

BEFORE THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

IN THE MATTER OF THE CONVERSION OF }
HYDROELECTRIC WATER RIGHT CERTIFICATE }
46965 IN THE NAME OF PACIFIC POWER } PROPOSED FINAL ORDER
AND LIGHT COMPANY TO AN INSTREAM RIGHT }
UNDER ORS 543A.305 & OAR 690-054 }

Summary of Recommendation

The Department recommends that Water Right Certificate 46965 in the name of Pacific Power and Light Company be converted to an instream right for 500 cubic feet per second (cfs) in the Hood River at the site of the former Powerdale dam with mitigation conditions.

Findings of Facts

The Pacific Power and Light Company (Company) perfected the use of 500 cubic feet per second (cfs) of water from the Hood River, at Powerdale Dam, for hydroelectric power purposes as evidenced by water right certificate 46965.

The priority date of this right is 1901 for 140 cfs of water and 1911 for an additional 360 cfs.

The location of the Powerdale diversion was 400 feet North and 50 feet West from the SE corner of Section 11, being within the SE ¼ SE 1/4 of Section 11, Township 2 North, Range 10 East, W.M.

On November 7, 2006, a large flood caused significant damage to the Powerdale hydroelectric project.¹ The flowline from the dam to the powerhouse was destroyed, so that hydroelectric use was no longer possible at the project without significant repairs. The Company determined that the hydroelectric project was uneconomical to repair or relicense and subsequently decommissioned the dam and powerplant facility.

On December 22, 2010, the Company submitted written consent for the hydroelectric water right under certificate 46965 to be converted to an instream water right pursuant to ORS 543A.305. (Exhibit 1)

Authorities

ORS 543A.305(3) provides, "Five years after the use of water under a hydroelectric water right ceases, or upon expiration of a hydroelectric water right not otherwise extended or reauthorized,

¹ PacifiCorp Energy letter to Federal Energy Regulatory Commission, February 1, 2007, http://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20070206-0191

or, at any time earlier with the written consent of the holder of the hydroelectric water right, up to the full amount of the water right associated with the hydroelectric project shall be converted to an in-stream 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 in-stream 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; or

(D) Any other available evidence that may assist the Director to make a finding on Injury;”

History of the Conversion Process

Following the receipt of written consent from the Company for the hydroelectric water right under certificate 46965 to be converted to an instream water right pursuant to ORS 543A.305, the Department issued a Draft Final Order on September 20, 2011. Comments were accepted until

October 20, 2011. On December 11, 2011, the Department issued a proposed final order to convert the water right of the decommissioned hydroelectric Powerdale project to an instream water right with certain conditions. Four protests were received on the proposed final order. A facilitator was engaged to assist in resolving the significant disputes, however no settlement was reached. The Department decided to ask the Water Resources Commission to begin a rulemaking process to set standards for the conversion process. The Commission adopted rules Chapter OAR 690 Division 054 on June 16, 2022.

The Department gave notice on August 16, 2022, that it would withdraw the proposed order of December 11, 2011, and restart the conversion process for this hydroelectric water right under the newly adopted rules OAR 690-054. This proposed final order supersedes the proposed final order of December 11, 2011.

As part of the notice given on August 16, 2022, the Director made preliminary findings that the full amount of the water right up to 500 cfs is eligible for conversion for all months of the year. 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-purposes dam releases. This proposed order confirms those findings.

Use of Hydroelectric Right and Streamflow Records

The Company provided the Department annual power claimant forms from 1912 to 2006 showing up to 500 cfs of water use for power purposes at the Powerdale project. The Powerdale dam provided only minimal storage, about 5 acre-feet.² The dam and storage capacity have been completely decommissioned.

The Company submitted data to the Department for water years 1998 to 2004 that shows water use for power purposes at the Powerdale project. (Exhibit 2) In practice, hydroelectric production at the Powerdale site followed a “run-of-the-river” pattern. Flows of 500 cfs were used in the winter and spring when streamflow was high. But, when less water was available in summer, then electricity production would be lower. The Federal Energy Regulatory Commission license for the project required the Company to bypass flows of 100 cfs or more to maintain water instream and was not protected by a water right under the State of Oregon’s water law. Therefore, the 100 cfs bypass flow was not a “right of record”, protected by the Water Resources Department. (ORS 540.045). In addition, the Department did not “regulate off” junior water users to enable the Company to bypass water downstream. Therefore, the Company used only the water that was available after all other uses upstream were satisfied; the hydroelectric project did not cause regulation of any upstream water user.

² Federal Energy Regulatory Commission, order amending licensing, accepting surrender . . . November 22, 2005,

https://elibrary.ferc.gov/eLibrary/idmws/file_list.asp?accession_num=20051122-3041

An excellent indicator of the amount of water that was available for use at the Powerdale site is the U.S. Geological Survey's streamflow gage approximately 2 miles upstream of Powerdale Dam – Hood River at Tucker Bridge, near Hood River, OR - Gage 14120000. Exhibit 3 shows the median statistics of daily mean flows at Tucker Bridge from October 1, 1964 to November 7, 2006.

https://nwis.waterdata.usgs.gov/or/nwis/dvstat/?referred_module=sw&site_no=14120000&por_14120000_113482=546312,00060,113482,1897-10-20,2022-03-22&start_dt=1965-01-01&end_dt=2006-11-07&format=html_table&stat_cds=p50_va&date_format=YYYY-MM-DD&rdb_compression=file&submitted_form=parameter_selection_list

Median statistics show flows greater than 600 cfs (500 cfs for the turbines and 100 cfs for bypass conditions) were available November through June. Occasionally 600 cfs was available for at least a few days in all months of the year. The power plant was ready and willing to use whatever flows were available to it.

There are no water rights authorized to withdraw water from the mainstem Hood River between Tucker Bridge and the former Powerdale dam site. Summertime flows at the Powerdale dam site are assumed to be 10 to 40 cfs greater than at Tucker Bridge because of inflows from Odell and Neal Creeks and from the Farmers Irrigation District's hydroelectric project.

Therefore, for purposes of determining whether streamflows can be met without injury to existing rights, streamflows recorded at Tucker Bridge are considered conservative estimates of streamflows at the Powerdale site.

Concerning the resulting impacts of the proposed conversion on actual use by other existing water rights as of October 23, 1999: the Department has records of water right certificates and permits that are junior to 1901 and 1911 that are upstream of the Powerdale point of diversion. A summary of other water rights is provided in Table 1. A full listing of authorized points of diversion in the Hood River basin is available at:

https://apps.wrd.state.or.us/apps/wr/wrinfo/wr_summary_pod.aspx.

Many of the water rights are reported on annually by the irrigation districts.

https://apps.wrd.state.or.us/apps/wr/wateruse_query/

New regulation during irrigation season would likely be required under Chapter 690, Division 250 for the proposed conversion to an Instream Water Right, based upon historic streamflow records and records of actual use of other existing water rights as of October 23, 1999. The water right was not subordinate to any other water right as originally decreed or certificated.

There is a preliminary finding that the conversion instream has the potential to injure other existing water rights as of October 23, 1999, and mitigation measures may be necessary to avoid injury and to ensure the continuation of other authorized water rights as of October 23, 1999.

The Middle Fork Irrigation District provided research papers addressing the loss of glacial ice that is predicted to occur over the next 50 years in the basin.

1. "Present-day and future contributions of glacier runoff to summertime flows in a Pacific Northwest watershed: Implications for water resources"; Anne W. Nolin, Jeff Phillippe, Anne Jefferson, and Sara L. Lewis, December 2010. (Nolin paper #1).

2. "Glacier melt makes a significant contribution to summertime streamflow in the Upper Middle Fork Hood River"; Anne W. Nolin and Jeff Phillippe; 2008. (Nolin paper #2).

Based on the projections of the loss of glacier melt in the Hood River basin over the next 50 years, Nolin estimated that in the future the minimum mean daily flow could be as low as 77 cfs for one August day within a one-hundred-year recurrence interval. The 50-year recurrence interval was estimated to have a minimum flow of 103 cfs for one day during the month of August. Nolin showed that the effects of glacial melting could result in about a 32 cfs less streamflow than the historical record alone would predict.

PROPOSED FINAL ORDER

This proposed final order supersedes the proposed final order of December 11, 2011.

Five hundred cubic feet per second (cfs) of water from the Hood River, at the site of the former Powerdale Dam is converted to an instream water right superseding water right certificate 46965.

The priority date of this right is 1901 for 140 cfs of water and 1911 for 360 cfs.

The location of the right is 400 feet North and 50 feet West from the SE corner of Section 11, being within the SE ¼ SE 1/4 of Section 11, Township 2 North, Range 10 East, W.M.

This right shall be subordinated to other existing authorized water uses with priority dates earlier than October 23, 1999.

This instream right is not additive to other existing instream rights (certificates 59747, 59679, nor 76155.)

Water right certificate 46965 is cancelled and a water right certificate for instream use shall be as attached.

AUG 01 2023

Issued _____



Dwight W. French,
Administrator Water Right Services, for
Doug E. Woodcock, Acting Director
Oregon Water Resources Department

IX. PROTESTS AND REQUESTS FOR STANDING

Comments or protests to this Proposed Order must be received by the Oregon Water Resources Department by 5:00 PM on September 29, 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.

Any person may submit a protest. Protests must include the following:

- Your name, address, and telephone number;
- 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;
- A detailed description of how the action proposed in the Proposed Final Order would impair or be detrimental to your interest;
- A detailed description of how the Proposed Final Order is in error or deficient, and how to correct the alleged error or deficiency;
- Any citation of legal authority to support your protest, if known;
- The protest fee of \$950 required by 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 September 29, 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 Servicemembers:

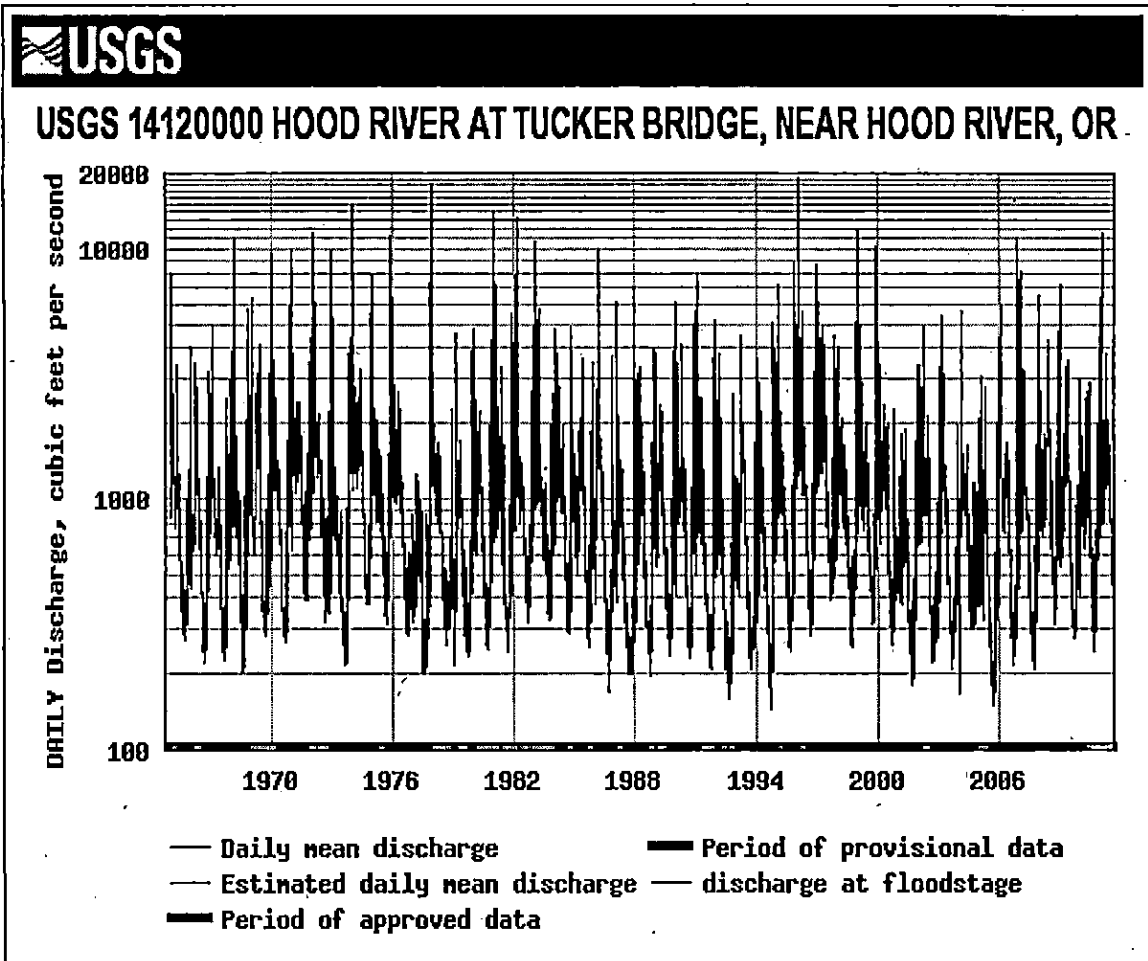
Active duty servicemembers have a right to stay a proceeding under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260 the Oregon Military Department at 503-584-3571, or the nearest United State Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a tollfree telephone number.

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 Will Davidson at 503-507-2749.

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

Exhibit 3 Continuous Streamflow Record at Tucker Bridge



STATE OF OREGON
COUNTY OF HOOD
DRAFT CERTIFICATE OF WATER RIGHT

THIS DRAFT CERTIFICATE ISSUED TO

STATE OF OREGON
WATER RESOURCES DEPARTMENT
SALEM, OR 97301

confirms the right to use the waters of HOOD RIVER, a tributary of the COLUMBIA RIVER to maintain an instream flow.

The right is established under Oregon Revised Statutes 543A.305 based on the conversion of a water right evidenced by certificate 46965 in the name of the Pacific Power and Light Company for hydroelectric power use in the Powerdale Plant to an instream water right.

This right is for flows to be maintained in the HOOD RIVER at the location of the FORMER POWERDALE DAM in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, SECTION 11, TOWNSHIP 2 NORTH, RANGE 10 EAST, W.M.

The following flows (cubic feet per second) are assigned instream:

The instream rights are subordinated to other authorized water uses with priority dates prior too October 23, 1999.

This instream right is not additive to other instream rights for Hood River.

This certificate is issued to convert the hydroelectric water right under certificate 46965 to an instream water right. Certificate 46965 is superseded by this certificate.

Issued _____

PROPOSED

Dwight W. French,
Administrator Water Right Services, for
Doug E. Woodcock, Acting Director
Oregon Water Resources Department

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

PROPOSED