

**Oregon Water Resources Department  
Water Right Services Division**

**Application for Extension of Time**

In the Matter of the Application for an Extension of Time ) PROPOSED  
for Permit S-54721, Water Right Application S-87646 ) FINAL  
in the name of Applegate Irrigation Corporation ) ORDER

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**Permit Information**

Application:	S-87646
Permit:	S-54721
Basin:	Rogue / Watermaster District 13
Date of Priority:	August 11, 2010
Source of Water:	Applegate Reservoir, constructed under Permit R-7810
Purpose or Use:	Irrigation of 270.19 Acres
Maximum Rate/Volume:	1,419.0 acre-feet (AF)

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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 complete construction of the water system from August 12, 2016, to October 1, 2019.
- Grant an extension of time to apply water to full beneficial use from August 12, 2016, to October 1, 2019.<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(5), 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**

Application – Application for Extension of Time  
Department – Oregon Water Resources Department  
District – Applegate Irrigation Corporation  
ODFW – Oregon Department of Fish and Wildlife  
PFO – Proposed Final Order  
FOF – Finding of Fact  
AF - acre-feet

## **AUTHORITY**

**Generally, see ORS 537.230 and OAR Chapter 690 Division 315.**

**ORS 537.230(2)** 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.

## **FINDINGS OF FACT**

1. On August 12, 2011 Permit S-54721 was issued by the Department. The permit authorizes the use of up to 1,419.0 AF of water from the Applegate Reservoir, constructed under Permit R-7810, for irrigation of 270.19 acres. The permit specified construction of the water system was to be completed by August 10, 2016, and complete application of water was to be made on or before August 10, 2016.
2. On June 13, 2018, Jean Yager, President of Applegate Irrigation Corporation (District), submitted an “Application for Extension of Time” (Application) to the Department, requesting the time to complete construction of the water system be extended from, August 10, 2016, to October 1, 2019, and the time to apply water to full beneficial use under the terms and conditions of Permit S-54721 be extended from August 12, 2016, to October 1, 2019. This is the first permit extension requested for Permit S-54721.

3. On June 19, 2018, notification of the Application for Permit S-54721 was published in the Department's Public Notice. No public comments were received.

**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)]**

4. On June 13, 2018, the Department received a completed Application 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)]**

5. Construction of the water system began prior to permit issuance. All pumps, suction assemblies, mainlines, distribution piping and irrigation equipment was in place and used under a previous water right.

Based on Findings of Fact (FOF) 5, the Department has determined the permit holder began construction prior to August 12, 2016.

**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 permit or previous extension.<sup>2</sup>*

6. Construction of the water system or reservoir began prior to August 12, 2016.

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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.

7. No other work was accomplished during the original development time frame under Permit S-54721, as a majority of the work was accomplished prior to permit issuance.

The Application provides evidence that progress of physical work, enough to qualify as the minimum necessary, has been made towards completion of the water system for the Department to find good cause and reasonable diligence towards 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 permit or previous extension conditions.*

8. The Department has considered the District's compliance with conditions, and has identified the following concerns: the record does not show that totalizing flow-meters have been installed at each point of re-diversion.

Based on FOF 19, the Department has determined that the permit holder has not demonstrated compliance with following permit condition as required by Permit S-54721:

- "Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each point of re-diversion"

Failure to comply with permit conditions constitutes illegal use of water. Beneficial use of water under this permit, therefore, has not yet been demonstrated. In order to legally perfect the use of water under this permit, the permit holder must demonstrate that all conditions of the permit have been satisfied.

**Beneficial Use of Water [OAR 690-315-0040(3)(b)]**

*The amount of beneficial use made of the water during the permit time limits or previous extension time limits.*

9. A maximum volume of 1,418.49 AF of water has been diverted from the Applegate Reservoir, constructed under Permit R-7810 for irrigation of 270.19 acres.

Based on FOF 8, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by August 12, 2016.

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

10. The permit holder has invested approximately \$418,229, which is about 97 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$14,000 investment is needed for the completion of this project.

Based on FOF 10, the Department has determined that the permit holder had 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 of progress towards completion of the water system; a financial investment has been made; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use has not been demonstrated. The Department has determined the applicant has demonstrated the minimum necessary for the Department to find reasonable diligence towards complete application of water to a beneficial use.

**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.*

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

The amount of water available to satisfy other affected water rights and scenic waterway flows.

11. 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-54721; 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.
12. Current Water Availability Analysis has determined that 1,419.0 AF of water is available from Applegate Reservoir, constructed under Permit R-7810.

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

13. The points of re-diversion are located on the Applegate River, and are not located within a Withdrawn Area.

14. The Applegate Reservoir, constructed under Permit R-7810, is above the Rogue Scenic Waterway.
15. The points of re-diversion are in a location listed by the Department of Environmental Quality as a water quality limited stream.
  - a. Applegate River, River Mile 0.0 to 46.8 is listed under Water Quality Limited for Flow Modification, pH, and temperature; and
  - b. Applegate River, River Mile 46.8 to 51.0 listed under Water Quality Limited for Mercury.

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

The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife.

16. Applegate 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.

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

Economic interests dependent on completion of the project.

17. An approximate total of \$418,229 has been invested in the project.

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

Other economic interests dependent on completion of the project.

18. Beyond the economic interest of the District and its patrons, the economic value to the area is immeasurable since the use of the natural flow of the river this project provides is broad based.

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

Other factors relevant to the determination of the market and present demand for water and power.

19. Permit S-54721 was issued to replace older water rights as a way to provide for more reliable instream flows for conservation purposes. The continued use under this permit helps to mitigate natural stream-flow through the river. The project provides a net positive impact for all involved.

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

20. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date. The structure of the partnership allows for reduced pumping costs for all the permit holders, which increase the value to

cost ratio of any crops produced on the land. Additionally, there is additional economic value added to the fishery with the increased flow in the river.

**Other Governmental Requirements [OAR 690-315-0042(2)(g)]**

21. Delay in the development of this project that was caused by other governmental requirements have not been identified.

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

22. The District did not realize at the time they began the project the complexity of completing the project in accordance with the permit and Oregon water law. The permit holders were of the belief that since this was a conservation project with a lot of moving parts, that the steps towards the permitting of the project were all that was necessary to complete the project.

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

23. A denial of the extension would result in undue hardship, the five property owners would lose their water right under the District permit and would have to reapply individually outside of District's agreement with the Bureau of Reclamation whereby they would have to pay for the water as well as the power to operate their pumps - increasing the cost of irrigation. This project was initiated as a conservation project to help ensure adequate stream flow in the river during the irrigation season, and the loss of the irrigation under this permit could result the water right holder reverting back to their certificated water rights that are currently leased in-stream, resulting in reduced flows in the river.

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

24. The Application provides evidence of good faith of the appropriator under Permit S-54721.

Based on FOF 5, 6, 9, 10, and 17, the Department has determined that the applicant has shown good faith and reasonable diligence.

**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.*

25. As of June 13, 2018, the permit holder states the remaining work to be completed consists of completing construction of the water system; meeting all permit conditions, which includes installing totalizing flow meters at each point of re-diversion; 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, 2019, 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-54721 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).

**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 5 through 24, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2019<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.
5. The Applicant has demonstrated good cause for the extension.

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<sup>3</sup>Pursuant to ORS 537.230(5), 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.



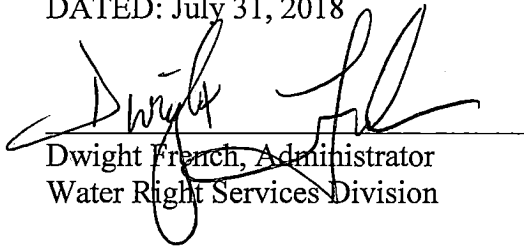
## PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department proposes to issue an order to:

Extend the time to complete construction of the water system under Permit S-54721 from August 10, 2016, to October 1, 2019.

Extend the time to apply water to beneficial use under Permit S-54721 from August 10, 2016, to October 1, 2019.

DATED: July 31, 2018



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 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 **September 14, 2014**, 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.

