

**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 G-15196, Water Right Application G-15623, in	)	PROPOSED
the name of Sester Farms Inc.	)	FINAL
		ORDER

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Permit Information

Application:	G-15623
Permit:	G-15196
Basin:	2C – Lower Willamette / Watermaster District 20
Date of Priority:	October 5, 2001
Source of Water:	three wells in North Fork Beaver Creek Basin
Purpose or Use:	nursery use on 300.35 acres
Maximum Rate:	4.01 cubic feet per second (cfs); being no more than 0.67 cfs from Well #1, 1.67 cfs from Well #2, and 1.67 cfs from Well #3

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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 apply water to full beneficial use from October 1, 2006, to October 1, 2030<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 537.630 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315.

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<sup>1</sup>Pursuant to ORS 537.630(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.

## **ACRONYM QUICK REFERENCE**

Agent – Ted Ressler  
Application – Application for Extension of Time  
Department – Oregon Department of Water Resources  
FOF – Finding of Fact  
PFO – Proposed Final Order  
Well 1 – MULT 3476  
Well 2 – not constructed  
Well 3 – MULT 67819  
cfs - cubic feet per second

## **AUTHORITY**

Generally, see ORS 537.630 and OAR Chapter 690 Division 315.

**ORS 537.630(2)** provides in pertinent part that the Oregon Water Resources Department (Department) for good cause shown shall order and allow 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.

**OAR 690-315-0050(6)** requires the Department, for extensions exceeding five years, to establish checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between checkpoints will not exceed five year periods.

## **FINDINGS OF FACT**

1. On September 4, 2002, Permit G-15196 was issued by the Department, consistent with the terms of a settlement agreement. The permit authorizes the use of up to 4.01 cfs of

water from three wells in North Fork Beaver Creek Basin, being no more than 0.67 cfs from Well #1, 1.67 cfs from Well #2, and 1.67 cfs from Well #3, for nursery use on 300.35 acres. The permit specified complete application of water was to be made on or before October 1, 2006.

2. On February 19, 2015, a Claim of Beneficial Use was submitted, identifying all the permitted acres have been developed.
3. On August 19, 2021, the permit holder, Sester Farms Inc., submitted an "Application for Extension of Time" (Application) to the Department, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-15196 be extended from October 1, 2006, to October 1, 2030. This is the first permit extension requested for Permit G-15196.
4. On September 14, 2021, notification of the Application for Permit G-15196 was published in the Department's Public Notice. No public comments were received regarding the Application.

#### **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)]**

5. On August 19, 2021, 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)]**

6. Construction of a well began prior to permit issuance.
7. According to the well log received by the Department on May 24, 1993, construction of MULT 3476 (Well 1) began March 9, 1993.

Based on Finding of Fact (FOF) 5, and 6, the Department has determined that the prosecution of the construction of the well began prior to October 1, 2006.

#### **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.<sup>2</sup>*

8. Construction of the Well 1, and installation of electrical service and piping began prior to permit issuance.
9. Work was accomplished during the original development time frame under Permit G-15196 is as follows:
  - MULT 67819 (Well 3) constructed; and
  - electrical service and piping from Well 3 installed;
10. Since October 1, 2006, the permit holder has accomplished the following:
  - additional piping installed

The Application provides evidence of progress of physical work made towards completion of the water system, enough to qualify as the minimum necessary 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 conditions.*

11. The Department has considered the permit holder's compliance with conditions, and has identified the following concern:
  - Water use has continued even though the static water level measurements indicate that water levels have declined below what is allowable in the permit.

The Department has determined that compliance with conditions of the development of the permit has been demonstrated, and therefore what has been developed may be perfected upon satisfactory determination of beneficial use.

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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.

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

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

12. A maximum rate of 0.9 cfs (406 gallons per minute) of water has been appropriated from the Well 1, and Well 3 for irrigation of 300.35 acres, being 0.67 cfs (301 gallons per minute) from Well 1, and 0.23 cfs (105 gallons per minute) from Well 3. According to the Application, approximately 30.0 acres have been developed in a location not authorized by the permit.

Based on FOF 12, the Department has determined that beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2006.

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

13. An approximate total of \$226,100 has been invested. The costs included items associated with work accomplished after October 1, 2006, which based on the information contained in the Claim of Beneficial Use submitted February 19, 2015, would have been to redevelop irrigated acres on other lands that had not previously been developed. These costs total an investment of \$116,100, which was towards redevelopment of irrigation on land not authorized under the permit, after the authorized lands had previously been developed. This investment cannot be considered as an investment in developing the use authorized by Permit G-15196. After deducting these costs, the approximate total investment for "actual construction" to date is approximately \$226,100 which is about 100 percent of the total projected cost for complete development of this project as authorized by the permit. The Application identifies an additional \$754,000 investment is needed to complete this project, which includes applying for a permit amendment to change the place of use that has been previously developed on the authorized lands. An estimated investment of approximately \$50,000 would be needed to construct Well 2 authorized by the permit.

Based on FOF 13, 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 G-15196.

**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.

14. 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 G-15196; 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.

**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).

15. The points of appropriation for Permit G-15196, located within the Beaver Creek Basin, are not located within a limited or critical groundwater area.
16. Beaver Creek is not located within or above any state or federal scenic waterway.
17. The points of appropriation are in an area listed by the Department of Environmental Quality as a water quality limited stream.

**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.

18. Beaver Creek 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.

19. An approximate total of \$226,100 has been invested in the project.

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

Other economic interests dependent on completion of the project.

20. The Application does not identify any additional economic interests directly dependent on the approval of the extension of time, and only identifies diffuse economic interests as the contribution the nursery makes to the economy.

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

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

21. Permit G-15196 contains a condition that states the use of water from the well must be controlled or shut off if the well displays a total water level decline of 3 or more feet per year for five consecutive years; or a total water level decline of 15.0 or more feet. On February 7, 2024, the Department's Ground Water Section determined that the reference levels for Well 1 should be set at 199.00 feet below land surface; and Well 3 should be set at 317.00 feet below land surface.
22. The ground water review identified that the decline condition had been exceeded from both wells, however the March 2022, measurement of Well 1 would indicate that the 15-foot of decline in this well had recovered. The 15-foot decline has not recovered in Well 3.
23. OAR 690-315-0050(5) states that extension orders may include, but are not limited to, any condition or provision needed to mitigate the effects of the subsequent development on competing demands on the resource. Due to static water level declined in the authorized wells, the Department has determined the need to limit the development under the permit to that which was developed prior to submittal of the Claim of Beneficial Use submitted February 19, 2015.
24. OAR 690-315-0050(6) requires the Department to place a checkpoint condition on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. A "Checkpoint Condition" is specified under Item 2 of the "Limitations and Conditions" section of this PFO to meet this condition.

**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 690-315-0040(2)(g)]**

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

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

27. The Application indicates that unforeseen events have been encountered which delayed complete development of the permit. The unforeseen events are described as issues maintaining the lease of land for the nursery.

Though the permit holder has identified issues with maintaining leases on lands they do not own as an unforeseen event, the Department does not consider this to be an unforeseen event which delayed the development of the permit because the Claim of Beneficial Use, submitted on identifies that the permit had been fully developed by October 1, 2006, as required by the permit.

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

28. The Application identifies that a denial of the extension would result in an undue hardship.

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

29. The Application provides evidence of good faith of the appropriator under Permit G-15196.

Based on FOF 6, through 13, and 19, 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.*

30. As of August 19, 2021, the remaining work to be completed consists of completing construction Well 2, continuing to meet all permit conditions, which includes discontinuing of use of water from the wells until static water levels recovered; 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, 2030, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-15196 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 apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d). However, based on the Claim of Beneficial Use submitted February 19, 2015, and the declines in the wells being utilized by the permit, the Department has determined that the extension must be limited to allow for a Permit Amendment to be submitted and reviewed which would allow for a portion of the place of use that had been developed outside of the authorized place of use to be perfected. However, because these lands have already been developed and water level declines are apparent in the authorized wells, the extension must be limited to only allow a place of use change to the lands that are identified in the map accompanying the Claim of Beneficial Use submitted on February 19, 2015, and limiting the rate of diversion to what the Claim of Beneficial Use identifies.

### **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. Based on Findings of Facts 15, the Department determined the need to place a "Permit Amendment Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of water use permit. This condition, specified under Item 1 of the "Limitations and Conditions" section of this PFO, was determined to be necessary because of the use of water at an unauthorized place of use has occurred under this permit.
2. OAR 690-315-0050(5) states that extension orders may include, but are not limited to, any condition or provision needed to mitigate the effects of the subsequent development on competing demands on the resource; and periodically document the continued need for the permit. Based on FOF 11, and 21, the Department has determined the need to place a "Development Limitation" Water Use Condition" and "Reference Level" on this extension of time. This condition is specified under Items 2 and 3 of the "Limitations and Conditions" section of this PFO, and was determined necessary due to declining water levels in the authorized wells.
3. OAR 690-315-0050(6) requires a checkpoint condition on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. A "Checkpoint Condition" is specified under Item 4 of the "Limitations and Conditions" section of this PFO to meet this condition.

### **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 has complied with the construction timeline requirements to begin construction as required by ORS 537.630, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. Based on Finding of Facts 6, through 29, application of water to beneficial use can be accomplished by October 1, 2030, 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 ensure future diligence and 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 an apply water to beneficial use. OAR 690-315-0050(5).
5. The applicant has demonstrated good cause for the extension. OAR 690-315-0040.
6. For extensions exceeding five years, the Department shall establish progress checkpoints to determine if diligence is being excised in the development and perfection of the water use permit. Intervals between progress check points will not exceed five years periods, as required by OAR 690-315-0050(6).

## **PROPOSED ORDER**

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

Extend the time to apply water to beneficial use under Permit G-15196 from October 1, 2006, to October 1, 2030.

Subject to the following conditions:

### **LIMITATIONS AND CONDITIONS**

1. **Permit Amendment Condition**  
The permit holder shall submit a Permit Amendment Application within 6 months from the date of a Final Order on Extension of Time. The Permit Amendment is limited to a place of use change identified in the Claim of Beneficial Use submitted on February 19, 2015. No other place of use change may be authorized by a Permit Amendment. A request to change or to add points of appropriation may be included in the Permit Amendment provided that the use of water from the new wells may only begin if the static water levels in the currently permitted wells has recovered.
2. **Development Limitation and Water Use Condition**  
The use of water under this permit, or any subsequent permit is limited to a total appropriation of 0.9 cubic foot per second. Water use from Well 3 shall be discontinued

until a reliable March static water level measurement is submitted, identifying the well has recovered to at least 332.0 feet below land surface, being 15 feet below the reference water level of 317.0 feet below land surface. Water use from Well 1 shall be discontinued if the static water level measurement falls below 214.0 feet below land surface, and shall continue until the static water level returns to at least 214.0 feet below land surface.

3. **Reference Level**

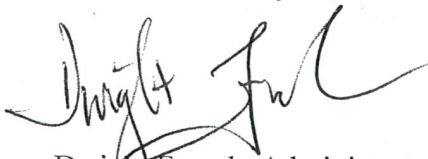
The March static water reference level shall be 199.0 feet below land surface for Well 1, and 317.0 feet below land surface for Well 3.

4. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2028**. *A form will be enclosed with your Final Order.*

- (a) At each checkpoint, the permit holder shall submit and the Department shall review evidence of the permit holder's diligence towards completion of the project and compliance with terms and conditions of the permit and extension. If, after this review, the Department determines the permit holder has not been diligent in developing and perfecting the water use permit, or complied with all terms and conditions, the Department shall modify or further condition the permit or extension to ensure future compliance, or begin cancellation proceedings on the undeveloped portion of the permit pursuant to ORS 537.260 or 537.410, or require submission of a final proof survey pursuant to ORS 537.250;
- (b) The Department shall provide notice of receipt of progress reports in its weekly notice and shall allow a 30 day comment period for each report. The Department shall provide notice of its determination to anyone who submitted comments.

DATED: February 20, 2024



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 **April 6, 2024**, 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 TO ACTIVE DUTY SERVICEMEMBERS:** Active duty Servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

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- If you have questions about statements contained in this document, please contact Jeffrey D. Pierceall at 503- 979-3213.
  - 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) 979-9160.
  - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0900.
  - Address any correspondence to :      Water Right Services Division  
725 Summer St NE, Suite A  
Salem, OR 97301-1266  
Fax: 503-986-0901
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