

**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 R-13129, Water Right Application R-84645 ) PROPOSED FINAL  
in the name of Ste Michelle Wine Estates LTD ) ORDER

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**Permit Information**

Application:	R-84645
Permit:	R-13129
Basin:	Middle Willamette / Watermaster District 16
Date of Priority:	February 1, 2001
Source of Water:	Runoff captured in a ditch and three unnamed streams, tributaries of Ash Swale
Storage Facility:	Reservoir
Purpose or Use:	Irrigation to be appropriated under Application S-84646 (Permit S-53768); and wildlife
Maximum Volume:	125.0 Acre-Feet (AF) per year

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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 apply water to full beneficial use from October 1, 2011, to October 1, 2035.<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**

Application – Application for Extension of Time  
Department – Oregon Water Resources Department  
ODFW – Oregon Department of Fish and Wildlife  
PFO – Proposed Final Order  
AF – acre-feet  
Claim – Claim of Beneficial Use  
FOF – Finding of Fact  
POD – point of diversion  
ODFW – Oregon Department of Fish and Wildlife

## **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)** 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 therefor; and the income or use that may be required to provide fair and reasonable returns upon the investment.

**OAR 690-315-0040** provides that in order to approve an application for an extension of time to complete construction or apply water to full beneficial use, the Department shall make the findings in OAR 690-315-0040(1) including a finding that there is “good cause” to approve the extension. OAR 690-315-0040(2)-(4) contains the factors that the Department must consider to make findings that support a “good cause” determination.

**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**

1. On February 13, 2002, Permit R-13129 was issued by the Department to Premier Pacific Vineyards, Inc. The permit authorizes the storage of up to 125.0 AF of water in a Reservoir from runoff captured in a ditch and three unnamed streams, tributaries of Ash Swale, to be appropriated under Application S-84646 (Permit S-53768) for irrigation and wildlife. The permit specified the reservoir shall be filled and complete application of the stored water to the use was to be made on or before October 1, 2006.
2. One prior permit extension has been granted for R-13129. The most recent extension request resulted in the completion dates for construction and full application of water being extended from October 1, 2006, to October 1, 2011.
3. On January 30, 2007, an assignment from Premier Pacific Vineyards, Inc. to Amity Hills, LLC was recorded in the records of the Water Resources Department.
4. On March 15, 2011, a Claim of Beneficial Use (Claim) was submitted to the Department, claiming all development was complete, and Amity Hills, LLC was satisfied with the maximum storage capacity of the Reservoir, being 98.48 AF.
5. On April 18, 2014, an assignment from Amity Hills, LLC to Ste. Michelle Wine Estates LTD was recorded in the records of the Water Resources Department.
6. On February 10, 2017, the Department issued a Proposed Certificate proposing to certify the perfection of the storage of 98.48 AF of water in Amity Reservoir, from runoff captured in a ditch and three unnamed streams, tributaries of Ash Swale for irrigation to be appropriated under Application S-84646 (Permit S-53768); and wildlife.
7. On May 18, 2017, Doug N. Gore, Executive Vice President of Ste Michelle Wine Estates LTD, submitted a Request to Withdraw the Claim, and an "Application for Extension of Time" (Application) to the Department, requesting the time to apply water to full beneficial use under the terms and conditions of Permit R-13129 be extended from October 1, 2011, to October 1, 2035.
8. On May 23, 2017, notification of the Application for Permit R-13129 was published in the Department's Public Notice. No public comments were received.

### **Review Criteria [OAR 690-315-0040]**

*In order to approve an Application for an Extension of Time to complete construction and/or apply water to full beneficial use pursuant to ORS 537.230 or 537.630, or to begin construction, pursuant to ORS 537.248, the Department must make the findings in OAR 690-315-0040(1)(a) – (d).*

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

9. On May 18, 2017, the Department received a completed Application 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)]**

10. Construction of the reservoir began prior to October 1, 2006, as specified in the permit as being the date to apply water to full beneficial use. The permit holder states, construction of the Reservoir began August 16, 2004.
11. According to correspondence from the project engineer received by the Department on April 13, 2005, construction of the dam began August 16, 2004.

Based on Finding of Facts (FOF) 10 and 11, the Department has determined the permit holder has satisfied the condition requiring beginning of construction of the water works prior to October 1, 2006.

**Good Cause [OAR 690-315-0040(1)(d)]**

*The Department must find that there is "good cause" to approve the extension. In making a "good cause" finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).*

**Reasonable Diligence of the Appropriator [OAR 690-315-0040(2)(a)]**

*In order to make a finding of "good cause" to approve the extension, the Department shall consider whether the applicant has demonstrated "reasonable diligence" in previous performance under the permit. OAR 690-315-0040(2)(a). In determining "reasonable diligence", the Department shall consider, but is not limited to, the following factors: a) The amount of construction completed within the time allowed in the permit or previous extension; b) The amount of beneficial use made of the water during the permit or previous extension time limits; c) Water right holder conformance with the permit or previous extension conditions; and d) Financial investments made toward developing the beneficial use of water.*

**Amount of Construction [OAR 690-315-0040(3)(a)]**

*The amount of construction completed within the time allowed in the previous extension.<sup>2</sup>*

12. Construction of the Reservoir was completed prior to October 1, 2006.
13. During the most recent extension period, being from October 1, 2006, to October 1, 2011, previous permit holder, Amity Hills, LLC, stored additional water in the Reservoir, increasing the volume from 31.0 AF to 98.48 AF.

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<sup>2</sup> "Actual Construction" is defined in OAR 690-315-0020(3)(d)(A) and (B) as physical work performed toward completion of the water system which demonstrates the water right permit holder's good faith and intention to complete the project with reasonable diligence. Actual construction does not include planning a diversion system, formulating a business plan, securing financing, letting contracts, purchasing but not installing equipment, surveying, clearing land or planting crops.

14. No other work has been accomplished since October 1, 2006.

Based on FOF 13, the Application provides evidence of progress of physical work made towards completion of the water system, enough to qualify as the minimum necessary for the Department to find good cause and reasonable diligence towards complete application of water to a beneficial use.

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

*The water right permit holder's conformance with the previous extension conditions.*

15. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns.
16. On April 13, 2005, the Department received written certification from the engineer of record stating that construction was completed by November 16, 2004.
17. Department records show a meter was installed on point of diversion (POD) #1 in 2005, and on POD #2 in 2006.
18. The permit holder obtained written documentation, dated January 19, 2006, from Oregon Department of Fish and Wildlife (ODFW) waiving the condition to install screens or fish passage, as they are not required for Permit R-13129. This letter is in the file for Permit R-13129.
19. Department records show annual water use reports were submitted for water years 2008, and 2013 through 2016.

Based on FOF 15 through 19, the Department has determined that the permit holder has demonstrated compliance with permit conditions, prior to October 1, 2011, as required by Permit R-13129.

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

*The amount of beneficial use made of the water during the previous extension time limits.*

20. The Application states a maximum volume of 98.48 AF of water has been stored in the Reservoir, from runoff captured in a ditch and three unnamed streams, tributaries of Ash Swale, for irrigation to be appropriated under Application S-84646 (Permit S-53768); and wildlife.
21. According to the permit holder delay of full beneficial use of water under Permit R-13129 was due, in part, to unexpected wetland permitting issues which delayed the construction of the Reservoir by 2 years. The permit holder needs more time in which to develop the remaining 26.52 AF in the Reservoir.

Based on FOF 15 through 19, the Department has determined that beneficial use of water has been demonstrated under this permit as all permit conditions were satisfied by October 1, 2011.

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

22. The Application states that approximately \$4,655,000 has been invested, which is about 92 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$400,000 investment is needed for the completion of this project.

The Department has determined based on FOF 22, that the permit holder had made an investment, which provides evidence of good cause and reasonable diligence towards the complete application of water to a beneficial use.

**Reasonable Diligence of the Appropriator [OAR 690-315-0040(2)(a)]**

The Application provides evidence that work has been accomplished towards completion of the water system; the permit holder has demonstrated compliance with permit conditions; a financial investment has been made, and; beneficial use of water has been demonstrated. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit R-13129.

**The Market and Present Demands for Water [OAR 690-315-0040(4)(a-f)]**

*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:*

- *(a) The amount of water available to satisfy other affected water rights and scenic waterway flows;*
- *(b) 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);*
- *(c) The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife;*
- *(d) Economic investment in the project to date;*
- *(e) Other economic interests dependent on completion of the project; and*
- *(f) Other factors relevant to the determination of the market and present demands for water and power.*

**OAR 690-315-0040(4)(a)**

The amount of water available to satisfy other affected water rights and scenic waterway flows.

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 R-13129; 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.
24. Current Water Availability Analysis for Salt Creek, (Tributary to Yamhill River) at the mouth (watershed ID 73562) shows that no water is available during the months of July through October at the 50% exceedance level.

**OAR 690-315-0040(4)(b)**

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).

25. The points of diversion are located on tributaries of Ash Swale, and are not located within a Withdrawn Area.
26. Ash Swale is not located within or above a state or federal scenic waterway.
27. The points of diversion are not in a location listed by the Department of Environmental Quality as a water quality limited stream.

**OAR 690-315-0040(4)(c)**

The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife.

28. Ash Swale is 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 is located within a Sensitive, Threatened or Endangered Fish Species Area as identified by the Department in consultation with Oregon Department of Fish and Wildlife.

**OAR 690-315-0040(4)(d)**

Economic interests dependent on completion of the project.

29. The Application states an approximate total of \$4,655,000 has been invested in the project.

**OAR 690-315-0040(4)(e)**

Other economic interests dependent on completion of the project.

30. The Application states the continued development of the Reservoir will employ

numerous people, along with the labor involved to manage the farmed acres that utilizes the stored water for irrigation.

**OAR 690-315-0040(4)(f)**

**Other factors relevant to the determination of the market and present demand for water and power.**

31. The permit holder is located within the Amity Hills/Walnut Hill Groundwater Limited Area, which will make groundwater for irrigation unlikely; additionally there are no surface water rights available.

**OAR 690-315-0040(2)(f)**

**Fair Return Upon Investment**

32. The Application states that expanding the Reservoir to the full amount of water authorized by the permit, being 125.0 AF, will increase the likelihood of planting an additional 93.0 acres of vineyard, which can increase yearly gross revenue by \$1.1 million, and create an additional \$3.5 million in wine sales.

**OAR 690-315-0040(2)(g)**

**Other Governmental Requirements**

33. The Application states the previous permit holder experienced a 2 year delay in construction of the reservoir, due to unexpected wetland permitting issues with Oregon Department of State Lands.

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

34. The Application did not identify any unforeseen events.

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

35. The Application states a denial of the extension would result in the inability of the permit holder to expand the storage capacity of the Reservoir. The permit holder would have to use the 98.48 AF already developed to accomplish primary irrigation of 170.0 primary acres, and supplemental irrigation of 43.6 acres authorized under Permit S-53768. This would be a threat to the health of the vines and quality of the wines, which could create significant economic hardship.

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

36. The Department has found good faith of the appropriator under Permit R-13129.

Based on FOF 10 through 13, 15 through 20, 22, and 29, the Department has determined that the applicant has shown good faith and reasonable diligence.



**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.*

37. In 2014, Ste. Michelle Wine Estates LTD purchased the property and determined that the continued development of the Reservoir to the maximum volume authorized by the permit, being 125.0 AF, was needed to continue development of Permit S-53768, which authorizes the appropriation of the stored water for irrigation.
38. As of May 18, 2017, the permit holder states the remaining work to be completed consists of developing the remaining 26.52 AF storage capacity of the reservoir to the full volume authorized, being 125.0 AF, and applying water to full beneficial use.
39. The permit holder is requesting to extend the date for complete application of the stored water to a beneficial use 24 years from their most recent completion date, being October 1, 2011. The amount of time requested shall allow for compliance of permit conditions as required by Permit R-13129:
  - “The completed structure shall not be enlarged, modified, altered or otherwise changed without the prior written approval of the Director of the Water Resources Department of the Director’s authorized representative. Except for routine repair and maintenance, plans and specifications prepared by an Oregon licensed engineer are required for any significant modification, alteration, or rehabilitation of the dam, spillway or appurtenant structures.”

Given the amount of development left to occur, the Department has determined that the permit holder’s request to have until October 1, 2035, to complete construction of the water system and to accomplish the application of water to beneficial use under the terms and conditions of Permit R-13129 is both reasonable and necessary.

**Good Cause [OAR 690-315-0040(1)(d)]**

*The Department must find that there is “good cause” to approve the extension. In making a “good cause” finding, the Department shall consider the requirements set forth under OAR 690-315-0040(2).*

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 apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).

## LIMITATIONS AND CONDITIONS

1. 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/or mitigate the effects of the subsequent development on competing demands on the resource. The Department determined the need to place a "Last Extension Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of the water use permit. This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary due to no additional work having been accomplished since October 1, 2006.
2. OAR 690-315-0050(6) requires 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 2 of the "Conditions" section of this PFO to meet this condition.

## CONCLUSIONS OF LAW

1. 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).
2. The Applicant complied with construction timeline requirements to begin construction as required by ORS 537.230, OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
3. Based on Finding of Facts 9 through 35, full application of water to beneficial use can be accomplished by October 1, 2035<sup>3</sup>, as required by OAR 690-315-0040(1)(c).
4. The Applicant can complete the project within the time period requested for the extension on the project, but the extension is conditioned to mitigate the effects of the subsequent development on competing demands on the resource and is granted only for the reasonable time necessary to complete water development and apply water to beneficial use. OAR 690-315-0050(5).
5. The Applicant has demonstrated good cause for the extension, but the extension must be conditioned to ensure this is the last extension granted in order to ensure future diligence; OAR 690-315-0050(5).

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<sup>3</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 apply water to beneficial use under Permit R-13129 from October 1, 2011, to October 1, 2035.

Subject to the following conditions:

### LIMITATIONS AND CONDITIONS

1. **Last Extension Condition**

This is to be the last extension of time granted for Permit R-13129. Any future extensions of time requests shall be denied.

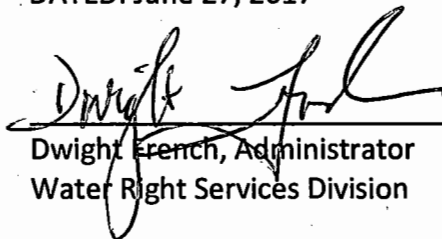
2. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2022, 2027, and 2032. 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: June 27, 2017

  
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 **August 11, 2017**, 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 permit holder, if petitioner is other than the water right permit holder; 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>

