

BEFORE THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON

IN THE MATTER OF THE CONVERSION OF	}	
HYDROELECTRIC LICENSE HE 298	}	PROPOSED FINAL ORDER
TO AN INSTREAM WATER RIGHT	}	

Summary of Recommendation:

The Department recommends that Hydroelectric License HE 298 be converted to an instream right for four (4) cubic feet per second (cfs) in Whiskey Creek, tributary to Parsons Creek in Lane County, Oregon.

Findings of Fact:

Hydroelectric License HE 298, originally issued in the name of Jack O. Barrowcliff, authorized the use of 4 cfs of water from Whiskey Creek, tributary to Parsons Creek in Lane County, Oregon.

The priority date of this right is November 26, 1980.

The license was effective as of the date of issuance and terminated on December 31, 2001.

On July 7, 1999, Jack O. Barrowcliff applied to the Water Resources Department (Department) for reauthorization of the hydroelectric project. Reauthorization was completed and certificate 76856 was issued. This license expired December 31, 2021.

On March 25, 2019, the Department received Mr. Barrowcliff's response to the Notice of Intent sent to him December 18, 2018. He stated that he would not be seeking reauthorization of the project and proposed decommissioning.

The project consisted of a concrete and steel intake box located in the NW ¼ SE ¼, Section 11, Township 16 South, Range 2 West, W.M., which was attached to a steel penstock that directed water to the turbine and generator in the powerhouse. The capacity of the project was 20.5 kilowatts.

The hydroelectric right was expressly made inferior in right and subsequent in time to any authorized appropriation of water from the same source made prior to April 3, 2001, and which may hereafter be made for domestic, municipal, irrigation, or any other beneficial consumptive use, or for storage for such purposes.

Thursday, September 29, 2022, John Zauner – ODFW, Chris Stine – ODEQ, and Craig Kohanek - OWRD visited the Project to determine if decommissioning measures for the hydroelectric

project were warranted. ODFW determined that the screened concrete intake collection and stilling box, which was embedded in Whiskey Creek, had to be removed. No other project features were identified for removal during the site visit. 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.

In October 2023 the Barrowcliff's removed the intake box/screen and a section of penstock. ODFW's John Cox and John Zauner visited the site after removal, and confirmed the fish passage conditions were satisfactory.

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:

The hydroelectric project diverted 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; April 3, 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 April 3, 2001.

Conclusions of Law:

The hydroelectric water right under HE 298 is eligible for conversion to an in-stream water right pursuant to OAR 690-054-0020 and ORS 543A.305.

On March 25, 2019, the Department received Mr. Barrowcliff 's reply to the Notice of Intent, sent him December 18, 2018, where he stated he did not intend to seek to reauthorize the project and proposed its decommissioning. OAR 690-054-0020(1)(b).

Up to 4 cfs of water was used to produce hydroelectric power.

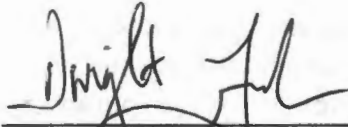
The hydroelectric water right has been subordinated to all other authorized appropriations of water for beneficial consumptive uses and storage purposes made prior to April 3, 2001. OAR 690-054-0040(6)(b)(C) provides a rebuttable presumption that if the water right is already subordinated no injury will 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 4 cfs of water authorized under Hydroelectric License HE 298 shall be converted to an instream water right at the location of the former point of diversion on Whiskey Creek, tributary to Parsons Creek.

Hydroelectric License HE 298 is terminated. A new water right certificate for instream use shall be issued with a priority date of November 26, 1980, it shall be subordinated to authorized appropriation of water for beneficial consumptive uses or storage purposes made prior to April 3, 2001, same as the previous water right, per the attached draft proposed water certificate.

Issued JAN 02 2024



DWIGHT FRENCH,
Water Right Services Division, Administrator for
Douglas 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.