

**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-42690, Water Right Application S-55751 ) PROPOSED FINAL  
in the name of Powder Valley Water Control District ) ORDER

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**Permit Information**

Application: S-55751  
Permit: S-42690  
Basin: Powder / Watermaster District 7  
Date of Priority: April 25, 1977  
Source of Water: Anthony Creek and Wolf Creek Reservoir (constructed under Permit R-5776)  
Purpose of Use: Irrigation and supplemental irrigation  
Maximum Rate 144.83 cubic feet 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 complete construction of the water system from October 1, 1986 to October 1, 2021.
- Grant an extension of time to apply water to full beneficial use from October 1, 1986 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 537.230 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315

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<sup>1</sup> 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

District – Powder Valley Water Control District (PVWCD)

CWRE – Certified Water Right Examiner

COBU – Claim of Beneficial Use

FOF – Finding of Fact

## **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.

## **FINDINGS OF FACT**

### **Background**

1. On April 25, 1977, Powder Valley Water Control District (District) submitted to the Department an Application for a Water Use Permit. The Application was assigned file S-55751.
2. On February 6, 1978, the District submitted to the Department an amended Application for a Water Use Permit, superseding the Application received on April 25, 1977.

3. On March 1, 1978, Permit S-42690 was issued by the Department authorizing the use of up to 144.83 cfs of water from Anthony Creek and Wolf Creek Reservoir constructed under Permit R-5776, for irrigation and supplemental irrigation. The permit specified actual construction was to begin on or before March 1, 1979, and construction of the water system was to be completed on or before October 1, 1979, and complete application of water was to be made on or before October 1, 1980.
4. On November 8, 1979, the District submitted an Application for Extension of Time requesting the time to complete construction and accomplish beneficial use of water from October 1, 1979 to October 1, 1982. This is the first Extension request for Permit S-42690. In the 1979 Extension of Time Application, the District states they had installed gaging stations on Wolf Creek below the dam and on the Coughanour Canal where the extension (of the Coughanour Canal) enters Wolf Creek Reservoir; stabilized the Carnes/Shaw channel at Shingle Gulch gaging station; constructed Wolf Creek Dam; reconstructed the Wolf Creek Dam Outlet into Wolf Creek; extended the Coughanour Canal three miles to Wolf Creek Reservoir; installed the P-2 pipeline; and constructed the Maharry-Blevins Ditch.
5. On November 26, 1979, the Department sent a letter to the District stating that the 1979 Application for Extension of Time was received and the Application indicates reasonable diligence has been exercised towards completion of the proposed project.
6. On September 29, 1980, the Department issued an Order in the matter of Application for Extension of Time to complete construction work and make complete application of water under certain permits (Special Order Volume 33, Page 713) resulting in the completion to complete work and to apply water be extended to October 1, 1980.
7. On January 17, 1983, the District submitted an Application for Extension of Time requesting the time to complete construction and accomplish beneficial use of water from October 1, 1982 to October 1, 1986. This is the second Extension request for Permit S-42690. In the 1983 Extension of Time Application, the District states they have irrigated approximately 90% or 10,000 acres.
8. On April 28, 1983, the Department sent a letter to the District stating that the 1983 Application for Extension of Time was received and the Application indicates reasonable diligence has been exercised towards completion of the proposed project.
9. On May 10, 1983, the Department issued an Order in the matter of Application for Extension of Time to complete construction work and make complete application of water under certain permits (Special Order Volume 37, Page 262) resulting in the completion to complete work and to apply water be extended to October 1, 1986.
10. On January 14, 1987, the District submitted a letter stating "Construction and application of water under permits numbered [S-]35791 and [S-]42690 are completed." The letter was accompanied by FORM B - Notice of Completion of Construction and

FORM C - Notice of Complete Application of Water to a Beneficial Use, meeting the requirement under ORS 537.799.

11. ORS 537.799 states

“Any person who has applied for or received a permit or a transfer to appropriate water under ORS 537.211, 537.625 or 540.530 on or before July 9, 1987, shall notify the Water Resources 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 Water Resources Department, for issuance of a water right certificate; or

(2) Continue to appropriate water under the water right permit or transfer issued under ORS 537.211, 537.625 or 540.530 until the Water Resources Department conducts a survey and the commission issues a water right certificate under ORS 537.250 or 537.625.”

As of the date of this PFO, the Department has not conducted a survey of the water appropriated under Permit S-42690. It is the intent of the District to prepare and submit a Claim of Beneficial Use (COBU), prepared by a Certified Water Right Examiner for consideration of issuance of a Water Right Certificate.

12. On June 23, 2016, the District, submitted an “Application for Extension of Time” to the Department 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-42690 be extended from October 1, 1986, to October 30, 2028. The District states in the Application “The extension of time will allow the acres that are currently irrigated to be identified which will result in a more accurate irrigation certificate being produced.”
13. Notification of the Application for Extension of Time for Permit S-42690 was published in the Department’s Public Notice dated June 28, 2015. One comment was received regarding the Application.
14. 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.
15. On August 2, 2016, The Department issued a Proposed Final Order proposing to grant an Extension of Time to complete construction and apply water to full beneficial use under the terms and conditions of Permit S-42690 from October 1, 1986 to October 1, 2028.
16. On September 13, 2016, the Department issued an Order withdrawing Proposed Final Order on Application for Extension of Time for Permit S-42690.

**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> and/or 539.010(5)<sup>4</sup>.*

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

17. On June 23, 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)]**

18. Actual construction of the water system began prior to the March 1, 1979, deadline specified in the permit. The Application states that actual construction began in August of 1975.

The Department's record show the Application for a Water Use Permit submitted to the Department on February 6, 1978, states construction work "has begun".

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.*

19. As of June 23, 2016, "The [requested] 12-year extension of time from the current year is requested in order to give adequate time for the mapping and other necessary details to be completed. The job should be completed within a shorter time period, but 12 years should give a margin of safety for the proof to be completed"; and "Work to be done to prove up on the beneficial use of the water under this permit. It will be assumed that the current irrigations systems that are in place will be the extent of the acres to be irrigated under this permit."
20. The District wishes to extend the time to develop the full beneficial use under Permit S-42690 in order to provide a more accurate and descriptive COBU as the development of the Permit has undergone a number of efficiency and equipment upgrades to the system over the last 20+ years.
21. The Application states, "The PVWCD (District) Board would like to finally move forward and get this permitted water right into a water right certificate. The extension of time will allow the acres that are currently irrigated to be identified which will result in a more accurate irrigation certificate being processed."

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

22. On January 14, 1987, the Department received FORM C - Notice of Complete Application of Water to a Beneficial Use, for Permit S-42690 which states, "Powder Valley Water Control District ... completely applied the waters to a beneficial use in accordance with the terms and conditions ... on the 1<sup>st</sup> day of October, 1986." The Department has not performed the Final Proof Survey.

Given that the District states in the Application that beneficial use of 140.0 cfs of water has occurred on approximately 5750.0 acres and that the "current irrigation systems that are in place will be the extent of the acres to be irrigated under this permit", 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-42690 is both unreasonable and unnecessary.

The Department has determined that an Extension of Time of Permit S-42690 from October 1, 1986 to October 1, 2021, for the District to complete any necessary details needed to perfect the permit, including gaining approval of a Permit Amendment, if necessary, and to prepare a COBU, is 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)]**

23. The Application states work was accomplished within the time allowed in the permit or previous extension as follows:
- a. Actual Construction of the water system began prior to permit issuance. The Application states that actual construction began in August of 1975. According to the District, "Modification of existing irrigation systems began in order to prepare for the use of the stored water from Wolf Creek Reservoir and live flow from Anthony Creek."
  - b. Work was completed during the original development time frame under Permit S-42690. The work consisted of the start of the "P-2 Pipeline", the addition of on farm irrigation systems and the addition of privately owned irrigation systems added by landowners who are served by the District.

- c. During the first extension period, being from October 1, 1979 to October 1, 1980, work consisted of the addition of on farm irrigation systems by private landowner who are served by the District.
- d. During the most recent extension period, being from October 1, 1983, to October 1, 1986, work consisted of the addition of on farm irrigation systems by private landowner who are served by the District.
- e. Work accomplished since the last extension time period ending on October 1, 1986, consisted of the addition of on farm equipment between 1986 and 2015.

The Department has determined that work has been accomplished within the time allowed in the permit and previous extensions, 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)]**

- 24. The District states a maximum rate of 140.0 cfs of water has been diverted from Anthony Creek and Wolf Creek Reservoir constructed under Permit R-5776 for irrigation of 2,700 acres and supplemental irrigation of 3,050 acres.
- 25. According to the District, there has been no delay of full beneficial use of water under Permit S-42690, as the full rate of 140.0 cfs has been diverted. In the Application it states, "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."
- 26. Beneficial Use of water under Permit S-42690 has been demonstrated as the District has diverted and applied water in accordance with the permit.

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

- 27. The Permit S-42690 contains no conditions.

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

- 28. The Applications states the District has invested about \$5,554,000, which is about 88 percent of the total projected cost for complete development of this project. The District anticipates in the Application a potential additional \$750,000 investment is needed for the completion of this project.

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

- 29. The Department has found good faith of the appropriator under Permit S-42690.

**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)].

30. 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-42690; 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.
31. Current Water Availability Analysis of Wolf Creek > Powder River - at Mouth (Watershed ID #72163); North Anthony Fork > Anthony Fork – at Mouth (Watershed ID#72184); and Anthony Fork > North Powder River – at Mouth (Watershed ID#72165) indicate that no additional water is available during any month of the year.
32. The points of diversion are located on Anthony Creek and Wolf Creek Reservoir constructed under Permit R-5776, and are not located within a Withdrawn Area.
33. Anthony Creek and Wolf Creek Reservoir are not located within or above a state or federal scenic waterway.
34. Anthony Creek and Wolf Creek Reservoir 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.
35. The points of diversion are in a location listed by the Department of Environmental Quality as a water quality limited stream.
  - a. Anthony Creek, River Mile 0 to 16 listed under Water Quality Limited for Temperature.
  - b. Wolf Creek, River Mile 0 to 7.2 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)].**

36. No 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)].**

37. No other factors relevant to the determination of the market and present demand for water and power have been identified.

38. 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 mitigate the effects of the subsequent development on competing demands on the resource. The Department determined a "Certified Water Right Examiner COBU Condition" on this Extension of Time in order to ensure diligence is exercised in the completion of development and perfection of Permit S-42690. The Department determined this condition, specified under Item 1 of the "Conditions" section of this PFO is necessary due to the District's request for an Extension of Time to identify and correct any deficiencies in the development of the water right.

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

39. 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)]**

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

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

41. No unforeseen events have been identified.

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

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

**Summary of the Departments Determination**

Based on information provided by the District in the Application, the request for an Extension of Time is to provide time for the District to complete the COBU and to remedy any unforeseen circumstances which may arise during the mapping and report preparation (FOF 12). As it was the Department's obligation to prepare a Final Proof Survey upon notification from the District of complete application of water to a beneficial use (FOF 11 & 22), and the District submitted the required notification to the Department on January 14, 1987 (FOF 10 & 22), it is reasonable to grant the extension until October 1, 2021, to provide adequate time for the district to identify and correct and deficiencies in the development of the water right; and prepare and submit a COBU (FOF 22). It is the intent of the District to prepare and submit a COBU, prepared by a Certified Water Right Examiner for consideration of issuance of a Water Right Certificate.(FOF 11, 12 19, & 22). Approval of the Extension of Time, conditioned to require the

District to submit a Claim of Beneficial Use prepared by a CWRE, will result in a more accurate and descriptive Certificate of Water Right describing the beneficial use of the water to the extent in which it has been developed. (FOF 38)

### **CONCLUSIONS OF LAW**

1. The District is entitled to apply for an extension of time to complete construction and completely apply water to the full beneficial use pursuant to ORS 537.230(3).
2. The District has submitted a complete Application for Extension and the fee specified in ORS 536.050, as required by OAR 690-315-0040(1)(a).
3. The District complied with the construction timeline requirements to begin construction as required by ORS 537.230, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. Based on Finding of Facts 17 through 29, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2021<sup>5</sup>, as required by OAR 690-315-0040(1)(c).
5. The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and fair and reasonable return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the permit holder had no control, whether denial of the extension will result in undue hardship to the applicant and whether there are no other reasonable alternatives for meeting water use needs, any other factors relevant to a determination of good cause, and has determined that the applicant has shown that good cause exists for an extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).
6. As allowed by OAR 690-315-0050(5) and as described in Finding 38, above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), upon the completion of beneficial use of water allowed under the permit, the District shall hire a certified water rights examiner to survey the appropriation. Within one year after the date allowed for the complete application of water to a beneficial use, the District shall submit a map of the survey and a new or revised COBU as deemed appropriate by the Department.

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<sup>5</sup>Pursuant 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.

## 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-42690 from October 1, 1986 to October 1, 2021.

Extend the time to apply water to beneficial use under Permit S-42690 from October 1, 1986 to October 1, 2021.

Subject to the following conditions:

### CONDITIONS

**1. Certified Water Right Examiner COBU**

The District shall submit a Claim of Beneficial Use, which includes a map and report, prepared by a Certified Water Rights Examiner meeting the minimum requirements under OAR 690-014-0100 through OAR 690-014-0170 by October 1, 2022.

DATED: November 1, 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 **December 15, 2016**, being 45 days from the date of publication of the proposed final order in the Department's weekly notice.

