

**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-41645 (modified by Permit Amendment T-7541 and T-8565), )  
Water Right Application S-55439 ) PROPOSED  
in the name of Threemile Canyon Farms, LLC.; ) FINAL ORDER  
Cooperative Central Raiffeisen-Boerenleenbank, BA; )  
Rabobank Nederland )

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**Permit Information**

Application:	S-55439
Permit:	S-41645 (modified by Permit Amendment T-7541 and T-8565)
Basin:	7 – Umatilla / Watermaster District 5
Date of Priority:	March 7, 1977 for Carty Reservoir and September 9, 1977 for Columbia River
Source of Water:	Columbia River and Carty Reservoir to be constructed under Application R-55437, Permit R-6605
Purpose of Use:	Irrigation and supplemental irrigation on 6833.7 acres
Maximum Rate:	170.8 (cfs)

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***Please read this Proposed Final Order in its entirety as it contains additional conditions not included in the original permit.***

*In summary, the Department proposes to:*

- Grant an extension of time to complete construction of the water system from October 1, 2010 for outside the Radar Range Area and October 31, 2015 for inside the Radar Range Area to October 1, 2025.
- Grant an extension of time to apply water to full beneficial use from October 1, 2010 for outside the Radar Range Area and October 31, 2015 for inside the Radar Range Area to October 1, 2025.<sup>1</sup>
- Make the extension subject to certain conditions set forth below.

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.230 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315

### **ACRONYM QUICK REFERENCE**

Department – Oregon Water Resources Department

PFO – Proposed Final Order

cfs – cubic feet per second

gpm – gallons per minute

AF – acre-feet

### **AUTHORITY**

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

**ORS 537.230(3)** provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, order an extension of time within which irrigation or other works shall be completed or the right perfected. In determining the extension, the Department shall give due weight to the considerations described under ORS 539.010(5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right.

**ORS 539.010(5)** 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;

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<sup>1</sup>For 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 Water Resources Department, for issuance of a water right certificate; or (2) Continue to appropriate water under the water right permit until the Water Resources Department conducts a survey and issues a water right certificate under ORS 537.250 or 537.625.

and the income or use that may be required to provide fair and reasonable returns upon the investment.

**OAR 690-315-0040** provides in pertinent part that the Water Resources Department shall make findings to determine if an extension of time may be approved to complete construction and/or apply water to full beneficial use.

**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**

### **Background**

1. Permit S-41645 was issued by the Department on September 14, 1977. The permit authorized the use of up to 224.0 cfs of water from the Columbia River and Carty Reservoir to be constructed under Application R-55437, Permit R-6605, for irrigation and supplemental irrigation of 8957.42 acres. The permit specified actual construction was to begin by September 14, 1978 and construction of the water system was to be completed by October 1, 1979, and complete application of water was to be made on or before October 1, 1980.
2. In May 2000, Permit S-41645 was assigned by the Department from Boeing Agri-Industrial Company to BAIC Inc. by proof of ownership.
3. On July 22, 1996 the Department approved Permit Amendment T-7541 (Special Order Volume 50, Page 360) authorizing an additional point of diversion under Permit S-41645 (modified by Permit Amendment T-7541).
4. On February 28, 2001 the Department approved Permit Amendment T-8565 (Special Order Volume 55, Page 185) authorizing a change in place of use under Permit S-41645 (modified by Permit Amendment T-7541 and T-8565). The amendment moved development from land that had been identified as containing suitable habitat for the Washington Ground Squirrel to land on which there was no evidence of squirrel occupation. The permittee has agreed to protect squirrel habitat and preserve the ecological values in the Conservation Area. Permit S-41645 (modified by Permit Amendment T-7541 and T-8565) which is hereafter referred to simply as Permit S-41645.
5. On February 28, 2001, a Final Order for an extension of time was granted for Permit S-41645 resulting in the completion dates for construction and full application of water being extended from October 1, 1996 to October 31, 2005 except for the Radar Range being extended to being completed within five years after the Boeing Company vacates and provided access to the permittee to develop the land, but in any event not later

than October 31, 2015. The Final Order amended the permit as follow: the total irrigated acres on this permit was limited to 6,833.7 acres, the rate of diversion was limited to 170.8 cfs, not to exceed 582.0 cfs of water in combination with Certificates 76709, 76710, 76711, 76712 and 76713, and the duty of use was limited to 4.0 acre-feet per acre (total annual diversion limited to 27,334.8 acre-feet), provided the maximum duty of the combined water use under Certificates 76709, 76710, 76711, 76712 and 76713 will not exceed an average duty of 3.0 acre-feet per acre.

6. On December 2, 2008, Permit S-41645 was assigned by the Department from BAIC Inc. to Threemile Canyon Farms, Inc. by proof of ownership.
7. Seven prior permit extensions have been granted for Permit S-41645. The most recent extension resulted in the completion dates for construction being extended to October 1, 2010 and inside the Radar Range Area being October 31, 2015; and full application of water being extended to October 1, 2010 and inside the Radar Range Area being October 31, 2015.
8. In October 2012, Boeing vacated the Radar Range but Boeing has retained the landing strip (400 acres) within the Radar Range Area.
9. On January 29, 2013, Permit S-41645 was assigned by the Department from Threemile Canyon Farms, Inc., to Threemile Canyon Farms LLC and Cooperative Central Raiffeisen-Boerenleenbank, B.A., Rabobank Nederland, as Collateral Agent by proof of ownership.
10. The permit holder, Threemile Canyon Farms LLC, submitted an "Application for Extension of Time" to the Department on September 3, 2015, requesting the time to complete construction of the water system extended for outside the Radar Range area from October 1, 2010 and October 31, 2015 for inside the Radar Range Area from to October 1, 2025 and the time to apply water to full beneficial use under the terms of Permit S-41645 be extended for outside the Radar Range Area from October 1, 2010 and October 31, 2015 for inside the Radar Range Area to October 1, 2025.
11. Notification of the Application for Extension of Time for Permit S-41645 was published in the Department's Public Notice dated September 15, 2015. No public comments were received regarding the extension application.

Review Criteria [OAR 690-315-0040]

*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 690-315-0040. This determination shall consider the applicable requirements of ORS 537.230<sup>2</sup>, 537.248<sup>3</sup> and/or 539.010(5)<sup>4</sup>.*

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<sup>2</sup>ORS 537.230 applies to surface water permits only.

<sup>3</sup>ORS 537.248 applies to reservoir permits only.

<sup>4</sup>ORS 539.010(5) applies to surface water and ground water permits.

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

12. On September 3, 2015, the Department received a completed Application for Extension of Time and the fee specified in ORS 536.050 from the permit holder.

Start of Construction [OAR 690-315-0040(1)(b) and 690-315-0040(5)]

13. Actual construction of the water system began prior to the September 14, 1978 deadline specified in the permit. According to the permit holder, Construction on the reservoir began prior to March 1977; installation of a pipeline from Willow Creek to Carty Reservoir and Carty Reservoir pumping plant began in 1978. Construction of the point of diversion at Columbia River/Willow Creek confluence began June 1972.

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.*

14. As of September 3, 2015, the permit holder states the remaining work to be completed consists of completing construction of the water system including installation of pumps, power, piping and center pivots; gaining approval for a permit amendment to amend the location of irrigation on lands currently occupied by the landing strip, that Boeing has retained; and applying water to full beneficial use.
15. 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-41645 is both reasonable and necessary.

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

*The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0040(2).*

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

*The Department's determination of reasonable diligence shall consider the requirements set forth under OAR 690-315-0040(3)(a-d). In accordance with OAR 690-315-0040(3), the Department shall consider, but is not limited to, the following factors when determining whether the applicant has demonstrated reasonable diligence in previous performance under the permit:*

Amount of Construction [OAR 690-315-0040(3)(a)]

16. The permit holder states work was accomplished within the time allowed in the permit or previous extension as follows:
  - a. Construction of the water system began prior to the September 14, 1978 deadline specified in the permit.
  - b. Work was completed during the original development time frame under Permit

S-41645.

- c. During the most recent extension period, being from October 1, 2005, to October 1, 2010, the following was accomplished:
  - 1,200 acres were developed;
  - A booster station was built; and
  - Additional piping was installed.
- d. Since October 1, 2010, the permit holder has accomplished the following construction required under S-41645:
  - 250 acres outside the Radar Range and 2,247 acres inside the Radar Range were developed;
  - A booster station was built;
  - Fish screen engineering and design began;
  - Cultural study completed and under review at USACE; and
  - At the booster station, a VFD was installed.

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

17. According to the water user a maximum rate of 133.0 cfs of water has been diverted for irrigation of 5,334 acres (3,087 acres outside of the Radar Range and 2,247 acres inside the Radar Range).
18. According to the permit holder delay of full beneficial use of water under Permit S-41645 was due, in part, to this permit being part of a large and complex project and was further complicated due to litigation and an administrative contested case hearing process and settlement associated not only with Permit S-41645 but with 8 other permits. Additionally, changes in ownership and business restructuring further complicated development of this permit. Finally, until recently, the Permittee was denied access by Boeing Company to a large portion of the proposed place of use (Radar Range).

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

19. The water right permit holder's conformance with the permit or previous extension conditions.
  - a. The Department has considered the permit holder's compliance with conditions, including mitigation requirements, and did not identify any concerns. The record does show the permit holder has installed continuous telemetric measurement and recording devices, and submitted the annual water use records.

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

20. As of September 3, 2015, the permit holder states they have invested approximately \$32,074,000, which is about 55 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$25,255,000 investment is needed for the completion of this project.

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

21. The Department has found good faith of the appropriator under Permit S-41645.

The Market and Present Demands for Water [OAR 690-315-0040(2)(d-e)]

*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:*

22. The amount of water available to satisfy other affected water rights and scenic waterway flows; 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); or the habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife [OAR 690-315-0040(4)(a-c)].
  - a. 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-41645; 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. The point of diversion is located on the Columbia River, and is not located within a Withdrawn Area. The Columbia River is not located within or above a state or federal scenic waterway, however, it is located within an area 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. The Columbia River is listed by the Department of Environmental Quality as a water quality limited stream.
23. Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].
  - a. None have been identified.

24. Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].
  - a. None have been identified.
25. 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 1 of the "Conditions" section of this PFO to meet this condition.

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

26. 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)]

27. Delay in the development of this project was caused in part by governmental requirements stipulated in a settlement agreement that resolved issues in a Contested Case.

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

28. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit S-41645, in that the permit holders were faced with litigation, contested hearings, inability to access a large portion of the land authorized for irrigation under Permit S-41645 that have significantly delayed completion of full beneficial use of this permit.

## **CONCLUSIONS OF LAW**

1. The applicant 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 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).
3. The applicant complied with begin actual construction timeline requirements pursuant to ORS 537.230 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. Completion of construction and full application of water to beneficial use can be accomplished by October 1, 2025<sup>5</sup>, as required by OAR 690-315-0040(1)(c).

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<sup>5</sup>For 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 Water Resources Department, for issuance of a water right certificate; or (2) Continue to appropriate water under the water right permit until the Water Resources Department conducts a survey and issues a water right certificate under ORS 537.250 or 537.625.



5. 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).
6. As required by OAR 690-315-0050(6) and as described in Finding 25, above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit S-41645.

**Continued on the following page**

## 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-41645 from October 1, 2010 for outside the Radar Range Area and October 31, 2015 for inside the Radar Range Area to October 1, 2025.

Extend the time to apply water to beneficial use under Permit S-41645 from October 1, 2010 for outside the Radar Range Area and October 31, 2015 for inside the Radar Range Area to October 1, 2025.

Subject to the following conditions:

### CONDITIONS

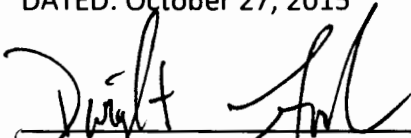
1. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2019 and 2024. 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: October 27, 2015

  
Dwight W. 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(1) and 690-315-0060, the applicant or any other person adversely affected or aggrieved by the proposed final order may submit a written protest to the proposed final order. The written protest must be received by the Water Resources Department no later than **December 11, 2015**, 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 SERVICE MEMBERS:** Active Duty service members have a right to stay these proceedings under federal Service members Civil Relief Act. For more information, contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.of.mil>



Mailing List for Extension PFO Copies

PFO Date: October 27, 2015

Copies Mailed

Application: S-55439

By: \_\_\_\_\_

Permit: S-41645

On: \_\_\_\_\_

Original mailed to Applicant:

Threemile Canyon Farms, LLC.;  
Cooperative Central Raiffeisen-Boerenleenbank, BA;  
Rabobank Nederland  
75906 Threemile Road  
Boardman, OR 97818

Copies sent to:

1. WRD - App. File S-55439/ Permit S-41645
2. GSI Water Solutions  
Attention: Molly Reid  
8019 W Quinault Ave, Suite 201  
Kennewick, WA 99336
3. Other permit holders of record besides applicant

Fee paid as specified under ORS 536.050 to receive copy:

4. None

Receiving via e-mail (10 AM Tuesday of signature date)

(DONE BY EXTENSION SPECIALIST)

5. WRD - Watermaster District 5, Greg Silbernagel

CASEWORKER: MAB