

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

Application for Extension of Time

In the Matter of the Application for an Extension of Time) PROPOSED
for Permit S-53683, Water Right Application S-80302,) FINAL
in the name of the Coos Bay North Bend Water Board) ORDER

Permit Information

Application File S-80302/ Permit S-53683

Basin 17 – South Coast Basin / Watermaster District 15

Date of Priority: May 11, 1995

Authorized Use of Water

Source of Water: Upper Pony Creek Reservoir, constructed under
Permits R-1064 and R-8518 and to be enlarged
under Permit R-12822, a tributary of Pony Creek
Purpose or Use: Municipal Use
Maximum Rate: 4,100 Cubic Feet per Second (cfs)

**This Extension of Time request is being processed in accordance with Oregon
Administrative Rule Chapter 690, Division 315.**

***Please read this Proposed Final Order in its entirety as it contains
additional conditions not included in the original permit.***

This Proposed Final Order applies only to Permit S-53683, water right Application S-80302.

Summary of Proposed Final Order for Extension of Time

The Department proposes to:

- Grant an extension of time to apply water to full beneficial use from October 1, 2004, to October 1, 2030.
- Make the extension of time subject to certain conditions as set forth below.

ACRONYM QUICK REFERENCE

Application – Application for Extension of Time
Department – Oregon Department of Water Resources
Board – Coos Bay North Bend Water Board
ODFW – Oregon Department of Fish and Wildlife
PFO – Proposed Final Order
WMCP – Water Management and Conservation Plan

Units of Measure

AF – acre feet (foot)
cfs – cubic feet per second
gpm – gallons per minute

AUTHORITY

Generally, see ORS 537.230 and OAR Chapter 690 Division 315.

ORS 537.230(3) provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, order and allow an extension to complete construction or perfect a water right. 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 690-315-0050(5) authorizes the Department to include in an extension order, but is 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 690-315-0090(3) authorizes the Department, under specific circumstances, to condition an extension of time for municipal and/or quasi-municipal water use permit holders to provide that diversion of water beyond the maximum rate diverted under the permit or previous extension(s) shall only be authorized upon issuance of a final order approving a WMCP Plan under OAR Chapter 690, Division 86 which grants access to water under this extended permit.

FINDINGS OF FACT

1. On April 7, 2000, Permit S-53671 was issued by the Department. Superseding Permit S-53683 was issued June 20, 2000, to identify the location of the Upper Pony Creek Dam. The permit authorizes the use of up to 4100.00 cfs of water from the Upper Pony Creek Reservoir, constructed under Permits R-1064 and R-8518 and to be enlarged under

Permit R-12822, a tributary of the Pony Creek, for municipal use. The permit specified that complete application of water was to be made on or before October 1, 2004.

2. On November 27, 2012, Coos Bay North Bend Water Board (Board) submitted an "Application for Extension of Time" (Application) to the Department requesting the time to apply water to full beneficial use under the terms and conditions of Permit S-53683 be extended from October 1, 2004, to October 1, 2013. This is the first extension of time request for Permit S-53683.
3. Notification of the Board's Application for Extension of Time for Permit S-53683 was published in the Department's Public Notice dated November 27, 2012. No public comments were received regarding the extension application.
4. On July 15, 2024, the Board submitted supplemental information and update revisions to their pending Application for Extension of Time, including a request to change the completion date from October 1, 2013, to October 1, 2030.
5. Notification of the Board's Amended Application for Extension of Time for Permit S-53683 was published in the Department's Public Notice dated July 23, 2024. No public comments were received regarding the extension application.

Review Criteria for Municipal and Quasi-Municipal Water Use Permits [OAR 690-315-0080(1)]

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 690-315-0080(1). This determination shall consider the applicable requirements of ORS 537.230¹, 537.630² and/or 539.010(5)³

Complete Extension of Time Application [OAR 690-315-0080(1)(a)]

6. On November 27, 2012, the Department received a completed application for extension of time and the fee specified in ORS 536.050.

Start of Construction [OAR 690-315-0080(1)(b)]

7. Permit S-53683 was issued prior to June 29, 2005; therefore, the permit holder is not required to provide evidence of actions taken to begin actual construction of the project.⁴

Duration of Extension [OAR 690-315-0080(1)(c) and (1)(d)]

Under OAR 690-315-0080(1)(c) and (1)(d), in order to approve an extension of time for municipal and quasi-municipal water use permits the Department must find that the time requested is reasonable and the applicant can complete the project within the time requested.

¹ ORS 537.230 applies to surface water permits only.

² ORS 537.630 applies to ground water permits only.

³ ORS 539.010(5) applies to surface water and ground water permits.

⁴ Section 5, Chapter 410, Oregon Laws 2005 and OAR 690-315-0070(3)(d).

8. The remaining work to be accomplished under Permit S-53683 consists of applying water to full beneficial use.
9. As of October 1, 2004, the permit holder had diverted 646 AF of the 4,100 AF of water authorized under Permit S-53683 for municipal purposes. There is an undeveloped portion of 3,454 AF of stored water under Permit S-53683 as per ORS 537.230(1).
10. In addition to the 4,100 AF of water authorized under Permit S-53683 the Board holds the following municipal use water right certificates and permits:
 - Certificate 96320 for 44 gallons per minute of water from two wells;
 - Certificate 74902 for 44 gpm of water from a well;
 - Certificate 88691 for 0.1649 cubic foot per second of water from two wells ;
 - Certificate 53521 for 3.1 cfs of water from Fourth Creek and Tarheel Creek;
 - Certificate 97011 for 8.0 cfs of water from Joe Ney Slough and Reservoir;
 - Certificate 83502 for storage of 383 AF of water from Pony Creek;
 - Certificate 32416 for 10 cfs of water from Pony Creek and Reservoir;
 - Certificate 32415 for storage of 1,685 AF of water from Pony Creek;
 - Certificate 91505 for 465 AF of water from Upper Pony Creek Reservoir;
 - Certificate 89644 for storage of 465 AF of water from Pony Creek;
 - Certificate 92948 for storage of 4,100 AF of water from Pony Creek;
 - Permit G-1389 for 46.0 cfs of water from 64 wells;
 - Permit G-10132 for 1.6 cfs of water from 64 wells;
 - R-2252 for storage of 2,500 AF of water from Joe Ney Slough;
 - Permit S-50155 for 18.0 cfs from Pony Creek and Lower Pony Creek Reservoir (Merritt Lake);
 - Permit S-18955 for 8.0 cfs of water from Winchester Creek;
 - Permit S-54344 for 23.2 cfs of water from Tenmile Lake; and
 - Surface Water Registration 297 for 10 cfs from Upper Pony Creek.

These water rights and permits total 128.26 cfs of live flow (surface) water and the storage and use of 9,133 AF of water.

11. According to the Application, in 2009, the population within the service boundary of Coos Bay North Bend Water Board was 34,500. The Board estimates the population will increase at a growth rate of 0.11 percent per year, reaching an estimated population of 37,496 by the year 2030.
12. The Board's peak water demand within its service area boundaries was 18.0 cfs in 2009.
13. The Board's peak day demand is projected to be approximately 22.2 cfs⁵ of water by the year 2030.

⁵ The data to determine the projected demand was gleaned from the Application for Extension of Time for Permit S-50155

14. Full development of Permit S-53683 is needed to address the present and future water demand of Coos Bay North Bend Water Board, including system redundancy and emergency use.
15. Based on Findings of Fact 9 - 14, the Department finds that the Board's request for an extension of time until October 1, 2030, to apply water to full beneficial use under the terms of Permit S-53683 is both reasonable and necessary.

Good Cause [OAR 690-315-0080(1)(e) and (3)(a-g)]

The Department's determination of good cause shall consider the requirements set forth under OAR 690-315-0080(3).

Reasonable Diligence and Good Faith of the Appropriator [OAR 690-315-0080(3)(a), (3)(c) and (4)]

Reasonable diligence and good faith of the appropriator must be demonstrated during the permit period or prior extension period as a part of evaluating good cause in determining whether or not to grant an extension. In determining the reasonable diligence and good faith of a municipal or quasi-municipal water use permit holder, the Department shall consider activities associated with the development of the right including, but not limited to, the items set forth under OAR 690-315-0080(4) and shall evaluate how well the applicant met the conditions of the permit or conditions of a prior extension period.

16. Prior to the issuance of Permit S-53683 the Board completed the Coos Bay North Bend Water Supply Expansion Project
17. Work was accomplished during the original development time frame includes;
 - Raising the height of Upper Pony Creek Dam;
 - Installed telemetry;
 - Replacing culverts; and
 - Providing mitigation.
18. According to the Application, as of November 27, 2012, the Board has invested approximately \$18,629,106, which is the total cost for complete development of this project. The Department recognizes that while some of these investment costs are unique to construction and development solely under S-53683, other costs included in this accounting are not partitioned out for S-53683 because (1) they are incurred under the development of a water supply system jointly utilized under other rights held by the Board, and/or (2) they are generated from individual activities counted towards reasonable diligence and good faith as listed in ORS 690-315-0080(4) which are not associated with just this permit, but with the development and exercise of all the Board's water rights.
19. As of October 1, 2004, the Board had diverted 646 AF of the 4,100.00 AF allowed for beneficial municipal purposes under the terms of this permit.
20. The Department has considered the Board's compliance with conditions, and did not identify any concerns.

Financial Investment and Cost to Appropriate and Apply Water to a Beneficial Purpose
[OAR 690-315-0080(3)(b)]

21. According to the Application, as of November 27, 2012, they have invested approximately \$18,629,106, which is the total cost for complete development of this project.

The Market and Present Demands for Water *[OAR 690-315-0080(3)(d) and (5)(a-f)]*

For municipal or quasi-municipal water use permits issued after November 2, 1998, in making a determination of good cause pursuant to 690-315-0080(3)(d), the Department shall also consider, but is not limited to, the factors in 690-315-0080(5)(a-f).

22. 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 690-315-0080(5)(a-f)]*.
- a. The amount of water available to satisfy other affected water rights and scenic waterway flows was determined at the time of issuance of Permit S-53683; furthermore, water availability for other affected water rights and scenic waterway flows after the permit was issued is determined at such time that such application for a new water right is submitted. The point of diversion for Permit S-53683, located within the Upper Pony Creek Reservoir, tributary to Pony Creek, is not located within a Withdrawn Area. The Upper Pony Creek Reservoir, tributary to Pony Creek is not located within or above any state or federal scenic waterway, however it is located within an area ranked highest for stream flow restoration needs as determined by the Department in consultation with the Oregon Department of Fish and Wildlife, and is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife. The Upper Pony Creek Reservoir, constructed under Permits R-1064 and R-8518 and to be enlarged under Permit R-12822. tributary to Pony Creek is listed by the Department of Environmental Quality as a water quality limited stream.

Economic investment in the project to date *[OAR 690-315-0080(5)(d)]*.

23. According to the Application, as of November 27, 2012, they have invested \$18,629,106, which is the total cost for complete development of this project.

Other economic interests dependent on completion of the project *[OAR 690-315-0080(5)(e)]*.

24. None have been identified.

Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0080(5)(f)].

25. As described in Findings 9 - 14 the Board has indicated, and the Department finds that Coos Bay North Bend Water Board must rely on full development of Permit S-53683 to meet its present and future water demands.
26. The Board estimates an annual population growth rate of 0.11 percent per year over a 21 year period, being 2009 to 2030.
27. Given the current water supply situation of Coos Bay North Bend Water Board, as well as current and expected demands including system redundancy and emergency use, there is a market and present demand for the water to be supplied under Permit S-53683.
28. OAR 690-315-0090(3) requires the Department to place a condition on this extension of time to provide that diversion of water beyond 646 cfs (not to exceed the maximum amount authorized under this permit, being 4,100.00 cfs) under Permit S-53683 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan(s) (WMCP) under OAR Chapter 690, Division 86 that grants access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7). A "Development Limitation" condition" is specified under Item 1 of the "Conditions" section of this PFO to meet this requirement.

Fair Return Upon Investment [OAR 690-315-0080(3)(e)]

29. Use and income from the permitted water development project would result in reasonable returns upon the investment made in the project to date.

Other Governmental Requirements [OAR 690-315-0080(3)(f)]

30. Delays caused by any other governmental requirements in the development of this project have not been identified.

Events which Delayed Development under the Permit [OAR 690-315-0080(3)(g)]

31. Delay of development under Permit S-53683 was due, in part, to the size and scope of the municipal water system, which was designed to be phased in over a period of years.

CONCLUSIONS OF LAW

1. The Board 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 537.230(2).
2. The Board has submitted a complete extension application form and the fee specified under ORS 536.050(1)(k), as required by OAR 690-315-0080(1)(a).
3. Pursuant to Section 5, Chapter 410, Oregon Laws 2005, the permit holder is not required

to demonstrate that actual construction of the project began within one year of the date of issuance of the permit, as otherwise required by OAR 690-315-0080(1)(b).

4. Pursuant to ORS 540.510(3)(a) and (b), water under Permit S-53683 may be applied to beneficial use on land to which the right is not appurtenant.
5. The time requested to apply water to full beneficial use is reasonable, as required by OAR 690-315-0080(1)(c).
6. Full application of water to beneficial use can be completed by October 1, 2030⁶, as required by OAR 690-315-0080(1)(d).
7. 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 the fair return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the water right permit holder had no control, and the Department finds that the Board has shown good cause for an extension of time to apply the water to full beneficial use pursuant to OAR 690-315-0080(1)(e).
8. As required by OAR 690-315-0090(3) and as described in Finding 28, above, and specified under Item 1 of the "Conditions" section of this PFO, the diversion of water beyond 646 AF (not to exceed the maximum amount authorized under this permit, being 4100 AF) under Permit S-53683 shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan (WMCP) under OAR Chapter 690, Division 86 that grants access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7).

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 the water to beneficial use under Permit S-53683 from October 1, 2004, to October 1, 2030.

Subject to the following conditions:

⁶ For permits applied for or received on or before July 9, 1987, upon complete development of the permit, you must notify the Department that the work has been completed and either: (1) hire a water right examiner certified under ORS 537.798 to conduct a survey, the original to be submitted as required by the Department, for issuance of a water right certificate; or (2) continue to appropriate water under the water right permit until the Department conducts a survey and issues a water right certificate under ORS 537.625.

CONDITIONS

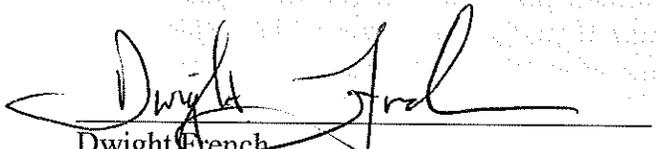
1. Development Limitations

A maximum diversion of 646 AF of water is currently allowed under Permit S-53683. Any diversion of water beyond 646 AF (not to exceed the maximum amount authorized under the permit, being 4100 AF) shall only be authorized upon issuance of a final order approving a Water Management and Conservation Plan (WMCP) under OAR Chapter 690, Division 86 that authorizes access to a greater rate of diversion of water under the permit consistent with OAR 690-086-0130(7). The required WMCP shall be submitted to the Department within 3 years of this Final Order. The amount of water used under Permit S-53683 must be consistent with this and subsequent WMCP's approved under OAR Chapter 690, on file with the Department.

The Development Limitation established in the above paragraph supersedes any prior limitation of the diversion of water under Permit S-53683 that has been established under a prior WMCP or Extension final order issued by the Department.

The deadline established in the Extension Final Order for submittal of a WMCP shall not relieve a permit holder of any existing or future requirement for submittal of a WMCP at an earlier date as established through other orders of the Department. A WMCP submitted to meet the requirements of the final order may also meet the WMCP submittal requirements of other Department orders.

DATED: September 10, 2024


Dwight French
Water Right Services Division Administrator

*If you have any questions,
please check the information
box on the last page for the
appropriate names and phone
numbers.*

Protests

Pursuant to OAR 690-315-0060(1), 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. Protests must be received by the Water Resources Department no later than **October 25, 2024**, at this address: Oregon Water Resources Department, Water Right Services Division, 725 Summer St NE, Suite A, Salem, OR 97301-1266. Protests may not be submitted by electronic mail. OAR 690-002-0025(3).

Protests must be in writing and include all of the following:

- The name, address, and telephone number of the protestant

- A detailed description of the protestant'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
- A detailed description of how the action proposed in the proposed final order would impair or be detrimental to the protestant's interest
- A detailed description of how the proposed final order is in error or deficient, and how to correct the alleged error or deficiency
- If the applicant protests, a statement of whether a hearing is requested
- Citation of legal authority supporting the protestant, if known
- Proof of service of the protest on the water right permit holder, if protestant is other than the water right permit holder, and
- If you are the applicant, the protest fee of \$480 required by ORS 536.050; and
- If you are not the applicant, the protest fee of \$950 required by ORS 536.050.

Within 60 days after the close of the period for requesting a contested case hearing, the Director shall either issue a final order on the extension request, or schedule a contested case hearing if a protest has been submitted, and, upon review of the issues, the Director finds there are significant disputes related to the proposed agency action; or, the applicant submits a written request for a contested case hearing within 30 days after the close of the period for submitting protests. The hearing will be conducted as provided in Oregon Revised Statutes (ORS) Chapter 183, and Oregon Administrative Rules (OAR) 137-003-0501 to 137-003-0700.

If the applicant does not request a hearing within 30 days after the close of the protest period, or if the request for a hearing is withdrawn, or the Department or the administrative law judge is notified that the protestant will not appear, or the protestant fails to appear, at a scheduled hearing, the Director may issue a Final Order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default.

A party may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 137-003-0555, an agency representative may represent a partnership, corporation, association, governmental subdivision or public or private organization if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

Notice Regarding Servicemembers: Active-duty service members have a right to stay 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 800-452-8260, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

If you have any questions about statements contained in this document, please contact Jeffrey 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 Will Davidson at 503-507-2749.

If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0801.

Address any correspondence to: Water Right Services Division
725 Summer St NE, Suite A
Salem, OR 97301-1266

Fax: 503-986-0901
