

**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-11498, Water Right Application R-72658 ) PROPOSED FINAL ORDER  
in the name of Left Coast Cellars LLC, Conrad Koning, )  
Jack and Cheri La Rue, and Johann Vineyards )

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**Permit Information**

Application:	R-72658
Permit:	R-11498
Basin:	2 – Middle Willamette / Watermaster District 16
Date of Priority:	September 8, 1992
Source of Water:	Unnamed streams, tributaries of Ash Swale
Purpose of Use:	Stored water to be appropriated under Application S-72659, Permit S-51534, for irrigation, livestock water, and recreation
Maximum Volume:	218.2 Acre-Feet (AF), being 100.0 AF in Reservoir E, 100.0 AF in Reservoir F, 9.1 AF in Reservoir G, and 9.1 AF in 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, 1999 to October 1, 2020.
- Grant an extension of time to apply water to full beneficial use from October 1, 1999 to October 1, 2020.<sup>1</sup>
- Make the extension subject to certain conditions set forth below.

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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.

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

**ACRONYM QUICK REFERENCE**

Department – Oregon Water Resources Department

PFO – Proposed Final Order

cfs – cubic feet per second

gpm – gallons per minute

AF – acre-feet

**AUTHORITY**

**Generally, see ORS 537.230 and OAR Chapter 690 Division 315.**

**ORS 537.230(3)** provides in pertinent part that the Oregon Water Resources Department (Department) may, for good cause shown, order an extension of time within which irrigation or other works shall be completed or the right perfected. In determining the extension, the Department shall give due weight to the considerations described under ORS 539.010(5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right.

**ORS 539.010(5)** provides in pertinent part that the Water Resources Director, for good cause shown, may extend the time within which the full amount of the water appropriated shall be applied to a beneficial use. This statute instructs the Director to consider: the cost of the appropriation and application of the water to a beneficial purpose; the good faith of the appropriator; the market for water or power to be supplied; the present demands therefore; and the income or use that may be required to provide fair and reasonable returns upon the investment.

**OAR 690-315-0040** provides in pertinent part that the Water Resources Department shall make findings to determine if an extension of time may be approved to complete construction and/or apply water to full beneficial use.

**OAR 690-315-0050(5)** states that extension orders may include, but are not limited to, any condition or provision needed to: ensure future diligence; mitigate the effects of the subsequent development on competing demands on the resource; and periodically document the continued need for the permit.

## FINDINGS OF FACT

### Background

1. Permit R-11498 was issued by the Department on August 12, 1994. The permit authorizes storage of up to 218.2 AF, being 100.0 AF in Reservoir E, 100.0 AF in Reservoir F, 9.1 AF in Reservoir G, and 9.1 AF in Reservoir H, from unnamed streams, tributaries of Ash Swale, to be appropriated under Application S-72659, Permit S-51534, for irrigation, livestock water, and recreation. The permit specified actual construction was to begin by August 12, 1995, construction of the water system was to be completed by October 1, 1996, and complete application of water was to be made on or before October 1, 1997.
2. On January 24, 2002, a partial assignment from Conrad H. Koning to Michael A. Koning was recorded in the records of the Department.
3. On January 24, 2002, a partial assignment from Conrad H. Koning to Jack and Cheri La Rue was recorded in the records of the Department.
4. On April 11, 2005, a partial assignment from Michael A. Koning to Johan Vineyards, LLC was recorded in the records of the Department.
5. On April 11, 2005, a partial assignment from Conrad H. Koning to W.S. Investment Trust c/o Tom Sorenson, MGR, was recorded in the records of the Department.
6. On August 8, 2014, a Proposed Order of Certification to cancel the permit was issued, for non-compliance of a permit condition to submit annual water use reports prior to the complete application of water date.
7. On January 6, 2015, a partial assignment from W.S. Investment Trust to Left Coast Cellars was recorded in the records of the Department.
8. Two prior permit extensions have been granted for Permit R-11498. The most recent extension resulted in the completion dates for construction being extended from October 1, 1997 to October 1, 1999 and full application of water being extended from October 1, 1997 to October 1, 1999.
9. The permit holder, Luke McCollom, managing member of Left Coast Cellars, LLC, submitted an "Application for Extension of Time" to the Department on November 9, 2015, requesting the time to complete construction of the water system extended from October 1, 1999 to October 1, 2020 and the time to apply water to full beneficial use under the terms of Permit R-11498 be extended from October 1, 1999 to October 1, 2020.

10. Notification of the Application for Extension of Time for Permit R-11498 was published in the Department's Public Notice dated November 17, 2015. No public comments were received regarding the extension application.

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

*The time limits to complete construction and/or apply water to full beneficial use may be extended if the Department finds that the permit holder has met the requirements set forth under OAR 690-315-0040. This determination shall consider the applicable requirements of ORS 537.230<sup>2</sup>, 537.248<sup>3</sup> and/or 539.010(5)<sup>4</sup>.*

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

11. On November 9, 2015, the Department received a completed Application for Extension of Time and the fee specified in ORS 536.050 from the permit holder.

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

12. Actual construction of the water system began prior to the August 12, 1995 deadline specified in the permit. According to the permit holder, construction began May 1, 1994.

According to the Notice of Beginning of Construction (A-Form) submitted to the Department January 19, 1995, actual construction began September 15, 1994. 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.*

13. As of November 9, 2015, the permit holder states the remaining work to be completed consists of meeting all permit conditions, including reporting annual water use; completing construction of the water system; 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, 2020, 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-11498 is both 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).*

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<sup>2</sup>ORS 537.230 applies to surface water permits only.

<sup>3</sup>ORS 537.248 applies to reservoir permits only.

<sup>4</sup>ORS 539.010(5) applies to surface water and ground water permits.

**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)]**

14. The permit holder states work was accomplished within the time allowed in the permit or previous extension as follows:
  - a. Actual construction of the water system began prior to the August 12, 1995 deadline specified in the permit. According to the Notice of Beginning of Construction (A-Form) submitted to the Department January 19, 1995, actual construction began September 15, 1994.
  - b. Work was completed during the original development time frame under Permit R-11498.
  - c. During the most recent extension period, being from October 1, 1997, to October 1, 1999, no work was accomplished.
  - d. Since October 1, 1999, the permit holder has accomplished the following construction required under R-11498:
    1. Reported annual water use
    2. Inspection and repair of the dam
    2. Reservoir H was constructed
    3. Maintenance of the irrigation system

The Department has determined that work has been accomplished within the time allowed in the permit and the most recent extension, providing 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)]**

15. According to the water user, a maximum volume of 218.2 AF of water has been stored within the reservoirs.
16. Beneficial use of water has not yet been demonstrated under this permit because not all permit conditions were satisfied by October 1, 1999.
17. According to the permit holder delay of full beneficial use of water under Permit G-11498 was due, in part, to insufficient documentation and reporting of annual water use before 1999, by the previous owner. The permit holder needs more time in which to come into compliance with the conditions of the permit.

The Department has determined that annual water use reporting did not begin until after the complete application of water date, being October 1, 1999. Therefore, compliance with conditions of the permit have not been met.

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

18. The water right permit holder's conformance with the permit or previous extension conditions.
- a. The Department has considered the permit holder's compliance with conditions, and has identified the following concerns: (1) annual reports of the amount of water used each month from Reservoir H have not been received by the Department.
  - b. Beneficial use of water under this permit, therefore, has not yet been demonstrated. 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.

The Department has determined that this extension will allow the water use reports submitted after October 1, 1999, to satisfy compliance of the condition of submitting annual water use reports to the Department, in an effort to make proof of beneficial use of the water as required by Permit R-11498.

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

19. As of November 9, 2015, the permit holder states they have invested approximately \$558,238, which is the total projected cost for complete development of this project.

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

20. The Department has found good faith of the appropriator under Permit R-11498.

**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:*

21. 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)].

- a. 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-11498; 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. The points of diversion are located on tributaries of Ash Swale, and are not located within a Withdrawn Area. The tributaries of Ash Swale are not located within or above a state or federal scenic waterway, however, they 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. The points of diversion are not in a location listed by the Department of Environmental Quality as a water quality limited stream.
22. Other economic interests dependent on completion of the project [OAR 690-315-0040(4)(e)].
    - a. None have been identified.
  23. Other factors relevant to the determination of the market and present demand for water and power [OAR 690-315-0040(4)(f)].
    - a. None have been identified.
  24. 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 to ensure future diligence.

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

25. 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)]**

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

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

27. According to the permit holder, unforeseen events extended the length of time needed to fully develop and perfect Permit R-11498, in that the permit holders were faced with

Reservoir H not being constructed by the previous owner due to a lack of resources, and the permit holders were unaware of the conditions on the permit, which restricted their ability to complete development of the project in a timely manner.

### **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 begin actual construction timeline requirements pursuant to ORS 537.230 as required by OAR 690-315-0040(1)(b) and OAR 690-315-0040(5).
4. Completion of construction and full application of water to beneficial use can be accomplished by October 1, 2020<sup>5</sup>, as required by OAR 690-315-0040(1)(c).
5. The Department has considered the reasonable diligence and good faith of the appropriator, the cost to appropriate and apply water to a beneficial purpose, the market and present demands for water to be supplied, the financial investment made and fair and reasonable return upon the investment, the requirements of other governmental agencies, and unforeseen events over which the permit holder had no control, whether denial of the extension will result in undue hardship to the applicant and whether there are no other reasonable alternatives for meeting water use needs, any other factors relevant to a determination of good cause, and has determined that the applicant has shown that good cause exists for an extension of time to complete construction and apply water to full beneficial use pursuant to OAR 690-315-0040(1)(d).
6. As authorized in OAR 690-315-0050(5) and as described in Finding 24, above, the Department has established, as specified in the "Conditions" section of this PFO (Item 1), a "Last Extension Condition" in order to ensure future diligence is exercised in the development and perfection of Permit G-11498.

**Continued on the following page**

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<sup>5</sup>Pursuant to ORS 537.230(3), upon the completion of beneficial use of water allowed under the permit, the permittee shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permittee shall submit a map of the survey and a new or revised claim of beneficial use as deemed appropriate by the Department.



## PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department proposes to issue an order to:

Extend the time to complete construction of the water system under Permit R-11498 from October 1, 1999 to October 1, 2020.

Extend the time to apply water to beneficial use under Permit R-11498 from October 1, 1999 to October 1, 2020.

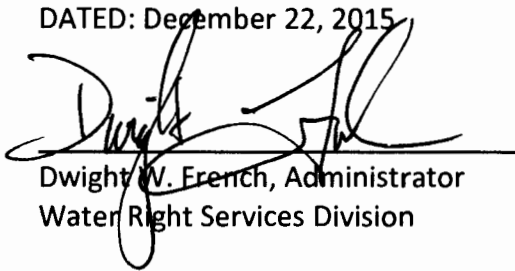
Subject to the following conditions:

### CONDITIONS

**1. Last Extension Condition**

This is to be the last extension of time granted for Permit G-11498. Any future extensions of time requests will be denied.

DATED: December 22, 2015



Dwight W. 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 **February 5, 2015**, 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 TO ACTIVE DUTY SERVICEMEMBERS:** Active Duty servicemembers have a right to stay these proceedings under federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.of.mil>

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- If you have any questions about statements contained in this document, please contact Corey A Courchane at (503) 986-0825.
  - If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Patricia McCarty at 503-986-0820.
  - If you have any questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0801.
  - Address any correspondence to :     Water Right Services Division  
   725 Summer St NE, Suite A  
   Salem, OR 97301-1266  
Fax: 503-986-0901
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Mailing List for Extension PFO Copies

PFO Date: December 22, 2015

Copies Mailed

Application: R-72658

By: \_\_\_\_\_

Permit: R-11498

On: \_\_\_\_\_

Original mailed to Applicant:

Left Coast Cellars LLC  
4225 N Pacific Highway-99W  
Rickreall, OR 97371

Copies sent to:

1. WRD - App. File R-72658/ Permit R-11498

2. Stuntzner Engineering & Forestry LLC  
Attn: Jeffrey Kee  
2137 19<sup>th</sup> Ave  
Forest Grove, OR 97116

3. JOHANN VINEYARDS  
4285 N PACIFIC HWY  
RICKREAL, OR 97371

CONRAD KONING  
5705 KINGSWAY  
ANACORTES, WA 98221

JACK LA RUE  
CHERI LA RUE  
8312 CADE CIRCLE  
HUNTINGTON BEACH, CA 92646

Fee paid as specified under ORS 536.050 to receive copy:

4. None

Receiving via e-mail (10 AM Tuesday of signature date)  
(DONE BY EXTENSION SPECIALIST)

5. WRD - Watermaster District 16, Joel Plahn

CASEWORKER: CAC