

**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 G-18414, Water Right Application G-14827, in)	FINAL
the name of Threemile Canyon Farms)	ORDER

Permit Information

Application:	G-14827
Permit:	G-18414
Basin:	7 – Umatilla / Watermaster District 5
Date of Priority:	August 27, 1998
Source of Water:	Inland Well 1 (MORR 52037), Inland Well 2 (MORR 52045), Inland Well 3 (MORR 52132), Inland Well 4 (MORR 52131), Inland Well 5 (MORR 52130) and up to nine well in the Columbia River Basin
Purpose or Use:	irrigation of 2129.5 acres and supplemental irrigation of 670.5 acres
Maximum Rate:	35.0 cubic feet per second (cfs)

***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, 2020, to October 1, 2025¹.
- Make the extension subject to certain conditions set forth below.

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.630 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315.

¹Pursuant to ORS 537.630(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.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
Inland Well 1 - MORR 52037
Inland Well 2 - MORR 52045
Inland Well 3 - MORR 52132
Inland Well 4 - MORR 52131
Inland Well 5 - MORR 52130
Monitoring Well – MORR 52279
cfs - cubic feet per second

AUTHORITY

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

ORS 537.630(2) provides in pertinent part that the Oregon Water Resources Department (Department) for good cause shown shall order and allow 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.

FINDINGS OF FACT

1. On February 5, 2004, Permit G-13880 was issued by the Department, consistent with the terms of a settlement agreement. The permit authorizes the use of up to 35.0 cfs of water from up to nine well in the Columbia River Basin for irrigation of 2129.5 acres and supplemental irrigation of 670.5 acres. The permit specified actual construction of the

well to begin by February 5, 2005, complete application of water was to be made on or before October 1, 2008.

2. On September 22, 2010, an assignment from Inland Land Co., LLC, to Threemile Canyon Farms, LLC, was recorded in the records of the Water Resources Department.
3. On December 8, 2015, an assignment from Threemile Canyon Farms, LLC, to Threemile Canyon Farms, LLC, and Wells Fargo Bank, National Association, was recorded in the records of the Water Resources Department.
4. One prior permit extension has been granted for Permit G-18414. The extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2008, to October 1, 2020.
5. On December 19, 2019, an Application for Permit Amendment was submitted to the Department requesting a change in place of use and a change in points of appropriation under Permit G-13880.
6. On September 22, 2020, the Department approved Permit Amendment T-13325 (Special Order Volume 117, Page 556) authorizing a change in the place of use and points of appropriation under Permit G-13880 (modified by Permit Amendment T-13325). Superseding Permit G-18414 was issued by the Department on September 22, 2020, to reflect the changes.
7. On August 13, 2021, the permit holder, Threemile Canyon Farms, submitted an "Application for Extension of Time" (Application) to the Department, requesting both the time to complete construction of the water system and the time to apply water to full beneficial use under the terms and conditions of Permit G-18414 be extended from October 1, 2020, to October 1, 2025.
8. On September 14, 2021, notification of the Application for Permit G-18414 was published in the Department's Public Notice. No public comments were received regarding the Application.

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)]

9. On August 13, 2021, 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)]

10. Actual construction of the well began prior to the February 5, 2005, deadline specified in the permit.

The Department has determined that the prosecution of the construction of the well began prior to February 5, 2005.

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 previous extension.²

11. During the most recent extension period, being from October 1, 2008, to October 1, 2020, the following was accomplished:

- constructed of MORR 52037 (Inland Well 1) MORR 52045 (Inland Well 2) MORR 52132 (Inland Well 3) MORR 52131 (Inland Well 4) MORR 52130 (Inland Well 5);
- constructed MORR 52279 (Monitoring Well); and
- installed pumps, meters, irrigation equipment, and mainline pipes.

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

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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.

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

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

12. The Department has considered the permit holder's compliance with conditions, and has identified the following concern, the required static water level measurements taken between February 15, and March 15 have not been received by the Department.

Based on FOF 12, the Department has determined that the permit holder has not demonstrated compliance with following permit condition as required by Permit G-18414, because no February/March static water level measurement have been submitted since issuance of Permit G-18414:

- "Measurement of static water levels at wells included in this monitoring plan shall be semi-annual between February 15 and March 15 and in the month of October. Wells authorized under this permit shall be idle for at least 60 days prior to the February/March measurement. Wells authorized under permits G-13244 and G-13282 shall be idle for at least 24 hours prior to the February/March measurement. All wells shall be idle for 24 hours prior to the October measurement. The Department may approve measurements made with a lesser period of idle time than specified above, provided that a written request is received which includes the reason(s) why the specified time cannot be met.

Following the first year of water use, the next February/March measurement shall establish the reference level against which future February/March measurements will be compared. If water use begins prior to completion of all wells authorized under this permit, the reference level for those wells completed after water use begins shall be the first February/March water level measured following well completion."

Failure to comply with permit conditions constitutes illegal use of water. 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.

13. A maximum rate of 28.0 cfs of water has been appropriated being 4.5 cfs from Inland Well 1, 5.8 cfs from Inland Well 2, 5.8 cfs from Inland Well 3, 6.0 cfs from Inland Well 4, and 5.9 cfs from Inland Well 5 for irrigation of 1576.5 acres and supplemental irrigation of 670.5 acres.

Based on FOF 12, the Department has determined that beneficial use of water, in compliance with the terms and conditions of the permit, has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 2020.

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

14. An approximate total of \$12,246,777, has been invested. The costs included items associated with construction of the original well authorized under Permit G-13880, the monitoring well constructed under Permit G-13880, abandonment of the monitoring well, water quality testing, permit amendment application costs, water use reporting, repair and maintenance costs of a system 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 \$5,015,000 which is about 91 percent of the total projected cost for complete development of this project. An additional \$500,000 investment is needed to complete this project, which includes developing the remaining acres for irrigation.

Based on FOF 14, 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.

15. 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 G-18414; 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).

16. The points of appropriation for Permit G-18414, located within the Columbia River Basin, are not located within a limited or critical groundwater area.
17. Columbia River is not located within or above any state or federal scenic waterway.
18. The points of appropriation are not in an area 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.

19. Columbia River 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.

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

Economic interests dependent on completion of the project.

20. An approximate total of \$5,015,000 has been invested in the project as currently authorized by Permit G-18414.

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

Other economic interests dependent on completion of the project.

21. Threemile Canyon Farm employees approximately 150 workers.

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

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

22. 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)]

23. 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 690-315-0040(2)(g)]

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

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

25. The Covid-19 Pandemic contributed to a delay in the completion of the project.

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

26. A denial of the extension would result in undue hardship in that the investment made to develop the acres would be lost.

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

27. The Application provides evidence of good faith of the appropriator under Permit G-18414.

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.

28. According to the Application, and error in the previous Application for a Permit Amendment, which resulted in not all acres authorized under Permit G-18414, have been attributed to all wells as desired. The permit holder has identified a need to submit an additional Permit Amendment to address this concern. It is the responsibility of the permit holder to submit this permit amendment application with sufficient time for the Department to review the request, and issue the necessary orders; and if approved, complete the development of the water use, comply with all permit conditions, and apply water to full beneficial use prior to October 1, 2025. To provide sufficient time for the

review of this potential permit amendment, it should be submitted to the Department by no later than October 1, 2022.

29. As of August 13, 2021, the remaining work to be completed consists of completing construction of the water system, meeting all permit conditions, which include submittal of the required February/March static water level measurements; 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, 2025, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-18414 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 apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

LIMITATIONS AND CONDITIONS

1. 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. Based on FOF 5, 6, 12, 28, and 29, 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 the amount of time authorized for development of the water use, submittal of Permit Amendment Application T-13325 requesting authorization of a change in place of use and points of diversion for the use that began in 2012, with minimal time for the Department to review the request, and the failure to submit the necessary February/March static water level measurements necessary to set reference levels in the authorized wells. To this end, the Department will not authorize an additional extension of time to demonstrate compliance with static water level measurements, or to allow additional development if a permit amendment is submitted after October 1, 2022.

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 has complied with the construction timeline requirements to begin actual construction as required by ORS 537.630, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. Based on Finding of Facts 10, through 27, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2025, 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 ensure future diligence and 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).

PROPOSED ORDER

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

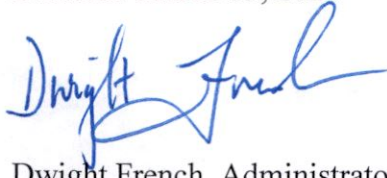
Extend the time to apply water to beneficial use under Permit G-18414 from October 1, 2020, to October 1, 2025.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Last Extension Condition**
This may be the last extension of time granted for Permit G-18414. Any future extensions of time request may be denied, unless the permit holder can provide the Department with evidence that the required static water level measurements have been submitted annually. No additional extensions of time will be approved to complete the development of any change of place of use or points of appropriation requested in an Application for a Permit Amendment submitted after October 1, 2022. In addition, all normal extension standards and rules will be evaluated. ORS 539.010(5); OAR 690-315-0040.

DATED: March 15, 2022



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 **April 29, 2022**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.
2. A written protest shall include:
 - a. The name, address and telephone number of the petitioner;
 - b. A description of the petitioner's interest in the proposed final order and if the protestant claims to represent the public interest, a precise statement of the public interest represented;
 - c. A detailed description of how the action proposed in the proposed final order would adversely affect or aggrieve the petitioner's interest;
 - d. A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;
 - e. Any citation of legal authority supporting the petitioner, if known;
 - f. Proof of service of the protest upon the water right permit holder, if petitioner is other than the water right permit holder; and
 - g. The applicant or non-applicant protest fee required under ORS 536.050.
3. Within 60 days after the close of the period for requesting a contested case hearing, the Director shall:
 - a. Issue a final order on the extension request; or
 - b. Schedule a contested case hearing if a protest has been submitted, and:
 - 1) Upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or
 - 2) The applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests.

NOTICE TO ACTIVE DUTY SERVICEMEMBERS: Active duty Servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571 or the nearest United States Armed Forces Legal Assistance Office through

<http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

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- If you have questions about statements contained in this document, please contact Jeffrey D. Pierceall at 503- 979-3213.
 - If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at (503) 979-9160.
 - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0900.
 - Address any correspondence to : Water Right Services Division
725 Summer St NE, Suite A
Fax: 503-986-0901 Salem, OR 97301-1266
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