

**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-54576, Water Right Application S-87220) FINAL
in the name of Greenberry Irrigation District) ORDER

Permit Information

Application:	S-87220
Permit:	S-54576
Basin:	Upper Willamette / Watermaster District 16
Date of Priority:	July 9, 2008
Source of Water:	Winkle Lake, approved under Permit R-13201 and Whitaker Lake, approved under Permit R-13202
Purpose or Use:	irrigation of 1,254.0 acres within the 12,348.0 acres designated
Maximum Rate/Volume:	313.5 acre-feet (AF), being 199.5 AF from Winkle Lake, and 114.0 AF from Whitaker Lake

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 April 4, 2019, to October 1, 2034.
- Grant an extension of time to apply water to full beneficial use from April 4, 2019, to October 1, 2034.¹
- Make the extension subject to certain conditions set forth below.

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

¹ Pursuant to ORS 537.230(5), upon the completion of beneficial use of water allowed under the permit, the permit holder shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permit holder shall submit a map of the survey and the claim of beneficial use.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Water Resources Department
ODFW – Oregon Department of Fish and Wildlife
PFO – Proposed Final Order
FOF – Finding of Fact
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.

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 April 4, 2014, Permit S-54576 was issued by the Department. The permit authorizes the use of up to 313.5 AF of water, being 199.5 AF from Winkle Lake, approved under Permit R-13201 and 114.0 AF from Whitaker Lake, approved under Permit R-13202, for irrigation of 1,254.0 acres within the 12,348.0 acres designated. The permit specified completion of construction, and complete application of water was to be made within five years of permit issuance, being April 4, 2019.

2. On January 8, 2019, Dan O'Brien, manager of Greenberry Irrigation District, submitted an "Application for Extension of Time" (Application) to the Department, requesting the time to complete construction of the water system be extended from, April 4, 2019, to October 1, 2034, and the time to apply water to full beneficial use under the terms and conditions of Permit S-54576 be extended from April 4, 2019, to October 1, 2034. This is the first permit extension requested for Permit S-54576.
3. On January 15, 2019, notification of the Application for Permit S-54576 was published in the Department's Public Notice. No public comments were received.
4. On May 16, 2019, Dan O'Brien submitted additional information to clarify the Application. The additional information included the maximum acres irrigated, and the maximum volume of water diverted under the permit.

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 January 8, 2019, 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 the water system began prior to permit issuance. The permit holder states, construction began in January 2009.
7. According to the application Phase 1 construction began in 2008.

Based on Findings of Fact (FOF) 6 and 7, the Department has determined the permit holder began construction prior to April 4, 2019.

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

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

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

In order to make a finding of "good cause" to approve the extension, the Department shall consider whether the applicant has demonstrated "reasonable diligence" in previous performance under the permit. OAR 690-315-0040(2)(a). In determining "reasonable diligence", the Department shall consider, but is not limited to, the following factors: a) The amount of construction completed within the time allowed in the permit or previous extension; b)

The amount of beneficial use made of the water during the permit or previous extension time limits; c) Water right holder conformance with the permit or previous extension conditions; and d) Financial investments made toward developing the beneficial use of water.

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

The amount of construction completed within the time allowed in the permit or previous extension.²

8. Construction of the water system began prior to April 19, 2017.
9. During the original development time frame under Permit S-54752, work accomplished includes:
 - turn-outs installed by the district for members to utilize on their individual farms; and
 - individual activities by district members on their farms to utilize the water delivered by the district.

Based on FOF 8, and 9, 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.

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

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

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

Based on FOF 10, the Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit S-54576.

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.

11. A maximum combined volume of 215 AF of water has been diverted from Winkle Lake, approved under Permit R-13201 and Whitaker Lake, approved under Permit R-13202 for irrigation of 430.0 acres.

Based on FOF 11, the Department has determined that beneficial use of water has been demonstrated under Permit S-54576.

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.

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

12. An approximate total of \$2,500,000 has been invested. The costs included items associated with environmental assessments, and engineering work; which are not “actual construction” under this permit and therefore are not counted towards development. After deducting these costs, the approximate total investment for “actual construction” to date is approximately \$2,000,000 which is about 11 percent of the total projected cost for complete development of this project. An additional \$15,500,000 investment is needed to complete this project, which includes developing the remaining acres for irrigation, installing new pivots in areas not previously irrigated, and a possible permit amendment.

Based on FOF 12, 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-54576.

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.

13. 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-54576; 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).

14. The points of diversion are located on Winkle Lake, and Whitaker Lake, and are not located within a Withdrawn Area.
15. Winkle Lake and Whitaker Lake, are not located within or above a state or federal scenic waterway.
16. The points of diversion are not in a location 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.

17. Winkle Lake, and Whitaker Lake, are 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 are 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.

18. An approximate total of \$2,000,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

19. Other economic interests dependent on the completion of the project have been identified. There are about 50 members of the district who will be affected, along with the local economy. Many acres have been dedicated to permanent crops since district formation, and these are dependent on irrigation.

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

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

20. 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 "Limitations and Conditions" section of this PFO to meet this condition.

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

21. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date. With the ability to irrigate also comes the ability to grow many higher value crops that often require irrigation. Further, the ability to irrigate raises land values appreciably and brings more money into support industries and the local economy in general.

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

22. Delay in the development of this project that was caused by other governmental requirements have not been identified.

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

23. Unforeseen events that extended the length of time needed to fully develop and perfect Permit S-54869, have not been identified

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

24. A denial of the extension would result in undue hardship, and there are no other reasonable alternatives exist for meeting water use needs. Denial of an extension will be extremely costly to the district and its members in terms of finance and opportunity lost. It has taken time to set up the district and bring security to members such that they can invest. Some have been able to respond quickly, others require time to gain ability to invest in irrigation equipment. The district is a small part of the investment, but it also requires more time to complete infrastructure investment and gain knowledge in how to proceed. The district was formed to make beneficial use of water stored behind Willamette Project dams when additional ground and surface water was unavailable. Each of the district's permits make up a portfolio of water sources that compliment and make secure a supply of water to the district's members.

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

25. The Application provides evidence of good faith of the appropriator under Permit S-54576.

Based on FOF 6, through 12, and 18, 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.

26. As of January 8, 2019, the permit holder states the remaining work to be completed consists of completing construction of the water system 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, 2034, 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-54576 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).

LIMITATIONS AND CONDITIONS

1. 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 1 of the "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 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 25, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2034³, 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 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 and apply water to beneficial use. OAR 690-315-0050(5).
5. The Applicant has demonstrated good cause for the extension, but the extension must be conditioned to ensure this is the last extension granted in order to ensure future diligence; OAR 690-315-0050(5).
6. For extensions exceeding five years, the Department shall establish progress checkpoints to determine if diligence is being exercised in the development and perfection of the water use permit. Intervals between progress check points will not exceed five year periods, as required by OAR 690-315-0050(6).

continued on following page

³Pursuant to ORS 537.230(5), upon the completion of beneficial use of water allowed under the permit, the permittee shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permittee shall submit a map of the survey and a new or revised claim of beneficial use as deemed appropriate by the Department.

PROPOSED ORDER

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

Extend the time to complete construction of the water system under Permit S-54576 from April 4, 2019, to October 1, 2034.

Extend the time to apply water to beneficial use under Permit S-54576 from April 4, 2019, to October 1, 2034.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2023, 2028, and 2033. 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: June 4, 2019


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 **July 20, 2019**, 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>

Mailing List for Extension PFO Copies

PFO Date: June 4, 2019

Copies Mailed

Application: S-87220

By: _____

Permit: S-54576

On: _____

Original mailed to Applicant:

Greenberry Irrigation District
30742 Venel Place
Corvallis, OR 97333

Copies sent to:

1. WRD - App. File S-87220/ Permit S-54576
2. Agents or CWRE's representing the Permit Holder
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 16, Joel Plahn

CASEWORKER: JDP