

**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-50717, Water Right Application S-67687) PROPOSED FINAL
in the name of Powder Valley Water Control District) ORDER

Permit Information

Application:	S-67687
Permit:	S-50717
Basin:	Powder / Watermaster District 8
Date of Priority:	February 2, 1987
Source of Water:	North Powder River, Anthony Creek, Pilcher Creek, and Pilcher Creek Reservoir
Purpose of Use And Maximum Rate/Volume:	Irrigation and supplemental irrigation of 17665.9 Acres 375.6 cubic feet per second (cfs); being 25.6 cfs from North Powder River; 300.0 cfs from Anthony Creek; 50.0 cfs from Pilcher Creek; and 5910.0 Acre-Feet (AF) from Pilcher Creek Reservoir constructed under Permit R-8353

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, 1991 to October 1, 2021.
- Grant an extension of time to apply water to full beneficial use from October 1, 1991 to October 1, 2021.¹
- 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
District – Powder Valley Water Control District
CWRE – certified Water Right Examiner

cfs – cubic feet per second
AF – acre-feet
COBU – Claim of Beneficial Use

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 February 26, 1987, Powder Valley Water Control District (District) submitted to the Department an Application for a Water Use Permit. The Application was assigned file S-67687.

2. On August 30, 1989, Water Exchange Agreements were recorded (Volume 7, pages 2223 through 2239 of the Miscellaneous Records) setting forth terms to which the use of an equal amount of stored water from Pilcher Creek Reservoir to be provided in exchange for use of water from Anthony Creek allotted under Water Right Certificate 1529.
3. On August 31, 1989 Permit S-50717 was issued by the Department. The permit authorizes the use of up to 375.6 cfs of water; being 25.6 cfs from North Powder River, 300.0 cfs from Anthony Creek, 50.0 cfs from Pilcher Creek and 5,910.0 AF from Pilcher Creek Reservoir constructed under Permit R-8353, for irrigation and supplemental irrigation of 17,665.9 acres: being primary supply of water from Anthony Creek, supplemental supply from Pilcher Creek and Pilcher Creek Reservoir for the irrigation of 1,304.9 acres; use of water from Anthony Creek, Pilcher Creek and Pilcher Creek Reservoir for the supplemental irrigation of 6,249.6 acres; use of Pilcher Creek and Pilcher Creek Reservoir for supplemental irrigation of 8,587.0 acres; use of primary supply of water from North Powder River and supplemental supply from Anthony Creek, Pilcher Creek and Pilcher Creek Reservoir for the irrigation of 982.0 acres; use of primary supply of water from Anthony Creek and supplemental supply from Pilcher Creek Reservoir (Exchange) for the irrigation of 141.6 acres; use of a supplemental supply of water from Pilcher Creek Reservoir (Exchange) for the irrigation of 400.8 acres. The permit specified actual construction was to begin on or before August 31, 1990, and construction of the water system was to be completed on or before October 1, 1991, and complete application of water was to be made on or before October 1, 1992.
4. On September 27, 1989, the Department received the FORM B - Notice of Completion of Construction stating that the District completed construction or the works described in the permit on September 1, 1989.
5. On December 14, 1989, the Department received the FORM C - Notice of Complete Application of Water to a Beneficial Use stating that the District completely applied the waters to a beneficial use in accordance with the terms of the permit on December 1, 1989.
6. On January 8, 1990, the Department returned the FORM C - Notice of Complete Application of Water to a Beneficial Use to the District with a letter stating "We have also received word from our field inspector that all of the land has not been irrigated as intended."
7. On June 10, 1992, the Department received the FORM C - Notice of Complete Application of Water to a Beneficial Use stating that the District completely applied the waters to a beneficial use in accordance with the terms of the permit on June 1, 1992.
8. 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.”

9. On June 23, 2016, the permit holder, Powder Valley Water Control District (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, 1991, to October 30, 2028, and the time to apply water to full beneficial use under the terms of Permit S-50717 be extended from October 1, 1992, to October 30, 2028. This is the first permit extension requested for Permit S-50717.
10. Notification of the Application for Extension of Time for Permit S-50717 was published in the Department’s Public Notice dated June 28, 2016. One comment was received regarding the extension application.
11. 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.
12. 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-50717 from October 1, 1986 to October 1, 2028.
13. On September 13, 2016, the Department issued an Order withdrawing Proposed Final Order on Application for Extension of Time for Permit S-50717.

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)]

14. 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.

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.

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

15. Actual construction of the water system began prior to the August 31, 1990, deadline specified in the permit. According to the District, "The beginning of construction of Pilcher Creek Dam began in October of 1982. Modification of existing irrigation systems began in order to prepare for the use of the stored water. Many of the landowners had already added irrigation systems to their property in order to use water from Permit S-35791 and Permit S-42690 which may also supply water to the lands under this permit... The farm irrigation systems continued to be added and modified with time, even up to the present in order to increase the efficient use of irrigation water."

Information submitted to the Department states actual construction began on October 1, 1982. The Department record shows a FORM B - Notice of Completion of Construction received by the Department on September 25, 1989, stating the District completed construction of the works described in the permit on September 1, 1989. The Department has determined the permit holder 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.

16. 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."
17. The District wishes to extend the time to develop the full beneficial use under Permit S-50717 in order to provide a more accurate and descriptive Claim of Beneficial Use (COBU) as the development of the Permit has undergone a number of efficiency and equipment upgrades to the system over the last 20+ years.
18. 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."
19. On June 10, 1992, the Department received FORM C - Notice of Complete Application of Water to a Beneficial Use, for Permit S-50717 which states, "Powder Valley Water Control District ... completely applied the waters to a beneficial use in accordance with the terms and conditions ... on June 1, 1992." The Department has not performed the Final Proof Survey.

Given that the District states in the Application that beneficial use of 320.0 cfs has occurred on approximately 17,665.9 acres (including acres under the exchange), being 2,428.5 acres of primary irrigation and 15,237.4 acres of supplemental irrigation; and 5,910 AF of water have been stored in Pilcher Creek Reservoir, 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 30, 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-50717 is both unreasonable and unnecessary.

The Department has determined that an Extension of Time of Permit S-50717 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)]

20. 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 August 31, 1990, deadline specified in the permit.
 - b. Work was completed prior to permit issuance and during the original development time frame under Permit S-50717. The work consisted of construction of the Pilcher Creek Dam and the addition of on farm irrigation systems by private landowner served by the District.
 - c. Since October 1, 1992, the District states “In the last 25 years since the C-Date many of the irrigators that use water under this permit have continued to upgrade their irrigation systems to provide for more efficient means of irrigation. Many landowners have installed center pivot irrigation systems and there are still areas where efficiency upgrades can be made.”

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

21. The District states a maximum rate of 320.0 cfs of water has been diverted from the North Powder River, Anthony Creek and Pilcher Creek; and 5,910 AF of water have been diverted from Pilcher Creek Reservoir for irrigation of approximately 2,428.5 acres and supplemental irrigation of approximately 15,237.4 acres.
22. According to the District, there has been no delay in beneficial use of water under Permit S-50717, as the rate of 320.0 cfs and 5,910 AF of water 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."
23. Beneficial use of water under Permit S-50717 has been demonstrated under this permit as water was put to use under the terms of this permit by June 1, 1992.

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

24. Permit S-50717 contains no conditions.

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

25. The Application states the District has invested about \$7,516,500, which is about 91 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$750,000 investment is needed for the completion of this project.

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

26. The Department has found good faith of the appropriator under Permit S-50717.

The Market and Present Demands for Water [OAR 690-315-0040(2)(d-e)]

The Department's determinations of market and present demand for water or power to be supplied shall consider the requirements set forth under OAR 690-315-0040(4)(a-f). In accordance with OAR 690-315-0040(4), the Department shall consider, but is not limited to, the following factors when determining the market and the present demand for water or power to be supplied:

The amount of water available to satisfy other affected water rights and scenic waterway flows; special water use designations established since permit issuance, including but not limited to state scenic waterways, federal wild and scenic rivers, serious water management problem areas or water quality limited sources established under 33 U.S.C. 1313(d); or the habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife [OAR 690-315-0040(4)(a-c)].

27. 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-50717; 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.
28. Current Water Availability Analysis of Wolf Creek > Powder River - at Mouth (Watershed ID #72163); North Powder River > Powder River – above Anthony Fork (Watershed ID#72187); Anthony Fork > North Powder River – at Mouth (Watershed ID#72165); Powder River > Snake River – above Unnamed Stream (Watershed ID#72191); and North Powder River > Powder River – at Mouth (Watershed ID#72188) indicate that no additional water is available during any month of the year.
29. The points of diversion are located on North Powder River, Anthony Creek, Pilcher Creek, and Pilcher Creek Reservoir, and are not located within a Withdrawn Area.
30. The North Powder River, Anthony Creek, Pilcher Creek, and Pilcher Creek Reservoir are not located within or above a state or federal scenic waterway.
31. North Powder River, Anthony Creek, Pilcher Creek, and Pilcher 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.
32. The points of diversion are in a location listed by the Department of Environmental Quality as a water quality limited stream.
 - a. North Powder River, River Mile 0 to 18.3 listed under Water Quality Limited for Temperature, Flow Modification and Habitat Modification.
 - b. North Powder River, River Mile 0 to 24.3 listed under Water Quality Limited for E.coli.
 - c. Anthony Creek, River Mile 0 to 16 listed under Water Quality Limited for Temperature.

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

33. 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)].

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

35. 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-35791. 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)]

36. 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)]

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

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

38. No unforeseen events have been identified.

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

39. 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 9). 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 8), and the District submitted the required notification to the Department on July 10, 1992, (FOF 7), it is reasonable to grant the extension until October 1, 2021, to provide adequate time for the District to identify and correct any deficiencies in the development of the water right; and prepare and submit a COBU (FOF 16, 17, 18, & 19). It is the intent of the District to prepare and submit a COBU, prepared by a Certified Water Right Examiner (CWRE) for consideration of issuance of a Water Right Certificate (FOF 8, 9, 16, 17, 18, & 19). Approval of the Extension of Time, conditioned to require the District to submit a COBU 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 35).

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 construction timeline requirements to begin actual construction required by to ORS 537.230, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. Based on Finding of Facts 12 through 19, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2021⁵, 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 required by OAR 690-315-0050(6) and as described in Finding 35, 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-50717.

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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.

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-50717 from October 1, 1991, to October 1, 2021.

Extend the time to apply water to beneficial use under Permit S-50717 from October 1, 1992, to October 1, 2021.

Subject to the following conditions:

CONDITIONS

1. Certified Water Right Examiner COBU

The permit holder 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.
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;

