

**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-13570 (modified by Permit Amendment T-9950),	)	
Water Right Application G-14605, in the name of Rogers	)	PROPOSED
Associates Oregon: George Rogers; Brian Rissberger; Mary	)	FINAL ORDER
Spada Living Trust; A and R Spada Farms, Inc.; Northwest Farm	)	
Credit Services, FLCA; George C. Wilder and Lucette A. Wilder;	)	
and Nursery Holdings LLC	)	

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Permit Information

Application:	G-14605
Permit:	G-13570 (modified by Permit Amendment T-9950)
Basin:	2 – Middle Willamette / Watermaster District 16
Date of Priority:	September 11, 1997
Source of Water:	Seven wells in Ryan Creek Basin
Purpose of Use:	Nursery operations on 163.8 acres
Maximum Rate:	4.12 cubic feet per second (cfs), being a cumulative total not to exceed 4.12 cfs from Wells 1, 2, 3, 4, 5, 6, and 7 during the time period September 1 to June 30 of each year, and a cumulative total not to exceed 1.34 cfs from Wells 4, 5, 6, and 7 during the time period July 1 to August 31 of each year

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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, 2003 to October 1, 2026<sup>1</sup>.
- Make the extension subject to certain conditions set forth below.

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<sup>1</sup>Pursuant to ORS 537.630(4), 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.

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.

### **ACRONYM QUICK REFERENCE**

Department – Oregon Department of Water Resources

PFO – Proposed Final Order

cfs – cubic feet per second

gpm – gallons per minute

### **AUTHORITY**

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

**ORS 537.630(1)** provides in pertinent part that the Oregon Water Resources Department may, for good cause shown, order an extension of time within which: irrigation or other works shall be completed; the well or other means of developing and securing ground water 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; 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(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

### *Background*

1. Permit G-13570 was issued by the Department on January 12, 1999. The permit authorizes the use of up to 4.12 cfs of water, being 1.11 cfs from Well 1, 1.34 cfs from Well 2, and 0.33 cfs from Well 3 from September 1 through June 30, and 1.34 cfs from Well 4 year round in Ryan Creek Basin for nursery operations on 163.8 acres. The permit specified actual construction of the well was to begin by November 4, 1999, and complete application of water was to be made on or before October 1, 2003.
2. On February 24, 2005, an assignment of a portion of the right from Rogers Associates to Brian Rissberger was recorded in the records of the Water Resources Department.
3. On February 24, 2005, an assignment of a portion of the right from Rogers Associates to Mary Spada Living Trust was recorded in the records of the Water Resources Department.
4. On February 4, 2007, a partial assignment by deed from Mary Spada Living Trust to A&R Spada Farms, LLC and Northwest Farm Credit Services, FLCA was recorded in the records of the Water Resources Department.
5. On May 8, 2007, the Department approved Permit Amendment T-9950 (Special Order Volume 71, Page 795) authorizing a change in the point of appropriation of Well 4 and adding additional points of appropriation, being Well 5, Well 6, and Well 7 under Permit G-13570. Here forward, the permit will be referred to simply as Permit G-13570.
6. One prior permit extension has been granted for Permit G-13570. The most recent extension request resulted in the completion date for full application of water being extended from October 1, 2003 to October 1, 2010.
7. On December 21, 2010, permit holder A&R Spada Farms, LLC submitted a Claim of Beneficial Use (COBU) for Well 1 (MARI 869), Well 4 (MARI 60041), and Well 5 (MARI 58231) to the Department for review.
8. On April 16, 2012, permit holder Brian Rissberger submitted a COBU for Well 6 (MARI 59835) to the Department for review.
9. On September 28, 2015, the Department returned the Application to Split a Permit and Request for Issuance of Replacement Permits, pursuant to ORS 537.225 and OAR 690-325-0020(3), to permit holders A&R Spada Farms, LLC, and Brian Rissberger, as the complete application of water date for the permit had expired October 1, 2010.

10. On October 23, 2015, a partial assignment from George Rogers and Rogers Associates Oregon to Nursery Holdings, LLC was recorded in the records of the Water Resources Department.
11. The applicant, George Rogers, owner of Rogers Associates Oregon, submitted an "Application for Extension of Time" to the Department on February 8, 2016, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-13570 be extended from October 1, 2010 to October 1, 2026.
12. Notification of the Application for Extension of Time for Permit G-13570 was published in the Department's Public Notice dated March 29, 2016. 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>, 537.630<sup>4</sup> and/or 539.010(5)<sup>5</sup>.*

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

13. On February 8, 2016, the Department received a completed Application for Extension of Time and the fee specified in ORS 536.050 from the applicant.

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

14. Actual construction of the well began prior to the November 4, 1999 deadline specified in the permit. According to the applicant, Well 1 was constructed May 14, 1949.

According to the well log received by the Department on February 8, 2016, Well 1 (MARI 869) was constructed May 14, 1949. The Department has determined that the prosecution of the construction of the well began prior to November 4, 1999.

**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.*

15. As of February 8, 2016, the applicant states the remaining work to be completed consists of constructing Well 7; installing a pump and electrical on Well 7; connecting Well 7 to the irrigation system; meeting all permit conditions, including installing a

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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 537.630 applies to ground water permits only.

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

meter on Wells 2, 3, and 7, submitting annual water use reports for Wells 2, 3, and 7, and March static water level measurements for Well 7; and applying water to full beneficial use.

Given the amount of development left to occur, the Department has determined that the applicant's request to have until October 1, 2026, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-13570 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 application states, work was accomplished within the time allowed in the permit or previous extension as follows:
  - a. Actual construction of the well began prior to the November 4, 1999 deadline specified in the permit. Well 1 (MARI 869) was constructed May 14, 1949 and had a dedicated electrical meter installed. Well 3 (MARI 630) began construction June 17, 1974 and was completed July 1, 1974, along with the installation of a pump, motor, and electric power connection. Well 2 (MARI 614) began construction May 15, 1975 and was completed August 12, 1975, along with the installation of a pump, motor, and electric power connection. Well 3 (MARI 630) was deepened, beginning October 1, 1975 and was completed October 23, 1975. Well 3 (MARI 630) was re-identified, and here forward will be referred to simply as Well 3 (MARI 613).
  - b. Work was completed during the original development time frame under Permit G-13570. The water delivery system including mainlines, laterals, and sprinklers were installed.
  - c. During the most recent extension period, being from October 1, 2003, to October 1, 2010, the following was accomplished:
    - Construction of Well 5 (MARI 58231) began March 4, 2004 and was completed July 6, 2004, along with the installation of a pump, motor, and electric connection;

- An irrigation traveler system was installed on Well 6 (MARI 59835);
- Construction of Well 4 (MARI 60041) began May 25, 2006 and was completed October 13, 2006;
- Construction of Well 6 (MARI 59835) began June 27, 2006 and was completed July 21, 2006, along with the installation of a pump, motor, and electric connection;
- Mainline, laterals, and sprinklers were installed on Well 1 (MARI 869), Well 4 (MARI 60041), and Well 5 (MARI 58231); and
- Installation of buried mainline and a meter on Well 6 (MARI 59835).

The Department has determined that work has been accomplished prior to permit issuance and within the time allowed in the permit, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

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

17. In addition to the 4.12 cfs of water authorized under Permit G-13570, 0.2963 cfs of water from Well 1 (MARI 869) is being appropriated for irrigation of 97.0 acres under GR-626; 0.76 cfs of water from Well 2 (MARI 614) is being appropriated for irrigation of 61.0 acres under Certificate 56530; and 1.63 cfs of water from Well 5 (MARI 58231) is being appropriated for nursery use on lands not associated with Permit G-13570 under Certificate 87131.

18. The application states a maximum cumulative total rate of 5.93 cfs of water has been appropriated from the wells during the time period September 1 to June 30, being 1.11 cfs from Well 1 (MARI 869) on 108.0 acres, 1.2 cfs from Well 2 (MARI 614) on 32.0 acres, 0.09 cfs from Well 3 (MARI 613), 1.34 cfs from Well 4 (MARI 60041) on 108.0 acres, 1.63 cfs from Well 5 (MARI 58231) on 108.0 acres, and 0.49 cfs from Well 6 (MARI 59835) on 19.6 acres for irrigation of a cumulative total of 159.6 acres. This exceeds the amount of water authorized under this permit. The authorized maximum cumulative total amount of water is not to exceed 4.12 cfs from September 1 to June 30 of each year.

The application states a maximum cumulative total rate of 3.46 cfs of water has been appropriated from the wells during the time period July 1 to August 31, being 1.34 cfs from Well 4 (MARI 60041) on 108.0 acres, 1.63 cfs from Well 5 (MARI 58231) on 108.0 acres, and 0.49 cfs from Well 6 (MARI 59835). This exceeds the amount of water authorized under this permit. The authorized maximum cumulative total amount of water is not to exceed 1.34 cfs from July 1 to August 31 of each year.

19. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2003.

20. According to the application, delay of full beneficial use of water under Permit G-13570 was due, in part, to the applicant subdividing the authorized 163.8 acres into multiple tax lots, and sold the tax lots which have been assigned to new landowners. The original permit holder, Rogers Associates Oregon/George Rogers, retains ownership of two contiguous tax lots, and would like to construct and make beneficial use of Well 7 on his remaining tax lots. Rogers Associates Oregon/George Rogers was significantly impacted financially by the recession in 2008, and has not been able to finance construction of Well 7 as had been planned. The applicant needs more time in which to complete construction of Well 7 to complete full beneficial use of the water on the applicant's tax lots.

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

21. The Department has considered the applicant's compliance with conditions, and has identified the following concerns: (1) the record does not show that a meter or other suitable measuring device has been installed on Well 2 (MARI 614), Well 3 (MARI 630), and Well 7, (2) the required March static water level measurements have not been received by the Department for Well 7, and (3) annual reports of the amount of water used each month have not been received by the Department for Well 3 (MARI 630) and Well 7.

The application states Well 1 (MARI 869) had a dedicated electrical meter installed in 1949, Well 4 (MARI 60041) meter was installed May 2006, Well 5 (MARI 58231) meter was installed July 2004, and Well 6 (MARI 59835) meter was installed December 2006.

Department records show the required annual water use reports have been submitted for the following wells:

- Well 1 (MARI 869) for years 2003, 2011-2015;
- Well 2 (MARI 614) for years 2002 and 2003;
- Well 4 (MARI 60041) for years 2008-2015;
- Well 5 (MARI 58231) for years 2005-2015; and
- Well 6 (MARI 59835) for years 2007-2015.

Department records show the required March static water level measurements have been submitted for the following wells:

- Well 1 (MARI 869) initial March measurement submitted March 4, 2003;
- Well 2 (MARI 614) initial March measurement submitted March 13, 2002;
- Well 3 (MARI 630) initial March measurement submitted March 15, 2002;
- Well 4 (MARI 60041) initial March measurement submitted March 9, 2007;
- Well 5 (MARI 58231) initial March measurement submitted March 8, 2005; and
- Well 6 (MARI 59835) initial March measurement submitted March 20, 2008.

The Department has determined that this extension will allow the meters to be installed, and the annual water use reports and March static water level measurements to be submitted after October 1, 2010, to satisfy compliance of the conditions of “the permittee shall install a meter or other suitable measuring device as approved by the Director,” “shall keep a complete record of the amount of water used each month and shall submit a report which includes the recorded water use measurements to the Department annually,” “The water user shall install a meter or other measuring device suitable to the Director, and shall submit an annual report of water used to the Department by December 1 of each year,” and “a water level measurement shall be made each year during the period March 1 through March 31,” in an effort to make proof of beneficial use of the water as required by Permit G-13570.

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 applicant must demonstrate that all conditions of the permit have been satisfied.

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

22. The application states the applicant has invested about \$395,365, which is approximately 81 percent of the total projected cost for complete development of this project. The applicant anticipates an additional \$90,000 investment is needed for the completion of this project.

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

23. The Department has found good faith of the appropriator under Permit G-13570.

***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:*

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)].

24. 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-13570; 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 points of appropriation for Permit G-13570, located within the Ryan Creek Basin, are not located within a limited or critical ground water area. Ryan Creek is not located within or above any 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 points of appropriation are not in an area listed by the Department of Environmental Quality as a water quality limited stream.

***Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].***

25. None have been identified.

***Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].***

26. None have been identified.

27. 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, and/or mitigate the effects of the subsequent development on competing demands on the resource. 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, was determined to be necessary due to no additional work having been accomplished since December 2006.

28. 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 "Conditions" section of this PFO to meet this condition.

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

29. 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)]***

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

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

31. None have been identified.

## **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 537.630(1).
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 537.630 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. Based on Finding of Facts 14 through 22, full application of water to beneficial use can be accomplished by October 1, 2026, as required by OAR 690-315-0040(1)(c).
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 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 27 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 2), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit G-13570.
7. As authorized in OAR 690-315-0050(5) and as described in Finding 26 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), a "Last Extension Condition" in order to ensure future diligence is exercised in the development and perfection of Permit G-13570.

**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 apply water to beneficial use under Permit G-13570 from October 1, 2010 to October 1, 2026.

Subject to the following conditions:

### CONDITIONS

**1. Last Extension Condition**

This is to be the last extension of time granted for Permit G-13570. Any future extensions of time requests will be denied.

**2. Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2020 and 2025. 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: May 31, 2016

  
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 July 15, 2016, 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 Regarding Service Members:** Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>

