

**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 S-35791, Water Right Application S-39223) PROPOSED FINAL
in the name of Powder Valley Water Control District) ORDER

Permit Information

Application:	S-39223
Permit:	S-35791
Basin:	Powder / Watermaster District 8
Date of Priority:	October 31, 1963
Source of Water:	Wolf Creek Reservoir, Wolf Creek and Anthony Fork, a tributary of Powder River
Purpose of Use:	Irrigation and Recreation
Maximum Rate/Volume:	11,100 AF (10,350 AF for Irrigation and 750 AF for Recreation) and 170 cfs (140 cfs from Anthony Fork and 30 cfs from Wolf Creek)

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 complete construction of the water system from October 1, 1986, to October 1, 2028.
- Grant an extension of time to apply water to full beneficial use from October 1, 1986, to October 1, 2028.¹
- Make the extension subject to certain conditions set forth below.

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.230 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315

¹ Pursuant to ORS 537.230(4), upon the completion of beneficial use of water allowed under the permit, the permit holder 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 permit holder shall submit a map of the survey and the claim of beneficial use.

ACRONYM QUICK REFERENCE

Department – Oregon Water Resources Department
PFO – Proposed Final Order
cfs – cubic feet per second
AF – acre-feet
District – Powder Valley Water Control District

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 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) 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 October 31, 1963, Powder Valley Water Control District (District) submitted to the Department an application for a water use permit. The Application was assigned file S-39223.

2. On April 19, 1972, after several previous amended applications were submitted, the final amended application was received by the Department.
3. Permit S-35791 was issued by the Department on April 21, 1972. The permit authorizes the use of water from Anthony Creek (Fork) and Wolf Creek and 10,350 AF from storage in Wolf Creek Reservoir constructed under Application R-39222/Permit R-5776; being 140.0 cfs from Anthony Creek (Fork) for primary irrigation and supplemental irrigation of lands having a primary right from Wolf Creek; and 30 cfs from Wolf Creek for primary irrigation and supplemental irrigation of lands having a primary right from Anthony Creek (Fork); and 10,350 AF from storage in Wolf Creek Reservoir for supplemental irrigation; and 750.0 AF retained in minimum pool in reservoir for recreation. The permit specified actual construction was to begin by April 21, 1973, and construction of the water system was to be completed by October 1, 1975, and complete application of water was to be made on or before October 1, 1976.
4. On May 9, 1973, the Department received the Notice of Beginning of Construction (A-Form) stating the District began actual construction on July 25, 1972.
5. Three prior permit extensions have been granted for Permit S-35791. The most recent extension resulted in the completion dates for construction and full application of water to beneficial use by October 1, 1986.
6. On August 21, 1987, the Department issued a letter by certified mail, requesting proof of beneficial use be submitted, or cancellation proceedings for Permit S-35791 would begin.
7. On October 28, 1987, the Department received the Notice of Complete Application of Water to a Beneficial Use (C-Form) stating that the District completely applied the waters to a beneficial use in accordance with the terms of the permit in the summer of 1986.
8. On June 13, 1988, the Department received the Notice of Completion of Construction (B-Form) stating the District has completed the construction of the works described in the permit on October 1, 1975.
9. On June 13, 1988, the Department received the Notice of Complete Application of Water to a Beneficial Use (C-Form) stating that the District completely applied the waters to a beneficial use in accordance with the terms of the permit in June of 1976.
10. The permit holder, Powder Valley Water Control District, submitted an "Application for Extension of Time" to the Department on June 23, 2016, requesting the time to complete construction of the water system extended from October 1, 1986, to October 30, 2028, and the time to apply water to full beneficial use under the terms of

Permit S-35791 be extended from October 1, 1986, to October 30, 2028. This is the fourth permit extension requested for Permit S-35791.

11. Notification of the Application for Extension of Time for Permit S-35791 was published in the Department's Public Notice dated June 28, 2016. One comment was received regarding the extension application.
12. In summary, the commenter requests that the Department deny the extension request due to lack of due diligence in the development of the permit, the present demand of water for Bull Trout and other resident fish, instream water rights and water quality issues, and therefore cannot find good cause needed to grant the extension.

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 537.230², 537.248³ and/or 539.010(5)⁴.

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

13. On June 23, 2016, the Department received a completed Application for Extension of Time and the fee specified in ORS 536.050 from the District.

Start of Construction [OAR 690-315-0040(1)(b) and 690-315-0040(5)]

14. Actual construction of the water system began prior to the July 1972 deadline specified in the permit. According to the District, actual construction began on August 1, 1972.

According to the Notice of Beginning of Construction (A-Form) submitted to the Department May 9, 1973, actual construction began July 25, 1972. The Department has determined the District has satisfied the condition requiring beginning of construction of the water works.

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.

15. As of June 23, 2016, the District states the remaining work to be completed consists of completing construction of the water system and applying water to full beneficial use.

Given the amount of development left to occur, the Department has determined that the District's request to have until October 1, 2028, to complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit S-35791 is both reasonable and necessary.

²ORS 537.230 applies to surface water permits only.

³ORS 537.248 applies to reservoir permits only.

⁴ORS 539.010(5) applies to surface water and ground water permits.

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)]

16. The application states work was accomplished within the time allowed in the permit or previous extension as follows:
 - a. Construction of the water system began prior to the July 1972 deadline specified in the permit.
 - b. Work was completed during the original development time frame under Permit S-35791.
 - c. During the most recent extension period, being from May 10, 1983, to October 1, 1986, work accomplished consisted of the addition of privately owned irrigation equipment by landowners served by the District.
 - d. Since October 1, 1986, the Application states that additional on-farm equipment was added between 1986 and 2015.

The Department has determined that work has been accomplished within the time allowed in the permit and its most recent extension ending on October 1, 1986, which provides evidence of good cause and reasonable diligence from the appropriator towards the complete application of water to a beneficial use.

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

17. The Application states a maximum rate of 170 cfs of water has been diverted from Wolf Creek and Anthony Fork and 11,100 AF of water has been diverted from Wolf Creek Reservoir for primary irrigation of approximately 3,300 acres and supplemental irrigation of approximately 7,400 acres.
18. Beneficial use of water has been demonstrated under this permit, as all permit conditions were satisfied by October 1, 1986.
19. According to the Application delay of full beneficial use of water under Permit S-35791 was due, in part, to "The area to be irrigated is large enough that it has been under continuous development and change. Some land was converted from flood to sprinkler over time and other areas have changed from wheel lines to pivots. Some of these

changes continue to happen. In some cases the irrigated acres haven't changed but more efficient methods have been implemented."

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

20. The District's conformance with the permit or previous extension conditions. Permit S-35791 contains no conditions.

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

21. The Application states the District has invested about \$8,484,000, which is about 94 percent of the total projected cost for complete development of this project. The District anticipates an additional \$500,000 investment is needed for the completion of this project.

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

22. The Department has found good faith of the appropriator under Permit S-35791.

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)].

23. 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 S-35791; 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. Current Water Availability Analysis of Wolf Creek > Powder River – at Mouth (Watershed ID #72163) and Wolf Creek > Powder River – Above Clear Creek (Watershed ID # 30920323) indicate that no additional water is available during any month of the year. The points of diversion are located on Wolf Creek Reservoir, Wolf Creek and Anthony Fork, and are not located within a Withdrawn Area. Wolf Creek Reservoir, Wolf Creek and Anthony Fork are not located within or above a state or federal scenic waterway. Wolf Creek Reservoir, Wolf Creek and Anthony Fork are 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 are 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 diversion in a location listed by the Department of Environmental Quality as a water quality limited stream. Wolf Creek, River Mile 0 to 13.3 listed under Water Quality Limited for Habitat Modification and Flow Modification.

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

24. The Application does not identify other economic interests dependent on completion of the project 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)].

25. 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 1 of the "Conditions" section of this PFO to meet this condition.

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

26. 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)].

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

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

28. The Application does not identify any unforeseen events.

Denial of an Extension Would Result in Undue Hardship [OAR 690-315-0040(2)(i)].

29. The Application did not state if a denial of the extension would result in undue hardship.

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 537.230(3).
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 537.230 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. Based on Finding of Facts 14 through 22, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2028⁵, as required by OAR 690-315-0040(1)(c).

⁵Pursuant to ORS 537.230(3), 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.

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 District 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).

6. As required by OAR 690-315-0050(6) and as described in Finding 24, above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), progress checkpoints in order to ensure future diligence is exercised in the development and perfection of Permit S-35791.

continued on 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 complete construction of the water system under Permit S-35791 from October 1, 1986, to October 1, 2028.

Extend the time to apply water to beneficial use under Permit S-35791 from October 1, 1986, to October 1, 2028.

Subject to the following conditions:

CONDITIONS

1. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2021**, and by **October 1, 2026**. ***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 2, 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 **September 16, 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 District, if petitioner is other than the water right District; 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>

-
- If you have any questions about statements contained in this document, please contact Jeffrey D. Pierceall 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 503-986-0801.
 - Address any correspondence to : Water Right Services Division
725 Summer St NE, Suite A
Fax: 503-986-0901 Salem, OR 97301-1266
-