

BEFORE THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

IN THE MATTER OF THE CONVERSION OF	}	
HYDROELECTRIC LICENSE HE 241	}	PROPOSED FINAL ORDER
TO AN INSTREAM WATER RIGHT	}	

Summary of Recommendation

The Department recommends that Hydroelectric License HE 241 originally in the names of Hillis Trenbeath be converted to an instream right for 4 cubic feet per second (cfs) in the Bronson Creek, tributary to Chehalem Creek in Yamhill County, Oregon.

Findings of Fact

Hydroelectric License HE 241, originally issued in the name of Hillis Trenbeath, authorized the use of 45 cubic feet per second (cfs) of water from Bronson Creek, tributary to Chehalem Creek in Yamhill County, Oregon.

The priority date of this right is April 3, 1977.

The license was effective as of the date of issuance and terminated on December 31, 1997. Under the provisions of ORS 543A.150 the expiration date has been extended until December 31, 2000.

The license was assigned to Robert and Robin Stern on January 7, 1997.

On December 30, 1997, Robert and Robin Stern applied to the Water Resources Department (Department) for reauthorization of the hydroelectric project. Reauthorization was completed and certificate 76688 was issued. It expired December 31, 2020.

A small rock and earthen dam was located in the SW ¼ SW ¼, Section 14, Township 3 South, Range 3 West, W.M. along with a wooden flume, a gate to control flume flow, and a water wheel water attached to a generator. The capacity of the powerhouse was six 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, 2020. An annual license was issued for a year while the owner, Robin Stern, decided whether to relicense or decommission the project. On August 18, 2021, John Zauner - ODFW and Craig Kohanek - OWRD visited HE 241 to confirm whether decommissioning measures for the hydroelectric project were

warranted. ODFW determined that the dam, constructed for the HE 241 Hydroelectric Project, is no longer a barrier to downstream or upstream fish passage as it seriously eroded and no longer blocks or impedes fish passage. Removal of the dam as a component of decommissioning was therefore unnecessary. Furthermore, during the site visit ODFW did not identify any items or measures for the project owner to complete for decommissioning of the project to be finished.

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

In practice, it is unlikely that in all months of the year that there would be sufficient streamflow for the hydroelectric project to divert the full amount of the water right up to 4 cfs.

Consideration of Injury or Impacts to Other Existing Water Rights:

The instream water right is 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, or for storage for such purposes, that was made prior to the date the most recent hydroelectric water right certificate was issued; January 2, 2001.

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 241 is eligible for conversion to an in-stream water right pursuant to OAR 690-054-0020 and ORS 543A.305.

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

Up to 4 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 4 cfs of water authorized under Hydroelectric License HE 241 shall be converted to an instream water right at the location of the former point of diversion on Bronson Creek, tributary to Chehalem Creek.

Hydroelectric License HE 241 is terminated. A new water right for instream use shall be issued with a priority date of April 3, 1977, 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 **NOV 07 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, January 5, 2024**, 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 **January 5, 2024**.

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 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