

**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-16109, Water Right Application G-16284, in            )  
the name of BGC Upland LLC    )     PROPOSED FINAL ORDER

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Permit Information

Application:            G-16284  
Permit:                 G-16109  
Basin:                 5 – Deschutes / Watermaster District 11  
Date of Priority:       May 10, 2005  
Source of Water:       A well in Deschutes River Basin  
Purpose of Use:        Irrigation use on 6.0 acres  
Maximum Rate:         0.05 cubic foot per second (cfs)

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***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, 2016 to October 1, 2021<sup>1</sup>.
  
- 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.

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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

MP – Mitigation Project

RM – River Mile

## **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.

**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

### *Background*

1. On July 26, 2004, Clifford Brooks submitted an Application for a Permit to Use Ground Water.
2. On January 3, 2006, an assignment by deed from Clifford Brooks to Cherie Brooks was recorded in the records of the Water Resources Department.
3. On August 9, 2006, the Department received a Deschutes Basin Mitigation Credit Documentary Evidence Form for Mitigation Banks, requesting to assign 7.2 mitigation credits from Mitigation Project (MP)-84 account held by the Deschutes Water Exchange Mitigation Bank, to ground water application G-16284.
4. On October 2, 2006, the Department received a Deschutes Basin Mitigation Credit Documentary Evidence Form revising the existing Documentary Evidence Form submitted on August 9, 2006. The permit holder was assigned 10.8 mitigation credits from the MP-85 account.
5. On October 12, 2006, Permit G-16109 was issued by the Department. The permit authorizes the use of up to 0.05 cfs of water from a well in Deschutes River Basin for irrigation use on 6.0 acres. The permit specified complete application of water was to be made on or before October 1, 2011.
6. On January 4, 2008, the Department received a Deschutes Basin Mitigation Credit Documentary Evidence Form identifying that 7.2 mitigation credits have been obtained and were requested to be assigned from the MP-29 account to ground water Permit G-16109.
7. On August 2, 2012 an assignment from Cherie Brooks to BGC Upland LLC was recorded in the records of the Water Resources Department.
8. One prior permit extension has been granted for Permit G-16109. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2011 to October 1, 2016. The final order required a progress report to be submitted by October 1, 2015.
9. On behalf of the permit holder, Bart Colson, member of BGC Upland LLC, submitted an "Application for Extension of Time" to the Department on May 31, 2016, requesting the time to apply water to full beneficial use under the terms and conditions of Permit G-16109 be extended from October 1, 2016 to October 1, 2021.
10. On June 13, 2016, the required Progress Report was received by the Department. The Department determined that diligence toward completion of the project and

compliance with the terms and conditions of the permit and extension is questionable. According to the Progress Report, the permit holder developed and irrigated one additional acre from December 13, 2010 to October 1, 2015.

11. Notification of the Application for Extension of Time for Permit G-16109 was published in the Department's Public Notice dated June 7, 2016. No public comments were received regarding the extension application.
12. On June 13, 2016, the permit holder submitted additional information to supplement their Application for Extension of Time.
13. On August 9, 2016, the Department received notification from the Deschutes River Conservancy that BGC Upland, LLC, has provided its mitigation for 2016, as required by Permit G-16109.

**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)]**

14. On May 31, 2016, 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)]**

15. Construction of the well began prior to permit issuance. The permit holder states, construction of Well (DESC 55505) began July 18, 2003.

According to the well log received by the Department on July 31, 2003, Well (DESC 55505) construction began July 18, 2003. The Department has determined that the prosecution of the construction of the well began prior to October 1, 2011.

**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.*

16. As of May 31, 2016, the application states the remaining work to be completed consists of installing a sprinkler system on the remaining 2.0 acres, and applying water to full

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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.

beneficial use.

Given the amount of development left to occur, the Department has determined that BGC Upland, LLC's request to have until October 1, 2021, to accomplish the application of water to beneficial use under the terms and conditions of Permit G-16109 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)]**

17. According to the application and previous extension of time, work was accomplished within the time allowed in the permit or previous extension as follows:
  - a. Construction of the well was completed prior to October 1, 2011. Construction of Well (DESC 55505) began July 18, 2003 and was completed on July 28, 2003.
  - b. Work was completed during the original development time frame under Permit G-16109. The previous permit holder installed a meter and high pressure irrigation system.
  - c. During the most recent extension period, being from October 1, 2011, to October 1, 2016, BGC Upland, LLC developed and irrigated an additional acre.
  - d. On June 13, 2016, a Progress Report, which was required to be submitted by October 1, 2015, was submitted to the Department, identifying the development and irrigation of one additional acre for the period of time between December 13, 2010 and October 1, 2015.

The Department has determined that work performed towards the completion of the water system authorized by Permit G-16109 during the last extension is questionable, which demonstrates both the present lack of good faith of the water right permit holder, and the water right permit holder's intention to complete the project with a lack of reasonable diligence.

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

18. The application states a maximum rate of 0.05 cfs of water has been appropriated from Well (DESC 55505) for irrigation of 4.0 acres.
19. Beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2016.
20. According to BGC Upland, LLC, delay of full beneficial use of water under Permit G-16109 was due, in part, to the previous permit holders divorcing and failing to complete the application of the water to full beneficial use. BGC Upland, LLC needs more time in which to apply the water to full beneficial use.

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

21. The Department has considered BGC Upland, LLC's compliance with conditions, including mitigation requirements, and did not identify any concerns.
22. Department records show a meter was installed in 2009.
23. Department records also show annual water use reports have been received for years 2009-2011 and 2013-2015.
24. BGC Upland, LLC is current with mitigation conditions as required by Permit G-16109.

The Department has determined that this extension will allow the permit holder to apply the water to full beneficial use on the remaining 2.0 acres.

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

25. As stated on the Application, BGC Upland, LLC has invested about \$35,000, which is approximately 64 percent of the total projected cost for complete development of this project. BGC Upland, LLC anticipates an additional \$20,000 investment is needed for the completion of this project.

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

26. The Department has found marginal good faith of BGC Upland, LLC under Permit G-16109.

***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:*

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)].

27. 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-16109; 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 point of appropriation for Permit G-16109, located within the Deschutes River Basin, is not located within a limited or critical ground water area. Deschutes River is above the Deschutes Scenic Waterway located above a stream segment designated as a Federal Wild and Scenic River, and, it is located within an area ranked "high" 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 point of appropriation is in an area listed by the Department of Environmental Quality as a water quality limited stream for Dissolved Oxygen (River Mile (RM) 116 to 222.2), Temperature (RM 110.8 to 223.3), and Dissolved Oxygen (RM 171.7 to 223.3).

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

28. No other economic interests 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)].***

29. No other factors relevant to the determination of the market and present demand for water and power have been identified.
30. 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. 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 the lack of due diligence and marginal good faith in developing or perfecting the water use permit during the last extension period, being October 1, 2011 to October 1, 2016.

31. Include only if checkpoints are required 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 2 of the "Conditions" section of this PFO to meet this condition.

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

32. 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)]***

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

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

34. No unforeseen events have been identified.

## **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 construction timeline requirements pursuant to ORS 537.630 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. Based on Finding of Facts 14 through 24, full application of water to beneficial use can be accomplished by October 1, 2021, 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 marginal good cause exists for an extension of time to apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).



6. As authorized in OAR 690-315-0050(5) and as described in Finding 26 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), a "Last Extension Condition" in order to ensure future diligence is exercised in the development and perfection of Permit G-16109.
7. As required by OAR 690-315-0050(6) and as described in Finding 27 above, the Department has established, as specified in the "Conditions" section of this PFO (Item 2), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit G-16109.

**Continued on the following page**

## 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-16109 from October 1, 2016 to October 1, 2021.

Subject to the following conditions:

### CONDITIONS

1. **Last Extension Condition**

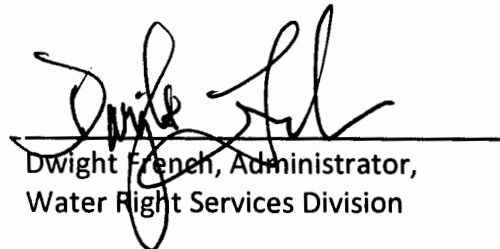
This is to be the last extension of time granted for Permit G-16109. Any future extensions of time requests will be denied.

2. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2020**. ***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: August 23, 2016

  
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 **October 7, 2016**, 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>

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- If you have questions about statements contained in this document, please contact Corey A Courchane at (503)986-0825.
  - 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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