

**Oregon Water Resources Department  
Water Rights Division**

Water Rights Application  
Number S-87121

Prior to the issuance of a permit, the Department must receive permit recording fees in the amount of \$300.00. Please include your application number on your check made out to the Oregon Water Resources Department.

**Proposed Final Order**

*Summary of Recommendation:* The Department recommends that the attached draft permit be issued with conditions.

*Application History*

On March 14, 2008, Fern Creek Vineyards LLC, (C/O) Premier Pacific Vineyards submitted an application to the Department for the following water use permit:

- Amount of Water: 3.0 CUBIC FEET PER SECOND (CFS) AND 180.0 ACRE FEET (AF)
- Use of Water: IRRIGATION USE ON 383.0 ACRES AND POND MAINTENANCE
- Source of Water: UNNAMED STREAM AND FERN CREEK RESERVOIR (CONSTRUCTED UNDER APPLICATION R-87120), TRIBUTARY TO COOPER CREEK
- Area of Proposed Use: POLK COUNTY WITHIN SECTION 16, SECTION 17 AND SECTION 21, TOWNSHIP 8 SOUTH, RANGE 5 WEST, W.M.

On December 12, 2008, the Department mailed the applicant notice of its Initial Review, determining that "*The use of 3.0 CFS from an unnamed stream, tributary to Cooper Creek, for irrigation on 383.0 acres from March 1 through October 31 is not allowed. The use of 1.8 CFS from an unnamed stream, tributary to Cooper Creek, for pond maintenance is allowable from October 1 through June 30. The use of 180.0 AF from Fern Creek Reservoir for irrigation on 383.0 acres is allowable from March 1 through October 31, contingent upon the approval of Application R-87120.*" The applicant did not notify the Department to stop processing the application within 14 days of that date.

On December 16, 2008, the Department gave public notice of the application in its weekly notice. The public notice included a request for comments, and information for interested persons about both obtaining future notices and a copy of the Proposed Final Order. No written comments were received within 30 days.

On January 15, 2009, the applicant amended the amount of water to be appropriated for irrigation from Fern Creek Reservoir under (Application R-87120) from 180.0 AF to 100.0 AF. Because the applicant amended the amount of water to be stored under (Application R-87120), pond maintenance use will be limited to 1.0 CFS.

The Department has determined an error was made in the Initial Review. The determinations of the Initial Review are hereby corrected to reflect that 3.0 CFS from an unnamed stream, tributary to Cooper Creek, for irrigation on 383.0 acres is allowable from March 1 through April 30.

In reviewing applications, the Department may consider any relevant sources of information, including the following:

- recommendations by other state agencies
- any applicable basin program
- any applicable comprehensive plan or zoning ordinance
- the amount of water available
- the rate and duty for the proposed use
- pending senior applications and existing water rights of record
- the Scenic Waterway requirements of ORS 390.835
- applicable statutes, administrative rules, and case law
- any comments received

#### *Findings of Fact*

The Willamette Basin Program allows irrigation and pond maintenance.

The Willamette Basin Program allows the use of water from an unnamed stream for irrigation from November 1 through April 30.

Senior water rights exist on unnamed stream, and Fern Creek Reservoir, tributaries to Cooper Creek, or on downstream waters.

Unnamed stream and Fern Creek Reservoir, tributaries to Cooper Creek are not within or above a State Scenic Waterway.

Stored water is available, subject to approval of Application (R-87120).

An assessment of water availability has been completed. This assessment compared a calculation of natural streamflow minus the consumptive portion of all relevant rights of record. A copy of this assessment is in the file. This assessment determined that water from unnamed stream is available for further appropriation (at an 80 percent exceedance probability) October 1 through June 30.

The Department finds that the amount of water requested, 100.0 AF from Fern Creek Reservoir and 3.0 CFS, being no more than 1.0 CFS for pond maintenance from an unnamed stream, is an acceptable amount.

In accordance with OAR 690-033-0330, an interagency team reviewed this proposed use for potential adverse impacts on sensitive, threatened and endangered fish populations. This team consisted of representatives from the Oregon Departments of Water Resources (WRD), Environmental Quality (DEQ), Fish and Wildlife (ODFW), and Agriculture. WRD and ODFW representatives included both technical and field staff. The interagency team did not recommend that additional limitations or conditions of use be imposed on this application.

*Conclusions of Law*

Under the provisions of ORS 537.153, the Department must presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310(12), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission.

The proposed use requested in this application is allowed in the Willamette Basin Program, or a preference for this use is granted under the provisions of ORS 536.310(12).

Water is available for the proposed use.

The proposed use will not injure other water rights.

The proposed use complies with other rules of the Water Resources Commission not otherwise described above.

The proposed use complies with the State Agency Agreement for land use.

For these reasons, the required presumption has been established.

Once the required presumption has been established, under the provisions of ORS 537.153(2) it may be overcome by a preponderance of evidence that either:

- (a) One or more of the criteria for establishing the presumption are not satisfied; or
- (b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest . . . or in a finding of the department that shows:
  - (A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and
  - (B) Specifically how the identified public interest would be impaired or detrimentally affected.

In this application, all criteria for establishing the presumption have been satisfied, as noted above. The presumption has not been overcome by a preponderance of evidence that the proposed use will impair or be detrimental to the public interest.

The Department therefore concludes that water is available in the amount necessary for the proposed use; the proposed use will not result in injury to existing water rights; and the proposed use will not impair or be detrimental to the public interest as provided in ORS 537.170.

When issuing permits, ORS 537.211(1) authorizes the Department to include limitations and conditions which have been determined necessary to protect the public interest. The attached draft permit is conditioned accordingly.

#### Recommendation

The Department recommends that the attached draft permit be issued with conditions.

DATED May 12, 2009



for Phillip C. Ward, Director  
Water Resources Department

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

#### Protests

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), you can protest this Proposed Final Order. Protests must be received in the Water Resources Department no later than **June 26, 2009**. Protests must be in writing, and must include the following:

- Your name, address, and telephone number;
- A description of your interest in the Proposed Final Order, and, if you claim to represent the public interest, a precise statement of the public interest represented;
- A detailed description of how the action proposed in this Proposed Final Order would impair or be detrimental to your interest;

- A detailed description of how the Proposed Final Order is in error or deficient, and how to correct the alleged error or deficiency;
- Any citation of legal authority to support your protest, if known; and
- If you are not the applicant, the protest fee of \$350 required by ORS 536.050 and proof of service of the protest upon the applicant.
- If you are the applicant, a statement of whether or not you are requesting a contested case hearing. If you do not request a hearing, the Department will presume that you do not wish to contest the findings of the Proposed Final Order.
- *If you do not protest this Proposed Final Order and if no substantive changes are made in the Final Order, you will not have an opportunity for judicial review, protest or appeal of the Final Order when it is issued.*

#### Requests for Standing

Under the provisions of ORS 537.153(7) (for surface water) or ORS 537.621(8) (for ground water), persons other than the applicant who support a Proposed Final Order can request standing for purposes of participating in any contested case proceeding on the Proposed Final Order or for judicial review of a Final Order.

Requests for standing must be received in the Water Resources Department no later than **June 26, 2009**. Requests for standing must be in writing, and must include the following:

- The requester's name, mailing address and telephone number;
- If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
- A statement that the requester supports the Proposed Final Order as issued;
- A detailed statement of how the requester would be harmed if the Proposed Final Order is modified; and
- A standing fee of \$100.00. If a hearing is scheduled, an additional fee of \$250.00 must be submitted along with a request for intervention.

After the protest period has ended, the Director will either issue a Final Order or schedule a contested case hearing. The contested case hearing will be scheduled only if a protest has been submitted and either:

- upon review of the issues, the director finds that there are significant disputes related to the proposed use of water, or
- the applicant requests a contested case hearing within 30 days after the close of the protest period.

If you do not request a hearing within 30 days after the close of the protest period, or if you withdraw a request for a hearing, notify the Department or the administrative law judge that you will not appear or fail 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 that you have submitted relating to this matter, as the record for purpose of proving a prima facie case upon default.

*This document was prepared by Joel Plahn. If you have any questions about any of the statements contained in this document I am most likely the best person to answer your questions. You can reach me at 503-986-0815.*

*If you have questions about how to file a protest or a request for standing, please refer to the respective sections in this Proposed Final Order entitled "Protests" and "Requests for Standing". If you have previously filed a protest and want to know its status, please contact Patricia McCarty at 503-986-0820.*

*If you have other questions about the Department or any of its programs please contact our Customer Service Group at 503-986-0801. Address all other correspondence to:*

*Water Rights Section, Oregon Water Resources Department, 725 Summer St NE Ste A, Salem OR 97301-1266, Fax: 503-986-0901.*

DRAFT

This is not a permit.  
STATE OF OREGON

DRAFT

COUNTY OF POLK

DRAFT PERMIT TO APPROPRIATE THE PUBLIC WATERS

THIS DRAFT PERMIT IS HEREBY ISSUED TO

FERN CREEK VINEYARDS LLC  
(C/O) PREMIER PACIFIC VINEYARDS  
PO BOX 3989  
NAPA, CA 94558

The specific limits and conditions of the use are listed below.

APPLICATION FILE NUMBER: S-87121

SOURCE OF WATER: FERN CREEK RESERVOIR (CONSTRUCTED UNDER APPLICATION R-87120) AND UNNAMED STREAM, TRIBUTARIES TO COOPER CREEK

PURPOSE OR USE: IRRIGATION USE ON 383.0 ACRES AND POND MAINTENANCE

MAXIMUM VOLUME/RATE: 100.0 ACRE FEET (AF) CONTINGENT UPON THE APPROVAL OF APPLICATION (R-87120) FOR IRRIGATION AND 3.0 CUBIC FOOT PER SECOND (CFS) BEING NO MORE THAN 1.0 CFS FOR POND MAINTENANCE

PERIOD OF USE:

OCTOBER 1 THROUGH JUNE 30 FOR POND MAINTENANCE FROM AN UNNAMED STREAM

MARCH 1 THROUGH APRIL 30 FOR IRRIGATION FROM AN UNNAMED STREAM

MARCH 1 THROUGH OCTOBER 31 FOR IRRIGATION FROM FERN CREEK RESERVOIR

DATE OF PRIORITY: MARCH 14, 2008

POINTS OF DIVERSION LOCATIONS:

UNNAMED STREAM - NENW, SECTION 21, T8S, R5W, W.M.; 1250 FEET SOUTH AND 1650 FEET EAST FROM NW CORNER, SECTION 21

FERN CREEK RESERVOIR - SENW, SECTION 16, T8S, R5W, W.M.; 2750 FEET NORTH AND 1760 FEET EAST FROM SW CORNER, SECTION 16

The amount of water used for irrigation under this right, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second and 2.5 acre-feet for each acre irrigated during the irrigation season of each year.

THE PLACE OF USE IS LOCATED AS FOLLOWS:

SW  $\frac{1}{4}$  NW  $\frac{1}{4}$  38.5 ACRES  
 SE  $\frac{1}{4}$  NW  $\frac{1}{4}$  40.0 ACRES & POND MAINTENANCE  
 NE  $\frac{1}{4}$  SW  $\frac{1}{4}$  40.0 ACRES & POND MAINTENANCE  
 NW  $\frac{1}{4}$  SW  $\frac{1}{4}$  35.6 ACRES & POND MAINTENANCE  
 SW  $\frac{1}{4}$  SW  $\frac{1}{4}$  38.0 ACRES  
 SE  $\frac{1}{4}$  SW  $\frac{1}{4}$  40.0 ACRES  
 SECTION 16

SE  $\frac{1}{4}$  NE  $\frac{1}{4}$  23.6 ACRES  
 NE  $\frac{1}{4}$  SE  $\frac{1}{4}$  27.5 ACRES  
 SE  $\frac{1}{4}$  SE  $\frac{1}{4}$  30.0 ACRES  
 SECTION 17

NE  $\frac{1}{4}$  NW  $\frac{1}{4}$  29.8 ACRES  
 NW  $\frac{1}{4}$  NW  $\frac{1}{4}$  40.0 ACRES  
 SECTION 21

TOWNSHIP 8 SOUTH, RANGE 5 WEST, W.M.

Measurement, recording and reporting conditions:

- A. Before water use may begin under this permit, the permittee shall install a totalizing flow meter at each point of diversion. The permittee shall maintain the meter(s) in good working order. The permittee shall keep a complete record of the amount of water used each month, and shall submit a report which includes the recorded water use measurements to the Department annually or more frequently as may be required by the Director. Further, the Director may require the permittee to report general water-use information, including the place and nature of use of water under the permit.
- B. The permittee shall allow the watermaster access to the meter(s); provided however, where any meter is located within a private structure, the watermaster shall request access upon reasonable notice.

Notwithstanding that Oregon Department of Fish and Wildlife has made a determination that fish screens and/or by-pass devices are not necessary at the time of permit issuance, the permittee may be required in the future to install, maintain, and operate fish screening and/or by-pass devices to prevent fish from entering the proposed diversion, and to provide adequate upstream and downstream passage for fish.

The permittee shall not construct, operate or maintain any dam or artificial obstruction to fish passage in the channel of the subject stream without providing a fishway to ensure adequate upstream and downstream passage for fish, unless the permittee has requested and been



granted a fish passage waiver by the Oregon Fish and Wildlife Commission. The permittee is hereby directed to contact an Oregon Department of Fish and Wildlife Fish Passage Coordinator, before beginning construction of any in-channel obstruction.

At the time of certification, the total rate allowed for pond maintenance may be reduced, in accordance with Departmental standards, so as to be commensurate with the certified volume(s) of the reservoir(s).

#### **STANDARD CONDITIONS**

Failure to comply with any of the provisions of this permit may result in action including, but not limited to, restrictions on the use, civil penalties, or cancellation of the permit.

Where two or more water users agree among themselves as to the manner of rotation in the use of water and such agreement is placed in writing and filed by such water users with the watermaster, and such rotation system does not infringe upon such prior rights of any water user not a party to such rotation plan, the watermaster shall distribute the water according to such agreement.

If the riparian area is disturbed in the process of developing a point of diversion, the permittee shall be responsible for restoration and enhancement of such riparian area in accordance with ODFW's Fish and Wildlife Habitat Mitigation Policy OAR 635-415. For purposes of mitigation, the ODFW Fish and Wildlife Habitat Mitigation Goals and Standards, OAR 635-415, shall be followed.

The use may be restricted if the quality of the source stream or downstream waters decreases to the point that those waters no longer meet existing state or federal water quality standards due to reduced flows.

This permit is for the beneficial use of water without waste. The water user is advised that new regulations may require the use of best practical technologies or conservation practices to achieve this end.

By law, the land use associated with this water use must be in compliance with statewide land-use goals and any local acknowledged land-use plan.

The use of water allowed herein may be made only at times when sufficient water is available to satisfy all prior rights, including prior rights for maintaining instream flows.

Completion of construction and application of the water shall be made within five years of the date of permit issuance. If beneficial use of

permitted water has not been made before this date, the permittee may submit an application for extension of time, which may be approved based upon the merit of the application.

Within one year after making beneficial use of water, the permittee shall submit a claim of beneficial use, which includes a map and report, prepared by a Certified Water Rights Examiner.

Issued \_\_\_\_\_, 2009

DRAFT - THIS IS **NOT** A PERMIT

\_\_\_\_\_  
for Phillip C. Ward, Director  
Water Resources Department

# Mailing List for PFO Copies

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Application #S-87121

PFO Date May 12, 2009

**Original mailed to applicant:**

PREMIER PACIFIC VINEYARDS, PO BOX 3989, NAPA, CA 94558

Copies sent to:

- WRD - File # S-87121
- Water Availability: Ken Stahr

Copies Mailed

By: \_\_\_\_\_  
(SUPPORT STAFF)

on: \_\_\_\_\_  
(DATE)

PFO and Map Sheet Copies sent to:

- WRD - Watermaster # 16

Copies sent to Other Interested Persons (CWRE, Agent, Well Driller, Commenter, etc.)

William Kness,

Stuntzner Engineering & Forestry, LLC, 2137 19<sup>th</sup> Avenue, Forest Grove OR 97116

Luckiamute Watershed Council, WOU, 345 North Monmouth Ave, Monmouth OR 97361

Gerald McDonald 3830 Mistletoe Rd Dallas, OR 97338

"\$10 LETTER" sent to Interested Persons who have not protested or paid for copies

CASEWORKER : Joel Plahn