Brownell Spring, a tributary of the Beaver Creek municipal use;
 - Certificate 41492 for 0.01 cfs of water from the a spring, a tributary of Cedar Creek for domestic use;
 - Certificate 91156 for 0.30 cfs of water from the Brownell Springs, a tributary of Beaver Creek for municipal use;
 - Certificate 91176 for 3.0 cfs of water from the Alder Creek, a tributary of Sandy River for municipal use; and
 - Permit S-48451 for 25.0 cfs of water from Salmon River, a tributary of Sandy River for municipal use.

These water rights and permits total 30.21 cfs of live flow (surface) water. The City has not yet made use of 25.0 cfs of water under Permit S-48451.

13. The City has been under contract for over 30 years to supply water to Alder Creek Barlow Water District (District).
14. According to the Application, the population within the service boundary of City of Sandy was 6,360 in 2004.
15. On June 23, 2004, the City utilized a peak day demand total of 4.0 cfs of water within its own service boundary and under contract to the District.

⁵ Effective August 15, 2017, Section 1, Chapter 704, Oregon Law 2017, 537.230(1) defines the “undeveloped Portion” of a municipal permit as the difference between the maximum rate or duty specified in a water right permit and the maximum rate or duty of water diverted as the later of June 29, 2005, or date specified in the permit or last approved extension.

16. The City's peak day demand was 4.0 cfs of water in the year 2004.
17. The service area of the District is outside of the place use authorized by Permit S-36601. However, ORS 540.510(3)(a) allows water use under a permit issued to a municipality to be applied to beneficial use on lands to which the right is not appurtenant if the use continues to be for municipal purposes and would not interfere or impair prior vested water rights.
18. Full development of Permit S-36601 is needed to address the present and future water demand of City of Sandy, including system redundancy and emergency use.

Based on Findings of Fact 9-17, the Department has determined the City's request for an extension of time until October 1, 2004, to complete construction and to apply water to full beneficial use under the terms of Permit S-36601 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.

19. During the most recent extension period under Permit S-36601, being October 1, 1991, to October 1, 1996, the following work was accomplished by City of Sandy:
 - a partial WMCP was prepared in 1991; and
 - improvements to backwash storage, chemical feed and disinfection systems.
20. Since October 1, 1996, the following work was accomplished by City of Sandy:
 - constructed 1 million gallon per day (mgd) expansion to water treatment plant;
 - updated the City's Water Master Plan; and
 - replaced a 1 mgd water treatment facility from 1977 with a new 1.6 mgd treatment facility.
21. The City has an approved WMCP on file with the Department which will remain in effect until June 2, 2026, and requires submittal of a WMCP Progress Report to the Department by June 2, 2021; and an update to be submitted to the Department by November 30, 2025.

Based on FOF 19 through 21, the Department has determined that work has been accomplished since the beginning of the last authorized extension time period, which provides evidence of good cause and reasonable diligence in developing the permit.

22. According to the Application, as of January 28, 2016, they have invested approximately \$3,615,000, which is the total cost for complete development of this project.
23. As of October 1, 1996, 3.0 cfs of water, of the 4.0 cfs of water, authorized under Permit S-36601 has been diverted from Alder Creek for beneficial municipal purposes and perfected under Certificate 91176.
24. As of June 23, 2004, the remaining 1.0 cfs of water authorized under Permit S-36601 has been diverted from Alder Creek for beneficial municipal purposes.
25. The Department has considered the City'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 January 28, 2016, the City has invested approximately \$3,615,000, which is the total projected cost for complete development of this project.

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

27. As described in Findings 15 through 18 and 20 above, the City has indicated, and the Department finds that the City must rely on full development of their Permit S-36601.
28. In 2004, the City had a population of 6,030.
29. Given the current water supply situation of the City, including its contract with the District, and estimates of build out, current and expected demands, the need for system redundancy, and emergency water supply, there is a market and present demand for the water being supplied under S-36601.
30. ORS 537.230(3)(b), requires the Department, for extensions of time for Municipal water use to be conditioned to require that the permit holder submit, and obtain Department approval of, a water management and conservation plan under OAR Chapter 690, Division 86.(Section 1, Chapter 704, Oregon Laws 2017) A "Municipal Use Extension 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. The City expects to obtain a fair and reasonable return on investment on the completed development of Permit S-36601.

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 JOAR 690-315-0080(3)(g)I

33. Delay of development under Permit S-36601 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. Application of the remaining 1.0 cfs of water under Permit S-36601 was completed June 23, 2004.

Maintaining the Persistence of Listed Fish Species JOAR 690-315-0080(1)(f) and (2)I

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. Permit S-36601 is not subject to an evaluation regarding maintaining the persistence of listed fish species because there is no "undeveloped portion" of Permit S-36601 as per ORS 537.230(1)⁶ and OAR 690-315-0010(6)(g).

Based on FOF 11, 24, and 33, the Department has determined that there is no "undeveloped portion" of water under Permit S-36601, as defined by ORS 537.230(1), therefore no portion of the water diverted under Permit S-36601 is conditioned to maintain the persistence of listed fish species.

CONCLUSIONS OF LAW

1. The City 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 City 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. Pursuant to ORS 540.510(3)(a) and (b), water under Permit S-36601 may be applied to beneficial use on land to which the right is not appurtenant.
5. The time requested to complete construction and apply water to full beneficial use is reasonable, as required by OAR 690-315-0080(1)(c).

⁶ Effective August 15, 2017, Section 1, Chapter 704, Oregon Law 2017, 537.230(1) defines the "undeveloped Portion" of a municipal permit as the difference between the maximum rate or duty specified in a water right permit and the maximum rate or duty of water diverted as the later of June 29, 2005, or date specified in the permit or last approved extension.

6. Completion of construction and full application of water to beneficial use can be completed by October 1, 2004⁷, as required by OAR 690-315-0080(1)(d).
7. 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 City has shown good cause for an extension of time to complete construction and to apply the water to full beneficial use pursuant to OAR 690-315-0080(1)(e).
8. There is no “undeveloped portion” of the permit to be considered under OAR 360-315-0080(1)(f).
9. There is no “undeveloped portion” of the permit to be considered under ORS 537.230(3) and OAR 690-315-0090(3).
10. As required by Section 1, Chapter 704, Oregon Laws 2017, and as described in Finding 30, above, and specified under Item 1 of the “Conditions” section of this PFO, for extensions of time for Municipal water use to be conditioned to require that the permit holder submit, and obtain Department approval of, a water management and conservation plan under OAR Chapter 690, Division 86.

continued on following page

⁷For permits applied for or received on or before July 9, 1987, upon complete development of the permit, you must notify the Department that the work has been completed and either: (1) hire a water right examiner certified under ORS 537.798 to conduct a survey, the original to be submitted as required by the Department, for issuance of a water right certificate; or (2) continue to appropriate water under the water right permit until the Department conducts a survey and issues a water right certificate under ORS 537.625.

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 under Permit S-36601 from October 1, 1996, to October 1, 2004.

Extend the time to apply the water to beneficial use under Permit S-36601 from October 1, 1996, to October 1, 2004.

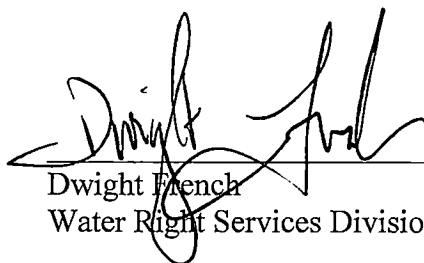
Subject to the following condition:

CONDITIONS AND LIMITATIONS

1. Municipal Use Condition

An updated Water Management and Conservation Plan (WMCP) under OAR Chapter 690, Division 86 shall be submitted and approved by the Department by November 30, 2025.

DATED: December 19, 2017



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 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 **February 2, 2018**, 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

- d. would adversely affect or aggrieve the petitioner's interest;
 - e. A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;
 - f. Any citation of legal authority supporting the petitioner, if known;
 - g. Proof of service of the protest upon the water right permit holder, if petitioner is other than the water right permit holder; and
 - h. 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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