

**Oregon Water Resources Department  
Water Right Services Division**

**Application for Extension of Time**

In the Matter of the Application for an Extension of Time ) PROPOSED  
for Permit S-54453, Water Right Application S-86406 ) FINAL  
in the name of Johan Vineyards, LLC ) ORDER

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**Permit Information**

Application: S-86406  
Permit: S-54453  
Basin: Middle Willamette / Watermaster District 16  
Date of Priority: August 24, 2005  
Source of Water: Reservoir E and Reservoir G, constructed under Permit R-11498; and Reservoir H, constructed under Permit R-14581, tributaries to Ash Swale  
Purpose or Use: Irrigation use on 174.5 acres  
Maximum Volume: 79.95 Acre Feet (AF) each year, being 11.25 AF from Reservoir E, 9.1 AF from Reservoir G and 59.6 AF from Reservoir H

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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, 2012, to October 1, 2025.
- Grant an extension of time to apply water to full beneficial use from October 1, 2012, to October 1, 2025.<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  
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)** 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(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 April 3, 2008, Permit S-54453 was issued by the Department. The permit authorizes the use of up to 79.95 AF of water each year, being 11.25 AF from Reservoir E, 9.1 AF from Reservoir G and 59.6 AF from Reservoir H for irrigation use on 174.5 acres. The permit specified completion of construction and complete application of water was to be made on or before October 1, 2012.
2. On October 23, 2017, the permit holder, Johan Vineyards, LLC, submitted an “Application for Extension of Time” (Application) to the Department, requesting the time to complete construction of the water system be extended from October 1, 2012, to October 1, 2025, and the time to apply water to full beneficial use under the terms and conditions of Permit S-54453 be extended from October 1, 2012, to October 1, 2025. This is the first permit extension requested for Permit S-54453.

3. On October 25, 2017, the permit holder submitted additional information to supplement their Application. The additional information was to clarify the amount of water used from each reservoir, and the work to be accomplished.
4. On October 31, 2017, notification of the Application for Permit S-54453 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)]**

5. On October 23, 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)]**

6. Construction of the water system began prior October 1, 2012, as specified in the permit as being the date to apply water to full beneficial use. Construction began April 29, 2009, with the installation of the irrigation system to supply and filter water to 24.3 acres of vineyard.

Based on Finding of Fact (FOF) 6, the Department has determined the permit holder has satisfied the condition requiring beginning of construction of the water works prior to October 1, 2012.

**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 permit.<sup>2</sup>*

7. Construction of the water system began prior to October 1, 2012.
8. Work was accomplished during the original development time frame under Permit S-54453. The work accomplished consisted of the installation of drip irrigation and a water filtration system.
9. No other work has been Since October 1, 2012.

The Department has determined based on FOF 8, and 9, that work has been accomplished prior to permit issuance and within the time allowed in the permit, which provides evidence of good cause and reasonable diligence towards the 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 permit conditions.*

**Reservoir E, Reservoir G, and Reservoir H**

10. The Department has considered the permit holder's compliance with conditions, and did not identify any concerns.

The Department has determined that the permit holder has demonstrated compliance with permit conditions as required by Permit S-54453:

- "Before water use may begin under this permit, the water user shall install a meter or other suitable measuring device as approved by the Director."

**Reservoir G**

11. The Department has considered the permit holder's compliance with conditions, and has identified the following concern: the record does not show that annual reports of the amount of water used each month have not been received by the Department.

The Department has determined based on FOF 11, that the permit holder has not demonstrated compliance with following permit conditions as required by Permit S-54453:

- "...The water user shall maintain the meter or measuring device in good working order, 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."

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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.

Beneficial use of water under this permit, therefore, has been demonstrated from Reservoir E and Reservoir H. In order to legally perfect the use of water under this permit, the permit holder must demonstrate that all conditions of the permit have been satisfied.

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

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

12. A maximum combined volume of 9.35 AF of water has been diverted, being 3.79 AF from Reservoir E, and 5.56 AF from Reservoir H, tributaries to Ash Swale for irrigation of 87.7 acres.

Based on FOF 11, the Department has determined that beneficial use of water has been demonstrated under this permit from Reservoir E and Reservoir H because all permit conditions were satisfied by October 1, 2012.

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

13. The permit holder has invested approximately \$43,569, which is about 23 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$148,000 investment is needed for the completion of this project. OR An approximate total of \$673,569 has been invested. The costs included items associated with planting crops which are not “actual construction” under this permit and therefore are not counted towards development. After deducting these costs, the approximate total investment for “actual construction” to date is approximately \$43,569 which is about 22 percent of the total projected cost for complete development of this project. An additional \$148,000 investment is needed to complete this project, which includes developing additional acres for irrigation and filter installation.

The Department has determined based on FOF 13, 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 of progress towards completion of the water system; a financial investment has been made; the permit holder has demonstrated compliance with all permit conditions from Reservoir E and Reservoir H, and; beneficial use has been demonstrated from Reservoir E and Reservoir H. The Department has determined the applicant has demonstrated the minimum necessary for the Department to find reasonable diligence towards complete application of water to a beneficial use.

**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.

14. 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-54453; 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.
15. Current Water Availability Analysis has determined that 79.95 of water is available, being 11.25 AF from Reservoir E, and 9.1 AF from Reservoir G, constructed under Permit R-11498, and 59.6 AF from Reservoir H, constructed under Permit R-14581.

**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).

16. The points of diversion are located on tributaries to Ash Swale, and are not located within a Withdrawn Area.
17. Ash Swale is not located within or above a state or federal scenic waterway.
18. 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.

19. 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.

20. An approximate total of \$43,569 has been invested in the project.

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

Other economic interests dependent on completion of the project.

21. There are no other economic interests dependent on completion of the project identified.

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

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

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

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

23. The use and income from the permitted water development will likely result in reasonable returns upon the investment made to date. Future markets will determine the fair return upon investment, and recent demand growth for Oregon wines would indicate a positive return upon investment.

**Other Governmental Requirements [OAR 690-315-0042(2)(g)]**

24. Delay in the development of this project that was caused by other governmental requirements were not identified.

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

25. Unforeseen events extended the length of time needed to fully develop and perfect Permit S-54453, in that the permit holders were faced the Great Recession. As a result of the Great Recession of 2009-2012 the demand for wine and grapes declined significantly. This required the owner to reduce investment and development timelines at the vineyard in order to reduce his financial risk. The economy has improved recently as has demand for Oregon grapes and wine. As demand for wine follows current economic growth it now makes economic sense to continue the development of the vineyard in order to meet demand. If demand continues over the next 15 years the required return on investments will be met that restricted their ability to complete development of the project in a timely manner.

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

26. A denial of the extension would result in undue hardship, and that there are no other reasonable alternatives existing for meeting water use needs. The permit holder has been planning and setting aside resources to complete development of the vineyard.

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

27. The Application provides evidence of good faith of the appropriator under Permit S-54453.

Based on FOF 6, 7, 8, 10, 12, 13, and 20, 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.*

28. As of October 23, 2017, the permit holder states the remaining work to be completed consists of completing construction of the water system, which includes expanding the irrigation lines and installing filtration; meeting all permit conditions, including submitting annual water use reports for Reservoir G; and applying water to full beneficial use.

Given the amount of development left to occur, the Department has determined that the permit holder's request to have until October 1, 2025, 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-54453 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 complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).



## **LIMITATIONS AND CONDITIONS**

1. 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 1 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 6 through 27, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2025<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. OAR 690-315-0050(5).

**Continued on the following page**

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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 complete construction of the water system under Permit S-54453 from October 1, 2012, to October 1, 2025.

Extend the time to apply water to beneficial use under Permit S-54453 from October 1, 2012, to October 1, 2025.

Subject to the following conditions:

### LIMITATIONS AND CONDITIONS

1. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2023**. *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: December 5, 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 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 **January 19, 2018**, 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>

