

**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-54816, Water Right Application S-87774)	FINAL
in the name of Boyer Farms II, LLC)	ORDER

Permit Information

Application:	S-87774
Permit:	S-54816
Basin:	Upper Willamette / Watermaster District 2
Date of Priority:	December 23, 2011
Source of Water:	Fern Ridge Reservoir, constructed under Permit R-1625, tributary to Long Tom River
Purpose or Use:	Irrigation of 275.8 Acres
Maximum Rate/Volume:	689.5 Acre Feet (AF)

Please read this Proposed Final Order in its entirety.

In summary, the Department proposes to:

- Grant an extension of time to complete construction of the water system from June 14, 2018, to October 1, 2022.
- Grant an extension of time to apply water to full beneficial use from June 14, 2018, to October 1, 2022.¹

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
AF - Acre Feet

AUTHORITY

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

ORS 537.230(2) provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, order an extension of time within which irrigation or other works shall be completed or the right perfected. In determining the extension, the Department shall give due weight to the considerations described under ORS 539.010(5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right.

ORS 539.010(5) instructs the Director to consider: the cost of the appropriation and application of the water to a beneficial purpose; the good faith of the appropriator; the market for water or power to be supplied; the present demands therefor; and the income or use that may be required to provide fair and reasonable returns upon the investment.

OAR 690-315-0040 provides that in order to approve an application for an extension of time to complete construction or apply water to full beneficial use, the Department shall make the findings in OAR 690-315-0040(1) including a finding that there is “good cause” to approve the extension. OAR 690-315-0040(2)-(4) contains the factors that the Department must consider to make findings that support a “good cause” determination.

FINDINGS OF FACT

1. On June 14, 2013, Permit S-54816 was issued by the Department. The permit authorizes the use of up to 689.5 AF of water from Fern Ridge Reservoir, constructed under Permit R-1625, tributary to Long Tom River, for irrigation of 275.8 acres. The permit specified construction of the water system was to be completed by June 14, 2018, and complete application of water was to be made on or before June 14, 2018.
2. On May 17, 2018, Boyer Farms II, LLC, submitted an “Application for Extension of Time” (Application) to the Department, requesting the time to complete construction of the water system be extended from, June 14, 2018, to October 1, 2022, and the time to apply water to full beneficial use under the terms and conditions of Permit S-54816 be extended from June 14, to October 1, 2022. This is the first permit extension requested for Permit S-54816.

3. On May 22, 2018, notification of the Application for Permit S-54816 was published in the Department's Public Notice. No public comments were received.

Review Criteria [OAR 690-315-0040]

In order to approve an Application for an Extension of Time to complete construction and/or apply water to full beneficial use pursuant to ORS 537.230 or 537.630, or to begin construction, pursuant to ORS 537.248, the Department must make the findings in OAR 690-315-0040(1)(a) – (d).

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

4. On May 17, 2018, the Department received a completed Application and the fee specified in ORS 536.050 from the permit holder.

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

5. Construction of the water system began prior to June 14, 2018, as specified in the permit as being the date to apply water to full beneficial use. The permit holder states, construction began May 1, 2014, with the construction of the point of diversion, including the pump, and pump platform.

Based on Findings of Fact (FOF) 5, the Department has determined the permit holder began construction prior to June 14, 2018.

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.

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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

6. During the original development time frame under Permit S-54816, work accomplished includes:
- installation of a 50-hp diesel pump and pump platform;
 - installation of 1,500 feet of underground mainline pipe; and
 - began installation of electrical service to the pump site

Based on FOF 5 and 6, the Department has determined that work has been accomplished 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.

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

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

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

Based on FOF 7, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit S-54816.

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.

8. A maximum volume of 534.0 AF of water has been diverted from Fern Ridge Reservoir, tributary to Long Tom River for irrigation of 255.5 acres.

Based on FOF 8, the Department has determined that beneficial use of water has been demonstrated under Permit S-54816.

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

9. The permit holder has invested approximately \$77,000, which is about 21 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$296,000 investment is needed for the completion of this project.

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.

Based on FOF 9, 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-54816.

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.

10. 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-54816; 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.
11. Current Water Availability Analysis has determined that 689.5 of water is available from Fern Ridge Reservoir, under Water Service Contract 139E101808 with United States Department of Interior.

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).

12. The point of diversion is located on Long Tom River, and is not located within a Withdrawn Area.
13. Fern Ridge Reservoir, constructed under Permit R-1625, tributary to Long Tom River is not located within or above a state or federal scenic waterway.
14. The point of diversion is in a location listed by the Department of Environmental Quality as a water quality limited stream.
 - a. Long Tom River, River Mile 0.0 through 24.2 listed under Water Quality Limited for biological criteria, temperature, and dissolved oxygen; and.
 - b. Long Tom River, River Mile 0.0 through 57.3 listed under Water Quality Limited for iron.

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.

15. Long Tom River is located within an area ranked “moderate” 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.

16. An approximate total of \$77,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

17. The permit holder anticipates that upon reassessment of the land, the land will increase in value, and the property taxes will increase accordingly. This would provide additional income to the county.

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

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

18. No other factors relevant to the determination of the market and present demand for water and power have been identified.

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

19. The irrigation authorized under the permit will allow for farming practices on the property, which in turn provides options for risk management and crop rotation. It is anticipated that with these options available, a fair return on investment is likely.

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

20. No delay in the completion of this project caused by other governmental requirements has been identified.

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

21. No unforeseen events were identified that extended the length of time needed to fully develop and perfect Permit S-54816.

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

22. A denial of the extension would result in undue hardship, and there are no other reasonable alternatives exist for meeting water use needs. There are no municipal providers in the area that could supply water to the farm, and the use of water from storage is the only available option for continued irrigation.

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

23. The Application provides evidence of good faith of the appropriator under Permit S-54816.

Based on FOF 5, through 9, and 16, 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.

24. As of May 17, 2018, the permit holder states the remaining work to be completed consists of completing construction of the water system which includes installation of two electric pumps, 10-inch mainline and two linear irrigation systems; 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, 2022, 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-54816 is both reasonable and necessary.

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

The Department must find that there is "good cause" to approve the extension. In making a "good cause" finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).

The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and fair and reasonable return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the permit holder had no control, whether denial of the extension will result in undue hardship to the applicant and whether there are no other reasonable alternatives for meeting water use needs, any other factors relevant to a determination of good cause, and has determined that the applicant has shown that good cause exists for an extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

CONCLUSIONS OF LAW

1. The Applicant has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
2. The Applicant complied with construction timeline requirements to begin 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 6 through 23, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2022³, as required by OAR 690-315-0040(1)(c).

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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.

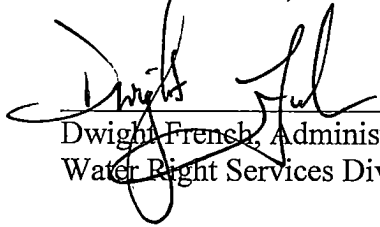
PROPOSED ORDER

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-54816 from June 14, 2018, to October 1, 2022.

Extend the time to apply water to beneficial use under Permit S-54816 from June 14, 2018, to October 1, 2022.

DATED: June 26, 2018


Dwight French, Administrator
Water Right Services Division

*If you have any questions,
please check the information
box on the last page for the
appropriate names and
phone numbers.*

Proposed Final Order Hearing Rights

1. Under the provisions of OAR 690-315-0100 and 690-315-0060, the applicant or any other person adversely affected or aggrieved by the proposed final order may submit a written protest to the proposed final order. The written protest must be received by the Water Resources Department no later than **August 10, 2018**, 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.

