

Oregon Water Resources Department
Water Right Services Division

Application for Extension of Time

In the Matter of the Application for an)	SUPERSEDING PROPOSED FINAL
Extension of Time for Permit G-16205, Water)	ORDER and WITHDRAW THE
Right Application G-16605, in the name of)	FINAL ORDER ON EXTENSION OF
Jacob Davis and Elli Davis		TIME

Permit Information

Application:	G-16605
Permit:	G-16205
Basin:	12 – Malheur Lake / Watermaster District 10
Date of Priority:	January 24, 2006
Source of Water:	a well (HARN 50673) in Malheur Lake Basin
Purpose or Use:	Irrigation use on 125.6 acres
Maximum Rate:	1.57 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:

- Withdraw the Final Order on Extension of Time issued July 1, 2022.
- Grant an extension of time to complete construction of the water system from October 1, 2011, to October 1, 2015.
- Grant an extension of time to apply water to full beneficial use from October 1, 2011, to October 1, 2015¹.
- 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

Agent – John Short
Application – Application for Extension of Time
Department – Oregon Department of Water Resources
FOF – Finding of Fact
PFO – Proposed Final Order
Well – HARN 50673
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 July 26, 2007, Permit G-16205 was issued by the Department. The permit authorizes the use of up to 1.57 cfs of water from a well (HARN 50673) in Malheur Lake Basin for irrigation use on 125.6 acres. The permit specified completion of construction and complete application of water was to be made on or before October 1, 2011.
2. On May 20, 2015, a claim of beneficial use was submitted for Permit G-16205. No pump test has been submitted.

3. On February 15, 2022, an assignment by proof from Herbert Davis, to Jacob Davis and Elli Davis, was recorded in the records of the Water Resources Department.
4. On February 15, 2022, the permit holder, Jacob Davis and Elli Davis, submitted a complete "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-16205 be extended from October 1, 2011, to October 1, 2023. This is the first permit extension requested for Permit G-16205.
5. On May 3, 2022, the Department issued a Proposed Final Order (PFO) approving the Extension of Time to October 1, 2024. The issuance of this PFO did not appear on the Departments weekly public notice as required by OAR 690-315-0050(3).
6. On July 1, 2022, the Department issued a Final Order on the Extension of Time to October 1, 2024.

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)]

7. On February 15, 2022, 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)]

8. Construction of the well began prior to permit issuance.
9. According to the well log received by the Department on May 24, 2001, construction of HARN 50673 (Well) began April 25, 2001.

Based on Finding of Fact (FOF) 8, and 9, the Department has determined that the prosecution of the construction of the well began prior to October 1, 2011.

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.²

10. Construction of the well, and installation of a pump, pipeline and pivot was complete prior to permit issuance.
11. No other work was accomplished during the original development time frame under Permit G-16205 as a majority of the work was completed prior to permit issuance.
12. On December 1, 2014, a totalizing flow meter was installed.

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.

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

The water right permit holder’s conformance with the permit conditions.

13. The Department has considered the permit holder’s compliance with conditions, and has identified the following concerns: (1) the record does not show that totalizing meter or other suitable measuring device has been installed by October 1, 2011, and (2) the required March static water level measurements have not been received by the Department by October 1, 2011.
14. The Department record shows a qualifying March static water level measurement was taken March 14, 2015, and on March 30, 2015.

Based on FOF 13, the Department has determined that the permit holder has not demonstrated compliance with following permit conditions as required by Permit G-16205:

- “Before water use may begin under this permit, the permittee shall install a totalizing flow meter or other suitable measuring device as approved by the Director at each point of appropriation; and
- “To monitor the effect of water use from the well(s) authorized under this permit, the Department requires the water user to make and report annual static water

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.

level measurements. The static water level shall be measured in the month of March.”

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.

15. A maximum rate of 1.57 cfs of water has been appropriated from the Well for irrigation use on 125.6 acres.

Based on FOF 13, 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 October 1, 2011.

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

16. An investment of approximately \$152,000, has been made which is the total projected cost for complete development of this project.

Based on FOF 16, 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.

17. 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-16205; 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).

18. The point of appropriation for Permit G-16205, is located in the Greater Harney Valley Groundwater Area of Concern (GHVGAC) which was established to ensure that groundwater in the GHVGAC is appropriated within the capacity of the resource and that new appropriations of groundwater assure the maintenance of reasonably stable groundwater levels and prevent depletion of the groundwater resource. Current data, comprising substantial evidence, indicate that groundwater levels are declining in areas of the GHVGAC. Additional allocation of groundwater within the GHVGAC may exacerbate these declines. A comparison between estimated annual recharge and previously allocated groundwater volumes indicates that groundwater is fully allocated in some areas of the basin. 690-512-0020(1)
19. Malheur Lake is not located within or above any state or federal scenic waterway.
20. The point of appropriation is 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.

21. Malheur Lake 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.

22. An approximate total of \$152,000 has been invested in the project.

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

Other economic interests dependent on completion of the project.

23. Other economic interests dependent on 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.

24. On March 14, 2015, the water user submitted a March static water level measurement. The Department record shows the first water use report submitted is reporting water use began during the 2010 water year. Based on the qualifying March static water level measurement submitted on March 14, 2015, the Department has determined that the reference level for determining water level declines are 13.05 feet below land surface for HARN 50673.

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

25. 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)]

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

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

27. No unforeseen events were identified that contributed to the extended the length of time needed to fully develop and perfect Permit G-16205.

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

28. A denial of the extension would result in undue hardship, and that there are no other reasonable alternatives exist for meeting water use needs. This extension of time is being granted only to allow for demonstration of compliance with permit conditions.

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

29. The Application provides evidence of good faith of the appropriator under Permit G-16205.

Based on FOF 8, 9, 10, 12 14, 15, 16, and 22, 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.

30. As of February 15, 2022, work is complete. An extension of time is necessary to allow for demonstration of compliance with the conditions requiring the installation of a totalizing flow meter, and submittal of at least one qualifying March static water level measurement. The Application identifies that the required totalizing flow meter was installed December 1, 2014, and the first qualifying March static water level measurement was made on March 14, 2015.
31. Submittal of a pump test is necessary for the Department to issue a certificate of water right. Compliance with the condition requiring submittal of a pump test does not need to be demonstrated within the time authorized for construction and complete application of water to the beneficial use, however, an approved pump test is required prior to the issuance of a certificate. As of April 1, 2022, no pump test has been received by the Department.

Based on FOF 3, 12, 14, and 24, the Department has determined that the permit holder's request to have until October 1, 2023, to complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit G-16205 is not reasonable or necessary. Based on FOF 12, 14, 24, and 30, the Department has determined an extension of time to October 1, 2015, 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 record shows that a Claim of Beneficial Use was submitted on May 20, 2015, identifying the extent to which Permit G-16205 had been developed. On January 10, 2020, the Department issued a proposed order of certification to cancel Permit G-16205, for failure to demonstrate compliance with permit conditions. An extension of time to October 1, 2015, is sufficient to provide time to demonstrate compliance with permit conditions, and to allow for the issuance of a certificate upon the approval of a pump test.

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(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 Findings of Facts 2, 17, and 30, the Department determined the need to place a "Pump Test Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of water use permit. This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary because development is complete, and submittal of a pump test is the only remaining requirement to allow perfection of the permit and issuance of a certificate. Because the point of appropriation for Permit G-16205 is located within the GHVGAC, and the concerns with overdevelopment of the groundwater resource are significant, the Department has determined a pump test must be submitted by no later than October 1, 2022, to allow for the final review of the claim of beneficial use submitted on May 20, 2015.

2. 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 mitigate the effects of the subsequent development on competing demands on the resource. This condition, specified under Item 2 of the "Conditions" section of this PFO, was determined to be necessary due the authorized use under Permit G-16205 has been fully developed according to the claim of beneficial use submitted on May 20, 2015, and this extension of time provides the additional time necessary for compliance with permit conditions to be demonstrated.

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 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 7, through 28, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2015, 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/or 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 complete construction of the water system under Permit G-16205 from October 1, 2011, to October 1, 2015.

Extend the time to apply water to beneficial use under Permit G-16205 from October 1, 2011, to October 1, 2015.

Subject to the following conditions:

LIMITATIONS AND CONDITIONS

1. **Pump Test Condition**

The water user shall submit a pump test as required by the permit no later than October 1, 2022. Failure to submit the required pump test by October 1, 2022, may result in the termination of this extension of time, and the cancellation of Permit G-16205.

2. **Last Extension Condition**

This shall be the last extension of time granted for Permit G-16205. Any future extensions of time request will be denied.

DATED: August 9, 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 **September 23, 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. Pierce 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
Salem, OR 97301-1266
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