

BEFORE THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

IN THE MATTER OF THE CONVERSION OF	}	
HYDROELECTRIC WATER RIGHT CERTIFICATE	}	
77010 IN THE NAME OF JOSH & LINDA FREDRICKS	}	PROPOSED FINAL ORDER
TO AN INSTREAM RIGHT	}	
OAR 690-054	}	

Summary of Recommendation:

The Department recommends that Water Right Certificate 77010 in the name of Josh & Linda Fredricks be converted to an instream right for 3.4 cubic feet per second (cfs) in Cherry Creek, Tributary to Muddy Creek.

Findings of Fact:

Josh & Linda Fredricks perfected the use of 3.4 cubic feet per second (cfs) of water from Cherry Creek, tributary to Muddy Creek, for hydroelectric power purposes as evidenced by water right certificate 77010.

The priority date of this right is December 16, 1980.

The location of the diversion was SW ¼ SE 1/4 of Section 1, Township 15 South, Range 6 West, W.M., Benton County .

On March 18, 2019, the Fredricks' submitted their Notice of Intent (NOI), stating that they did not intend to seek reauthorization of the project and provided a project decommissioning plan. The Fredricks' NOI makes this project eligible for conversion from a hydroelectric right to an instream right Oregon Administrative Rules 690-054-0020(1)(b).

Notice for consideration was posted on the Department's public notice on July 18th, 2023. No comments were submitted during the 30-day comment period ending August 18, 2023.

Authorities:

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;"

Consideration of Actual Water Use:

The Director makes a preliminary finding that the full amount of the water right up to 3.4 cfs is eligible for conversion. 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.

3.4 cfs of water was used to produce hydroelectric power.

Consideration of Injury or Impacts to Other Existing Water Rights:

The instream water right as converted is expressly made inferior in right and subsequent in time to any authorized 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 July 24, 2001.

The instream right as converted shall be subordinated in the same manner as the previous license to all other authorized appropriation of water for beneficial consumptive uses or storage purposes made prior to July 24, 2001.

Conclusions of Law:

The hydroelectric water right under HE 293 is eligible for conversion to an instream water right pursuant to ORS 543A.305 and OAR 690-054-0020(1)(b).

Up to 3.4 cfs of water was used to produce hydroelectric power.

The hydroelectric water right has been subordinated to all other authorized appropriations of water for beneficial consumptive uses and storage purposes made prior to July 24, 2001. 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 3.4 cfs of water authorized under Hydroelectric License HE 293 shall be converted to an instream water right at the location of the former point of diversion on Cherry Creek, tributary to Muddy Creek.

Hydroelectric License HE 293 is terminated. A new water right certificate for instream use shall be issued with a priority date of December 16, 1980, it shall be subordinated to authorized appropriation of water for beneficial consumptive uses or storage purposes made prior to July 24, 2001, same as the previous water right, per the attached draft proposed water certificate.

Issued JAN 02 2024



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

Comments, Requests for Standing, and Protests:

Comments, requests for standing, or protests to this Proposed Order must be received by the Oregon Water Resources Department by 5:00 PM on **Friday, February 23, 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 **February 23, 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