

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-51017, Water Right Application S-70272) FINAL
in the name of Madison Ranches Inc., and AXA Equitable Life) ORDER
Insurance Co.

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)

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, 2020, to October 1, 2021.
- Grant an extension of time to apply water to full beneficial use from October 1, 2020, to October 1, 2021.¹
- 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

¹ 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
ODFW – Oregon Department of Fish and Wildlife
PFO – Proposed Final Order
FOF – Finding of Fact
cfs – cubic feet per second

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.

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. Six 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, 2015 to October 1, 2020.
6. On February 8, 2020, the permit holder submitted Permit Amendment Application T-13367, requesting a change in place of use under the permit to update the place of use to match the land developed under the permit.
7. On August 31, 2020, Jake Madison, president 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 be extended from, October 1, 2020, to October 1, 2025, and the time to apply water to full beneficial use under the terms and conditions of Permit S-51017 be extended from October 1, 2020, to October 1, 2025.
8. On September 8, 2020, notification of the Application for Permit S-51017 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)]

9. On August 31, 2020, 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)]

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.

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) 9, and 10, the Department has determined the permit holder began construction prior to July 5, 1991.

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.²

11. The Application does not identify work accomplished during the most recent extension period, being from October 1, 2015, to October 1, 2020.

² “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.

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

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

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

Based on FOF 12, 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 time limits or previous extension time limits.

13. 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.

Based on FOF 12, and 13, the Department has determined that beneficial use of water has been demonstrated under Permit S-51017.

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

14. An approximate total of \$4.6 million has been invested. The Application included items associated with cost to buy into CID irrigation project, which is not associated with development under this permit, and are not "actual construction" under this permit and therefore are not counted towards development. The Application asserts the Claim of Beneficial Use as soon as Permit Amendment T-13367, suggesting development is complete and no additional work needs to be accomplished.

Based on FOF 14, 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 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.

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

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

15. 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.
16. 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.

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).

17. The points of diversion are located on Columbia River, a tributary of Pacific Ocean, and are not located within a Withdrawn Area.
18. The Columbia River, a tributary of Pacific Ocean is not located within or above a state or federal scenic waterway.
19. The points of diversion are in a location listed by the Department of Environmental Quality as a water quality limited stream. Impairment Cause: Total Dissolved gas;

Temperature- Year Round; Methylmercury; Dioxin (2,3,7,8-TCDD) Columbia River, RM 0 through 303.9, is listed for Temperature.

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.

20. 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.

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

Economic interests dependent on completion of the project.

21. An approximate total of \$4.6 million has been invested in the project.

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

Other economic interests dependent on completion of the project.

22. Economic interests dependent on completion of development under this permit are limited to ancillary effect and benefits to the local economy.

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

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

23. 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.
24. 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)]

25. 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 690-315-0042(2)(g)]

26. The delay in the timely completion of the development of the project and/or timely application of water to full beneficial use was caused, in part, to the need to complete review of Permit Amendment Application T-13367.
27. The Application also identifies policy discussions surrounding mitigation under other permits which may serve the same land.

The Department has determined the need for the extension of time to complete the processing of Permit Amendment Application T-13367, however, the Department recognizes that the timing of the submittal of Permit Amendment Application T-13367, and the subsequent updates to the permit amendment, provided little opportunity to complete the processing prior to October 1, 2020.

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

28. Unforeseen events which extended the length of time needed to fully develop and perfect Permit S-51017, have been identified in the Application. The Application refers to mitigation policy under other permits, and the need to submit Permit Amendment Application T-13367 to address these requirements. Though it was possible to review Permit Amendment Application T-13367 with sufficient time for water to be put to beneficial use prior to October 1, 2020, ultimately the decision by the permit holder to amend the place of use under the permit is within the control of the permit holder, and it is not a requirement under the this permits.

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

29. A denial of the extension would result in undue hardship, in that a denial would prevent the complete review of Permit Amendment Application T-13367. Water may be available under the other permits to irrigate the lands described under Permit S-51017.

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

30. The Application provides evidence of good faith of the appropriator under Permit S-51017.

Based on FOF 10, 12, 13, 14, and 21, 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.

31. Permit S-51017 was originally issued on July 3, 1990, and has had five previous extension of time approved, providing more than 30 years for the development of the permit. The previous extension of time final order issued on April 21, 2017, provided until October 1, 2020, to complete construction and complete application of water to the beneficial use, was conditioned to be the last extension authorized for this permit.
32. As of August 31, 2020, the permit holder states that completion of installation of the necessary mainline, pivots and pumps will be completed by October 1, 2021, and anticipates being able to complete a claim of beneficial use as soon as the permit amendment is processed.
33. The Department has completed the review of Permit Amendment T-13367, and anticipate issuance of prior to the beginning of the 2021 irrigation season.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2025, 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 not reasonable or necessary. Given that the Application identifies the Claim of Beneficial Use may be completed upon the completion of the review of Permit Amendment T-13367, and the more than 30 years allowed for development by the permit and previous five extensions of time, the Department has determined October 1, 2021, is sufficient to complete review of Permit Amendment T-13367, and accomplish application of water to full beneficial use.

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. Due to the amount of time already authorized for development of this permit, the delay in submittal of a permit amendment to address the place of use issues, no additional work being accomplished during the most recent extension of time period, and the permit holder anticipating the Claim of Beneficial Use can be prepared upon completion of review of Permit Amendment T-13367, 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.

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 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 33, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2021³, as required by OAR 690-315-0040(1)(c).
4. The Applicant can complete the project within the time period provided in the extension.
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).

continued on following page

³Pursuant 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-51017 from October 1, 2020, to October 1, 2021.

Extend the time to apply water to beneficial use under Permit S-51017 from October 1, 2020, to October 1, 2021.

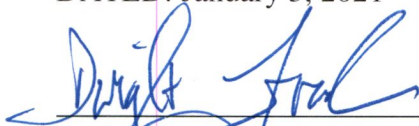
Subject to the following condition:

LIMITATIONS AND CONDITIONS

1. Last Extension Condition

This may be the last extension of time granted for Permit S-51017. Any future extensions of time may only be approved if a Final Order on Permit Amendment T-13367 has not been issued due to delays caused by the Department. If the Final Order on Permit Amendment T-13367 has not been issued as a result of delays in submittal of additional information requested by the Department prior to the date of this Final Order on Extension of Time, any future extensions of time may be denied. ORS 539.010(5); OAR 690-315-0040.

DATED: January 5, 2021



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 **February 17, 2021**, 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:

