

BEFORE THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

IN THE MATTER OF THE CONVERSION OF }
HYDROELECTRIC LICENSE HE 451 } PROPOSED FINAL ORDER
TO AN INSTREAM WATER RIGHT }

Summary of Recommendation

The Department recommends that Hydroelectric License HE 451 originally in the names of Frederick L. and Wilma F. Plog be converted to an instream right for 45 cubic feet per second (cfs) in the Odell Creek, tributary to Hood River in Hood River County, Oregon.

Findings of Fact

Hydroelectric License HE 451 issued in the name of Frederick L. and Wilma F. Plog authorized the use of 45 cubic feet per second (cfs) of water from Odell Creek, tributary to Hood River in Hood River County, Oregon.

Throughout its lifespan the project was assigned to a series of owners. On February 17, 2006, Ladd and Jeannette Henderson submitted a request to assign the license to James S. and Sharon S. Jans. The assignment was approved on February 24, 2006, Special Order Volume 68, Page 100.

The priority date of this right is March 11, 1983.

A concrete core rock-fill dam 15 feet in height located in the SW ¼ SW ¼, Section 14, Township 2 North, Range 10 East, W.M. diverted water through 1330 feet of penstock to the powerhouse located in the NW ¼ SW ¼, of said Section 14. The capacity of the powerhouse was 225 kilowatts.

The hydroelectric right was expressly made inferior in right and subsequent in time to any appropriation of water from this source which may hereafter be made for domestic, municipal, irrigation, or any other beneficial consumptive use.

The hydroelectric license for the project terminated December 31, 2010. Annual licenses were issued for several years while the owners decided whether to relicense or decommission the project. In the summer of 2016, the license holders ceased use of water for hydroelectric purposes and arranged for the project to be decommissioned and the stream restored to natural conditions.

According to the records of the Department, no part of the water right has been transferred under ORS 540.520 or 540.530. During the time of hydroelectric use, all the water was used

exclusively for hydroelectric purposes, no part of the right was used in conjunction with another water right, nor in conjunction with multi-purpose dam releases.

Authorities

ORS 543A.305(3) provides, in part, that after the use of water under a hydroelectric water right ceases up to the full amount of the water right shall be converted to an instream water right, upon a finding by the Water Resources Director that the conversion will not result in injury to other existing water rights. In making the evaluation, the director shall consider the actual use of the hydroelectric project and the resulting impacts on actual use by other existing water rights as of October 23, 1999. The director may include mitigation measures as conditions of the instream water right to avoid injury and to ensure the continuation of authorized water uses by other existing water rights.

OAR 690-054-0040(6):

The Director shall determine whether conversion of a Hydroelectric Water Right to an Instream Water Right will result in Injury. In making this determination, the Director shall consider:

(a) The Actual Use of the Project. To determine the Actual Use of the Project, the Director shall consider available documentation including, but not limited to: meter records of flow through a turbine, stream gage records, records of electricity production, seasonal restrictions on use, records of water historically supplied from storage, evidence that storage capacity has or has not been decommissioned, and other evidence of use by the Project;

(b) The resulting impacts on Actual Use by Other Existing Water Rights as of October 23, 1999. To determine the resulting impacts on Actual Use by Other Existing Water Rights as of October 23, 1999, the Director may consider:

(A) Whether Other Existing Water Rights as of October 23, 1999, are junior to and upstream of the Hydroelectric Water Right;

(B) Whether new regulation under Chapter 690, Division 250 would likely be required for the proposed conversion to an Instream Water Right, based upon historic streamflow records, regulation actions historically taken by the watermaster, or other data;

(C) Whether the Hydroelectric Water Right is Subordinated to Other Existing Water Rights as of October 23, 1999. **If Subordinated, there is a rebuttable presumption that no Injury will occur and that no Mitigation Measures are required to ensure the Continuation of Authorized Water Uses; . . . (emphasis added)**

Consideration of Actual Water Use

Article 3 of License HE 451 requires the licensee to comply fully with the order of the Water Policy Review Board dated October 14, 1983. The order provided for minimum flows in an agreement with the Oregon Department of Fish and Wildlife (ODFW). The order required minimum bypass flows of 10 cfs from December through June, and 7 cfs from July through November.

In practice, it is unlikely that in all months of the year after passing the minimum flows through the fish ladder, that there would be sufficient streamflow for the hydroelectric project to divert the full amount of the water right up to 45 cfs. However, one or more turbines could be shut off so that some power could be produced even at lower flows.

Consideration of Injury or Impacts to Other Existing Water Rights:

HE 451 was subordinated. It was expressly made inferior in right and subsequent in time to any appropriation of water from the same source which may hereafter be made for domestic, municipal, irrigation, or any other beneficial consumptive use.

The instream right as converted shall be subordinated in the same manner as the original license to all other beneficial consumptive uses. Thus no upstream water rights shall be regulated off in order to meet the instream right at the original point of diversion. All existing water rights shall be allowed to continue their existing uses.

Conclusions of Law

The hydroelectric water right under HE 451 is subject to conversion to an in-stream water right under ORS 543A.305(3).

Use of water under the hydroelectric water right has ceased for a period of more than five years.

Up to 45 cfs of water was used to produce hydroelectric power.

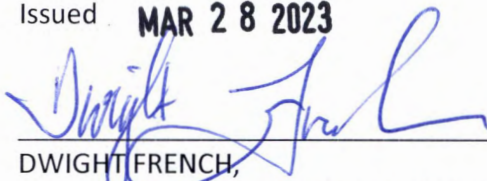
The hydroelectric water right has already been subordinated to all other beneficial consumptive uses. OAR 690-054-0040(6)(b)(C) provides a rebuttable presumption that if the water right is already subordinated no injury will occur and that no mitigation measures are required to ensure the continuation of authorized water uses. The presumption has not been rebutted. No additional mitigation measures will be required to avoid injury or to ensure the continuation of authorized water users.

Proposed Order:

The Department proposes 45 cfs of water authorized under Hydroelectric License HE 451 shall be converted to an instream water right at the location of the former point of diversion on Odell Creek, tributary to Hood River.

Hydroelectric License HE 451 is terminated. A new water right for instream use shall be issued with a priority date of March 11, 1983, and it shall be subordinated to other beneficial consumptive uses in the same manner as the original water right, per the attached draft proposed water certificate.

Issued **MAR 28 2023**



DWIGHT FRENCH,
Water Right Services Division, Administrator for
Douglas E. Woodcock, Acting Director,
Oregon Water Resources Department

Comments or Protests

Comments or protests to this Proposed Order must be received by the Oregon Water Resources Department by 5:00 PM on **Friday, May 12, 2023**, and must be in writing.

Comments or protests must state facts, which support the allegation that the proposed conversion of hydroelectric use to an instream use may result in injury to other existing water rights or cause impacts on actual use by other water rights existing as of October 23, 1999. Commenters may suggest mitigation measures as conditions of the instream water right to avoid injury and to ensure the continuation of authorized water uses by other existing water rights.

Protests must include the following:

1. Your name, address, and telephone number;
2. A description of your interest in the Proposed Final Order, and, if you claim to represent the public interest, a precise statement of the public interest represented;
3. A detailed description of how the action proposed in this Proposed Final Order would impair or be detrimental to your interest;
4. A detailed description of how the Proposed Final Order is in error or deficient, and how to correct the alleged error or deficiency;
5. Any citation of legal authority to support your protest, if known.

A protest must be accompanied by a \$950 fee as required under ORS 536.050(1)(j).

Requests for Standing

Any person who supports a Proposed Final Order can request standing for purposes of participating in any contested case proceeding on the Proposed Final Order or for judicial review of a Final Order. Requests for standing must be received in the Water Resources Department no later than **May 12, 2023**.

Requests for standing must be in writing, and must include the following:

- The requester's name, mailing address and telephone number;
- If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
- A statement that the requester supports the Proposed Final Order as issued;
- A detailed statement of how the requester would be harmed if the Proposed Final Order is modified; and
- A standing fee of \$270. If a hearing is scheduled, an additional fee of \$680 must be submitted along with a petition for party status.

Persons may mail or deliver comments or protests to:

Craig Kohanek
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

The proposed final order and supporting documents can be viewed at the Water Resources Department, 725 Summer Street NE, Salem, Oregon 97301. For Further Information Contact: Craig Kohanek, Ron.c.kohanek@water.oregon.gov

After the protest period has ended, the Director will either issue a Final Order or schedule a contested case hearing. The contested case hearing will be scheduled only if upon review of the issues, the director finds that there are significant disputes related to the proposed conversion.

If you do not request a hearing within 30 days after the close of the protest period, or if you withdraw a request for a hearing, notify the Department or the administrative law judge that you will not appear or fail to appear at a scheduled hearing, the Director may issue a Final Order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials that you have submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default. You may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 137-003-0555, an agency representative may represent a partnership, corporation, association, governmental subdivision or public or private organization if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

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>.

This document was prepared by R. Craig Kohanek. If you have any questions about any of the statements contained in this document, I can be reached at 503-979-3185.

If you have questions about how to file a protest or a request for standing, please refer to the respective sections in this Proposed Final Order entitled "Protests" and "Requests for Standing".

If you have previously filed a protest and want to know its status, please contact Patricia McCarty at 503-979-9160.

If you have other questions about the Department or any of its programs, please contact our Customer Service Group at 503-986-0801. Address all other correspondence to: Water Rights Section, Oregon Water Resources Department, 725 Summer St NE Ste A, Salem OR 97301-1266, Fax: 503-986-0901

STATE OF OREGON
COUNTY OF HOOD RIVER
PROPOSED CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

STATE OF OREGON
WATER RESOURCES DEPARTMENT
SALEM, OR 97301

confirms the right to use the waters of ODELL CREEK, a tributary of the HOOD RIVER, to maintain an instream flow for public use.

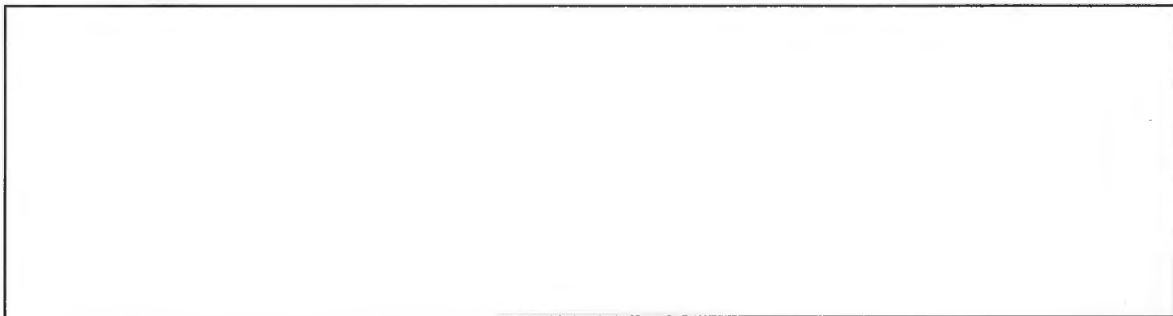
The right is established under Oregon Revised Statutes 543A.305 based on the conversion of Hydroelectric License HE 451 to an instream water right.

The date of priority is March 11, 1983.

The right is expressly made inferior in right and subsequent in time to any appropriation of water from this source which may hereafter be made for domestic, municipal, irrigation, or any other beneficial consumptive use.

The right is limited to not more than 45 CUBIC FEET PER SECOND.

This right is for flows to be maintained in Odell Creek at the site of the former point of diversion under HE 451 located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$, SECTION 14, TOWNSHIP 2 NORTH, RANGE 10 EAST, W.M.



Hydroelectric license HE 451 is terminated. This Water Right Certificate supersedes Hydroelectric License HE 451.

Issued

DWIGHT FRENCH, Administrator
Water Right Services Division, for
Douglas E. Woodcock, Acting Director,
Oregon Water Resources Department

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Recorded in State Record of Water Right Certificates Number .