

**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-54642, Water Right Application S-87463 ) FINAL  
in the name of Silvies Valley Ranch, LLC ) ORDER

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**Permit Information**

Application:	S-87463
Permit:	S-54642
Basin:	Malheur Lake / Watermaster District 10
Date of Priority:	May 29, 2009
Source of Water:	Lake Pon's Lake, also known as Bridge Creek-Cottonwood Creek Reservoir (constructed under Permit R-4806)
Purpose or Use:	supplemental irrigation of 308.5 acres
Maximum Volume:	785.0 acre-feet (AF)

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***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 May 31, 2015, to October 1, 2021.
- Grant an extension of time to apply water to full beneficial use from May 31, 2015, to October 1, 2021.<sup>1</sup>

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

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<sup>1</sup> 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

Reservoir – Lake Pon's Lake, also known as Bridge Creek-Cottonwood Creek Reservoir (constructed under Permit R-4806)

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 March 31, 2010, Permit S-54642 was issued by the Department. The permit authorizes the use of up to 785.0 AF of stored water from Lake Pon's Lake, also known as Bridge Creek-Cottonwood Creek Reservoir (constructed under Permit R-4806) (Reservoir), for supplemental irrigation of 308.5 acres. The permit specified completion of construction and application of water was to be made within five years of the date of permit issuance, being May 31, 2015.
2. On June 24, 2019, Scott Campbell, president of Silvies Valley Ranch, 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, May 31, 2015, to October 1, 2021, and the time to apply water to full beneficial use under the terms and conditions of Permit S-54642 be extended from May 31, 2015, to October 1, 2021. This is the first permit extension requested for Permit S-54642.

3. On July 2, 2019, notification of the Application for Permit S-54642 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 June 24, 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)]**

5. Construction of the reservoir, which is the source of the water authorized under Permit S-54642, began prior to permit issuance.
6. According to the Final Proof Survey prepared by the Department on November 6, 2000, for Permit R-4806, the Reservoir was present on September 28, 1999.

Based on Findings of Fact (FOF) 5 and 6, the Department has determined the permit holder began construction prior to May 31, 2015.

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

7. Construction of the water system or reservoir began prior to May 31, 2015.
8. During the original development time frame under Permit S-54642, a fish screen was installed on a temporary pump.

The Application provides evidence that progress of physical work, enough to qualify as the minimum necessary, has been made towards completion of the water system for the Department to find good cause and reasonable diligence towards complete application of water to a beneficial use.

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

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

9. The Department has considered the permit holder's compliance with conditions, and has identified the following concern; the record does not show that a totalizing flow meter has been installed. The Department recognizes that it is the intent of the permit holder to comply with all permit conditions at the time the conditions become applicable.

Based on FOF 9, the Department has determined that the permit holder has not demonstrated compliance with following (or any of the) permit conditions as required by Permit S-54642:

- "Before water use may begin under the permit, the permittee shall install a totalizing flow meter at each point of diversion".

In order to legally perfect the use of water under this permit, the permit holder must demonstrate that all conditions of the permit have been satisfied.

**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.*

10. No water has been diverted from the Reservoir.
11. A delay of full beneficial use of water under Permit S-54642 was due to water being available for irrigation under the permit holder's primary irrigation right. The permit holder believed that since Permit S-54642 was for supplemental irrigation, the necessary pump, meter and fish screen would need to be available on site to demonstrate that the permit holder is "ready, willing, and able" to exercise the right when necessary.

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<sup>2</sup> "Actual Construction" is defined in OAR 690-315-0020(3)(d)(A) and (B) as physical work performed toward completion of the water system which demonstrates the water right permit holder's good faith and intention to complete the project with reasonable diligence. Actual construction does not include planning a diversion system, formulating a business plan, securing financing, letting contracts, purchasing but not installing equipment, surveying, clearing land or planting crops.

Based on FOF 9 and 10, the Department has determined that beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by May 31, 2015.

**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 \$4,476 has been invested. The costs included items associated with renting a pump to test the delivery system to be utilized under the permit, which is 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 \$1,776 which is about 6 percent of the total projected cost for complete development of this project. An additional \$27,800 investment is needed to complete this project, which includes installation of a pump, pipe, valves, and meter.

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 of progress towards completion of the water system; a financial investment has been made; the permit holder has not demonstrated compliance with all permit conditions, and; beneficial use has not been demonstrated. The Department has determined the applicant has demonstrated the minimum necessary for the Department to find reasonable diligence towards complete application of water to a beneficial use.

**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-54642; 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.
14. Current Water Availability Analysis has determined that 785.0 AF of water is available from Lake Pon's Lake, also known as Bridge Creek-Cottonwood Creek Reservoir (constructed under Permit R-4806).

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

Special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d).

15. The point of diversion is located on Lake Pon's Lake, and is not located within a Withdrawn Area.
16. Lake Pon's Lake is not located within or above a state or federal scenic waterway.
17. The point of diversion is 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.

18. Lake Pon's Lake, is located within an area ranked "highest" for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife.

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

Economic interests dependent on completion of the project.

19. An approximate total of \$1,776 has been invested in the project.

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

Other economic interests dependent on completion of the project.

20. Other economic interests dependent on the completion of the project have not been identified.

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

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

21. 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)]**

22. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date.

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

23. Delay in the development of this project that was not caused by other governmental requirements.

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

24. The permit holder believed that testing the delivery system was sufficient to demonstrate to the Department that the standard of “ready, willing, and able”, to make proof of beneficial use under a permit for supplemental irrigation.

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

25. 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 the extension for Permit S-54642 would result in inability to perfect the permit. Loss of Permit S-54642, may also result in the loss of Permit R-4806, since there would no longer be a beneficial use for the stored water.

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

26. The Application provides evidence of good faith of the appropriator under Permit S-54642.

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.*

27. As of June 24, 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, 2021, 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-54642 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 actual 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 5 through 26, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2021<sup>3</sup>, as required by OAR 690-315-0040(1)(c).

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<sup>3</sup>Pursuant 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.



4. The Applicant can complete the project within the time period requested for the extension on the project.
5. The Applicant has demonstrated good cause for the extension.

### **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-54642 from May 31, 2015, to October 1, 2021.

Extend the time to apply water to beneficial use under Permit S-54642 from May 31, 2015, to October 1, 2021.

DATED: August 6, 2019

  
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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 **September 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;

