

**Oregon Water Resources Department  
Water Right Services Division**

**Application for Extension of Time**

In the Matter of the Application for an Extension of Time    )  
for Permit G-15816, Water Right Application G-16207,        ) PROPOSED FINAL ORDER  
in the name of Justin and Stephanie Bowen                    )

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**Permit Information**

Application:	G-16207
Permit:	G-15816
Basin:	12 – Malheur Lake / Watermaster District 10
Date of Priority:	March 11, 2004
Source of Water:	Well 1, Well 2, Well 3, Well 4, Well 5 and Well 6 in Malheur Lake Basin
Purpose of Use:	Irrigation use on 405.4 acres
Maximum Rate:	5.07 cubic feet per second (cfs)

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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 apply water to full beneficial use from October 1, 2015 to October 1, 2020<sup>1</sup>.

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.

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<sup>1</sup>Pursuant to ORS 537.630(4), upon the completion of beneficial use of water allowed under the permit, the permittee shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permittee shall submit a map of the survey and a new or revised claim of beneficial use as deemed appropriate by the Department.

## **ACRONYM QUICK REFERENCE**

Department – Oregon Department of Water Resources

PFO – Proposed Final Order

cfs – cubic feet per second

gpm – gallons per minute

## **AUTHORITY**

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

**ORS 537.630(1)** provides in pertinent part that the Oregon Water Resources Department may, for good cause shown, order an extension of time within which: irrigation or other works shall be completed; the well or other means of developing and securing ground water shall be completed; or the right perfected. In determining the extension, the Department shall give due weight to the considerations described under ORS 539.010(5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right.

**ORS 539.010(5)** provides in pertinent part that the Water Resources Director, for good cause shown, may extend the time within which the full amount of the water appropriated shall be applied to a beneficial use. This statute instructs the Director to consider: the cost of the appropriation and application of the water to a beneficial purpose; the good faith of the appropriator; the market for water or power to be supplied; the present demands therefore; and the income or use that may be required to provide fair and reasonable returns upon the investment.

**OAR 690-315-0040** provides in pertinent part that the Water Resources Department shall make findings to determine if an extension of time may be approved to complete construction and/or apply water to full beneficial use.

## **FINDINGS OF FACT**

### *Background*

1. Permit G-15816 was issued by the Department on December 30, 2004. The permit authorizes the use of up to 5.07 cfs of water from Well 1, Well 2, Well 3, Well 4, Well 5 and Well 6 in Malheur Lake Basin for irrigation use on 405.4 acres. The permit specified complete application of water was to be made on or before October 1, 2009.
2. On January 2, 2007, Permit G-15816 was assigned by the Department from Robert Cargill to Wayne and Midge Smith by proof of ownership.
3. On May 8, 2009, Permit G-15816 was assigned by the Department from Wayne and Midge Smith to Justin and Stephanie Bowen by proof of ownership.

4. One prior permit extensions has been granted for Permit G-15816. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2009 to October 1, 2015.
5. The permit holders Justin and Stephanie Bowen, submitted an “Application for Extension of Time” to the Department on September 25, 2015, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-15816 be extended from October 1, 2015 to October 1, 2020.
6. Notification of the Application for Extension of Time for Permit G-15816 was published in the Department’s Public Notice dated October 6, 2015. No public comments were received regarding the extension application.

**Review Criteria [OAR 690-315-0040]**

*The time limits to complete construction and/or apply water to full beneficial use may be extended if the Department finds that the permit holder has met the requirements set forth under OAR 690-315-0040. This determination shall consider the applicable requirements of ORS 537.230<sup>2</sup>, 537.248<sup>3</sup>, 537.630<sup>4</sup> and/or 539.010(5)<sup>5</sup>.*

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

7. On September 25, 2015, the Department received a completed Application for Extension of Time 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)]**

8. Construction of the well began within 5 years of permit issuance. The permit holder states, construction of Well 4 (HARN 5114) began February 18, 2005.

**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.*

9. As of September 25, 2015, the permit holder states the remaining work to be completed consists of gaining approval of a Permit Amendment to add an additional point of appropriation, meet all permit conditions on the added well; and applying water to full beneficial use.
10. Given the amount of development left to occur, the Department has determined that the permit holder’s request to have until October 1, 2020, to accomplish the application

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<sup>2</sup>ORS 537.230 applies to surface water permits only.

<sup>3</sup>ORS 537.248 applies to reservoir permits only.

<sup>4</sup>ORS 537.630 applies to ground water permits only.

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

of water to beneficial use under the terms and conditions of Permit G-15816 is both reasonable and necessary.

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

*The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0040(2).*

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

*The Department's determination of reasonable diligence shall consider the requirements set forth under OAR 690-315-0040(3)(a-d). In accordance with OAR 690-315-0040(3), the Department shall consider, but is not limited to, the following factors when determining whether the applicant has demonstrated reasonable diligence in previous performance under the permit:*

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

11. According to the permit holder, work was accomplished within the time allowed in the permit or previous extension as follows:
  - a. Construction of the wells were completed prior to October 1, 2009. The applicant states Well 1 (HARN 1913) was completed May 13, 1991; Well 2 (HARN 1867) was completed March 17, 1991; Well 3 (HARN 2072) was completed March 20, 1995; Well 4 (HARN 5114) was completed March 19, 2005; Well 5 (HARN 50236) was completed June 10, 1997; and Well 6 (HARN 5175) was completed July 13, 2004.
  - b. Work was completed during the original development time frame under Permit G-15816. According to the applicant the water delivery system and four meters were installed.
  - d. During the most recent extension period, being from October 1, 2009, to October 1, 2015, the following was accomplished:
    - Completed installation of totalizing flowmeters on all wells; and
    - Constructed a mini pivot.

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

12. According to the water user a maximum rate of 5.07 cfs of water has been appropriated from the wells for irrigation of 405.4 acres.
13. According to the permit holder, delay of full beneficial use of water under Permit G-15816 was due, in part, to the original permit holder split and sold the farm to separate parties. One landowner, Mr. Snipes was unaware that his portion land was Authorized place of use under the permit. Mr. Snipes drilled his own well, which needs to be added to this permit. The permit holders needs more time in which to gain approval for

the additional point of appropriation and apply the water to beneficial use.

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

14. From October 1, 2012, the permit holder has submitted the annual water use records, and submitted the static water level measurements for March 2015 required under Permit G-15816.
15. The Department has considered the permit holder's compliance with conditions, and has no concerns.

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

16. As of September 25, 2015, the permit holder states they have invested approximately \$709,700, which is approximately 98 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$8,200 investment is needed for the completion of this project.

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

17. The Department has found good faith of the appropriator under Permit G-15816.

*The Market and Present Demands for Water [OAR 690-315-0040(2)(d-e)]*

*The Department's determinations of market and present demand for water or power to be supplied shall consider the requirements set forth under OAR 690-315-0040(4)(a-f). In accordance with OAR 690-315-0040(4), the Department shall consider, but is not limited to, the following factors when determining the market and the present demand for water or power to be supplied:*

18. The amount of water available to satisfy other affected water rights and scenic waterway flows; special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d); or the habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife [OAR 690-315-0040(4)(a-c)].

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-15816; furthermore, water availability for other affected water rights and scenic waterway flows after the permit was issued is determined when an application for a new water right is submitted. The points of appropriation for Permit G-15816, located within the Malheur Lake Basin, are not located within a limited or critical ground water area. Malheur Lake is not located within or above any state or federal scenic waterway, however, it is located within an area ranked "low" for stream flow restoration needs as

determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife. The points of appropriation are not in an area listed by the Department of Environmental Quality as a water quality limited stream.

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

19. None have been identified.

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

20. None have been identified.

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

21. 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)]*

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

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

23. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit G-15816, in that the permit holders were unaware that the property was split during the sale and a portion of the place of use is on the neighbors property that restricted their ability to complete development of the project in a timely manner.

## **CONCLUSIONS OF LAW**

1. The applicant is entitled to apply for an extension of time to complete construction and/or completely apply water to the full beneficial use pursuant to ORS 537.630(1).
2. The applicant has submitted a complete extension application form and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
3. The applicant complied with begin actual construction timeline requirements pursuant to ORS 537.630 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. Full application of water to beneficial use can be accomplished by October 1, 2020, as required by OAR 690-315-0040(1)(c).

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

### 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-15816 from October 1, 2015 to October 1, 2020.

DATED: November 10, 2015



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(1) and 690-315-0060, the applicant or any other person adversely affected or aggrieved by the proposed final order may submit a written protest to the proposed final order. The written protest must be received by the Water Resources Department no later than **December 25, 2015**, 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 SERVICE MEMBERS:** Active Duty Service members have a right to stay these proceedings under federal Service members Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.of.mil>



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- If you have questions about statements contained in this document, please contact Machel A Bamberger at (503)986-0802.
  - 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 503-986-0820.
  - 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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Mailing List for Extension PFO Copies

PFO Date: November 10, 2015

Copies Mailed

Application: G-16207

By: \_\_\_\_\_

Permit: G-15816

On: \_\_\_\_\_

Original mailed to Applicant:

Justin and Stephanie Bowen  
5528 HWY 78  
Burns, OR 97720

Copies sent to:

1. WRD - App. File G-16207/ Permit G-15816
2. All Points Engineering & Surveying  
PO BOX 767  
Terrebonne, OR 97760

Fee paid as specified under ORS 536.050 to receive copy:

3. None

Receiving via e-mail (10 AM Tuesday of signature date)  
(DONE BY EXTENSION SPECIALIST)

4. WRD - Watermaster District 10, JR Johnson

CASEWORKER: MAB