

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

Application for Extension of Time

In the Matter of the Application for an Extension of Time)
for Permit S-54692, Water Right Application S-86459) PROPOSED FINAL
in the name of Left Coast Cellars, LLC) ORDER

Permit Information

Application: S-86459
Permit: S-54692
Basin: Middle Willamette / Watermaster District 16
Date of Priority: November 8, 2005
Source of Water: Reservoir E, Permit R-11498; Reservoir I, Permit R-14300; Reservoir J, Permit R-14301; Reservoir K, Permit R-14302; Reservoir L, Permit R-14303; and Reservoir M, Permit R-14304; all tributaries of Ash Swale
Purpose or Use: Irrigation of 195.8 acres
Maximum Volume: 91.0 Acre Feet (AF) each year, being 52.5 AF from Reservoir E; 4.5 AF from Reservoir I; 9.0 AF from Reservoir J; 10.0 AF from Reservoir K; 8.0 AF from Reservoir L; and 7.0 AF from Reservoir M

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 December 27, 2015, to October 1, 2023.
- Grant an extension of time to apply water to full beneficial use from December 27, 2015, to October 1, 2023.¹
- Make the extension subject to certain conditions set forth below.

This Extension of Time request is being processed in accordance with Oregon Revised Statute 537.230 and 539.010(5), and Oregon Administrative Rule Chapter 690, Division 315

¹ Pursuant to ORS 537.230(4), upon the completion of beneficial use of water allowed under the permit, the permit holder shall hire a certified water rights examiner to survey the appropriation. Within one year after the complete application of water to a beneficial use (or by the date allowed for the complete application of water to a beneficial use), the permit holder shall submit a map of the survey and the claim of beneficial use.

ACRONYM QUICK REFERENCE

Agent – Jeffrey Kee
Application – Application for Extension of Time
Department – Oregon Water Resources Department
FOF – Finding of Fact
ODFW – Oregon Department of Fish and Wildlife
ODSL – Oregon Department of State Lands
PFO – Proposed Final Order
POU – Place of Use
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) 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 December 27, 2010, Permit S-54692 was issued by the Department. The permit authorizes the use of up 91.0 AF each year, being 52.5 AF from Reservoir E, Permit R-11498; 4.5 AF from Reservoir I, Permit R-14300; 9.0 AF from Reservoir J, Permit R-14301; 10.0 AF from Reservoir K, Permit R-14302; 8.0 AF from Reservoir L Permit R-14303; and 7.0 AF from Reservoir M, Permit R-14304; all tributaries of Ash Swale, for irrigation of 195.8 acres. The permit specified completion of construction and application of water was to be made within five years of the date of permit issuance, being December 27, 2015.
2. On March 14, 2017, Luke McCollom, manager and owner of Left Coast Cellars, 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 December 27, 2015, to October 1, 2023, and the time to apply water to full beneficial use under the terms and conditions of Permit S-54692 be extended from December 27, 2015, to October 1, 2023. This is the first permit extension requested for Permit S-54692.
3. On March 21, 2017, notification of the Application for Permit S-54692 was published in the Department's Public Notice. No public comments were received.
4. On March 15, 2017 and April 5, 2017, Jeffrey Kee (Agent), agent for the permit holder, submitted additional information to supplement their Application. The additional information was to clarify the acres irrigated and to identify the volume of water used as specified in the permit.

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 March 14, 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 Reservoir E, Reservoir I, and Reservoir J, the authorized sources of water under this permit; and installation of a meter began prior to permit issuance. The permit holder states, construction of Reservoir E began in 1996.

7. According to the Application for a Permit to Use Surface Water submitted on November 8, 2005, Reservoir I and Reservoir E were existing at the time of application.

Based on Finding of Fact (FOF) 6 and 7, the Department has determined the permit holder has satisfied the condition requiring beginning of construction of the water works.

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.²

8. Construction of the water system began prior to the deadline specified in the permit.
 - Construction of Reservoir E, Reservoir I, and Reservoir J began prior to December 27, 2015.
9. Work accomplished during the original development time frame under Permit S-54692 consisted of installation of irrigation delivery system and irrigation lines.

Based on Finding of Fact (FOF) 6 through 9, the Department has determined that work has been accomplished prior to permit issuance and within the time allowed in the permit period being from December 27, 2010 through December 27, 2015, 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 and previous extension conditions.

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

² "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.

Based on FOF 10, the Department has determined that the permit holder has demonstrated compliance with all permit conditions as required by Permit S-54692.

Beneficial Use of Water OAR 690-315-0040(3)(b): *the amount of beneficial use made of the water during the permit or previous extension conditions.*

11. The Application states a maximum combined volume of 56.9 AF of water has been diverted, being 52.4 AF from Reservoir E (Permit R-11498); and 4.5 AF from Reservoir I, (Permit R-14300) for irrigation of 71.0 acres.
12. According to the Agent, 24.0 acres of the 71.0 acres irrigated to date are outside of the authorized place of use (POU).

Based on FOF 11, the Department has determined that the use of water that occurred outside of the authorized POU under Permit S-54692 constitutes illegal use of water.

The Department has determined that this extension will allow the permit holder to apply for a Permit Amendment to request authorization of the 24.0 acres irrigated outside of the authorized POU, complete construction, obtain the full volume of water allowed under the permit and or to apply the water to full beneficial use on the remaining 124.8 acres.

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

13. The Application states the permit holder has invested approximately \$221,235 which is about 60 percent of the total projected cost for complete development of this project. The permit holder anticipates an additional \$150,000 investment is needed for the completion of this project.

Based on FOF 12, the Department has determined 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 on 47.0 acres. The irrigation on the 24.0 acres outside of the authorized POU does not demonstrate beneficial use under Permit S-54692. The Department has determined the applicant has demonstrated reasonable diligence in previous performance under Permit S-54692.

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.

The amount of water available to satisfy other affected water rights and scenic waterway flows OAR 690-315-0040(4)(a)

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-54692; 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 91.0 AF, being 52.5 AF from Reservoir E, Permit R-11498; 4.5 AF from Reservoir I, Permit R-14300; 9.0 AF from Reservoir J, Permit R-14301; 10.0 AF from Reservoir K, Permit R-14302; 8.0 AF from Reservoir L Permit R-14303; and 7.0 AF from Reservoir M, Permit R-14304, is available for use under Permit S-54692.

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

16. The points of diversion are located on tributaries of 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.

The habitat needs of sensitive, threatened or endangered species, in consultation with the Oregon Department of Fish and Wildlife OAR 690-315-0040(4)(c)

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.

Economic interests dependent on completion of the project OAR 690-315-0040(4)(d)

20. The Application states an approximate total of \$221,235 has been invested in the project.

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

21. The Application did not identify economic interests other than those of the applicant's that may be dependent on completion of the project.

Other factors relevant to the determination of the market and present demand for water and power OAR 690-315-0040(4)(f)

22. Water is available for use from Reservoirs K, L and M, however due to constraints on land use, as determined by Oregon Department of State Lands (ODSL), the construction of the reservoirs likely will not occur.

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

23. The Application states the vineyard has been profitable and will likely continue which will likely result in reasonable returns upon the investment made to date.

Other Governmental Requirements OAR 690-315-0040(2)(g)

24. The Application identifies a delay in the development of this project that was caused, in part, by Oregon Department of State Lands not allowing construction of Reservoirs K, L and M due to potential impact to wetland areas.

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

25. The Application did not identify any unforeseen events.

Denial of the Extension Will Result in Undue Hardship OAR 690-315-0040(2)(i)

26. The Application did state that a denial of the extension would result in undue hardship in that loss of the water right may cause excessive financial loss in the investment in grapes and the loss of utilization of irrigation system.

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

27. The Department has found good faith of the appropriator under Permit S-54692.

Based on FOF 6 through 10, 12 and 19, 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 March 14, 2017, the permit holder states the remaining work to be completed consists of submitting a Permit Amendment to authorize the 24.0 acres irrigated outside of the POU authorized under Permit S-54692, 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, 2023, 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-54692 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(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. Based on Findings of Fact 11, the Department determined the need to place a "Permit Amendment Condition" on this extension of time in order to ensure diligence is exercised in the development and perfection of water use permit. This condition, specified under Item 1 of the "Conditions" section of this PFO, was determined to be necessary because of the use of water on unauthorized place of use has occurred under this permit.
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 6 through 26, completion of construction and full application of water to beneficial use can be accomplished by October 1, 2023³, 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 an 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).

³Pursuant 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-54692 from December 27, 2015, to October 1, 2023.

Extend the time to apply water to beneficial use under Permit S-54692 from December 27, 2015, to October 1, 2023.

Subject to the following condition:

LIMITATIONS AND CONDITIONS

1. **Permit Amendment Condition**

The use of any water outside of the authorized POU under S-54692 is subject to this condition.

The permit holder shall submit an application for a Permit Amendment within six months of issuance of a Final Order to approve this Extension of Time. Use of water under permit S-54692 on lands not authorized shall be discontinued until such a time that a Permit Amendment authorizing the POU is approved.

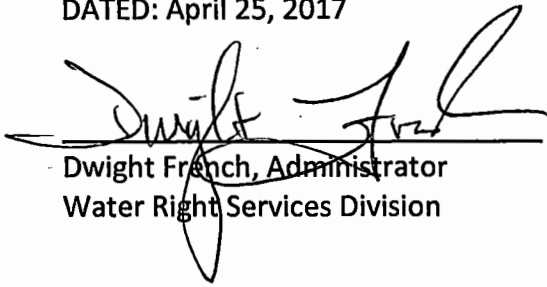
2. **Checkpoint Condition**

The permit holder must submit a completed Progress Report Form to the Department by **October 1, 2020. 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: April 25, 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 **June 9, 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>

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- If you have any questions about statements contained in this document, please contact Jeffrey D. Pierceall at (503) 986-0802.
 - 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
Fax: 503-986-0901 Salem, OR 97301-1266
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