



(1) Notwithstanding ORS 543.440, and subject to subsections (2) and (3) of this section, a license issued for a project under ORS 543.010 to 543.610 shall continue in effect following a transfer of the license, rights, or property of the project to a county if: . . .

- (a) The project is located in the Umatilla Basin.
- (b) The transfer of the license, rights or property is to Umatilla County.
- (c) The transfer occurred through the foreclosure of a tax lien; and
- (d) The transfer occurred on or before January 1, 2010.

The property in question meets all the requirements of the law, given the project is in the Umatilla Basin and was acquired by Umatilla County as the result of a foreclosure of a tax lien before January 1, 2010.

However, the timeframe for the project to be transferred to new ownership was limited.

(2) The license for a project described in subsection (1) of this section, and any water right that is included in the license, shall terminate:

. . . (b) Two years after transfer of the license, rights, or property of the project to Umatilla County, unless the county has transferred all county-held licenses, rights, and property of the project to a new owner that is unaffiliated with the county; or . . .

Umatilla County did not transfer ownership of the project within the two-year time period fixed in Oregon Laws 2010 Chapter 63. Therefore, the license is terminated according to ORS 543.440 and is eligible for conversion instream as provided under ORS 543A.305.

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.

Public notice was given on July 26, 2022, that the hydroelectric right was eligible for conversion to an instream water right with preliminary findings as required by OAR 690-054-0030.

Public notice was given on May 23, 2023, that the proposed final order and draft certificate for the hydroelectric right conversion to an instream water right was issued as required by OAR 690-054-0050. Comments were received from WaterWatch of Oregon and the Oregon Department of Fish and Wildlife and were considered by the Department.

### **Authorities**

ORS 543A.305(3) provides, "Five years after the use of water under a hydroelectric water right ceases, . . . up to the full amount of the water right associated with the hydroelectric project 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:

Actual use of water for hydroelectric purposes could only happen in conformance with Article 3 of the License, which required the licensee to comply fully with the order of the Water Policy Review Board dated February 24, 1983. The order provided for minimum flows and that the licensee cooperate with the Oregon Department of Fish and Wildlife (ODFW). The order required minimum bypass flows of 100 cfs from December through August, and 150 cfs from September through November. These flows were modified by a Settlement Agreement with the ODFW on October 8, 1985, to 200 cfs from September through November and 100 cfs for the remainder of the year.

Based on streamflow records for the Umatilla River, there would have been insufficient flow in



the river from July through November to meet the minimum bypass flows.<sup>1</sup> The instream flow requirements limited operation of the project to the months of December through June. In practice, between the years 1985 and 2002, under the direction of the watermaster, the panels for the diversion dam were removed from the river from July to about the middle of November to allow for open fish passage. (See location of temporary stream gage, UBBO in photo below.)<sup>2</sup> No water was diverted for power production July through November.



<sup>1</sup> OWRD Historical Streamflow Records Umatilla R 1992 to 2002 – Station is upstream of Boyd Project above several diversions. Temporary gaging for Boyd Project was discontinued in 2002.  
[https://apps.wrd.state.or.us/apps/sw/hydro\\_report/gage\\_summary.aspx?station\\_nbr=14031050&start\\_date=11/09/1992&end\\_date=10/30/2002&tolerance=0&fdcCase=usgs&record\\_status=PUB](https://apps.wrd.state.or.us/apps/sw/hydro_report/gage_summary.aspx?station_nbr=14031050&start_date=11/09/1992&end_date=10/30/2002&tolerance=0&fdcCase=usgs&record_status=PUB)

<sup>2</sup> June 24, 2014, email from Paul Hendricks, Umatilla River Coordinator, Oregon Water Resources Department

### **Consideration of Injury or Impacts on Other Existing Water Rights:**

Exhibit 1 is a list of water rights from the Department's WRIS database that may be impacted by the conversion of the hydroelectric right to an instream right. The list only includes water rights for out-of-stream uses that are upstream of the diversion point for the Boyd hydroelectric project. The spreadsheet identifies points of diversion and their allowed uses with priority dates between October 21, 1981, and October 23, 1999. There are numerous certificates and permits representing the other existing water rights that might be impacted by conversion of the hydroelectric water right to an instream water right. Many of the upstream water rights are regulated annually by the Watermaster to ensure water is available to serve the senior water right of the West Extension Irrigation District downstream of the hydroelectric project.

OAR 690-054-0040(6)(b)(C) provides that if the hydroelectric water right is already subordinated to other existing water rights, there is a rebuttable presumption that the conversion instream will cause no injury and that no mitigation measures are required to ensure the continuation of authorized water uses. The original hydroelectric license HE 363 was subordinated:

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

This subordination must continue under the new instream water right to avoid expansion of the existing right. By including the subordination clause, the instream right will not require new regulation of other water rights. The conversion of the right to an instream right will not result in impacts to authorized water uses by existing water rights.

The Water Resources Department holds an instream water right under Certificate # 59837 for waters in the Umatilla River from McKay Creek to the mouth of the Umatilla River. That right has a priority date of November 3, 1983. Because the conversion yields an instream right with a different priority date than Certificate #59837, the hydroelectric conversion will not be additive to the instream right at the location of the original point of diversion.

### **Conclusions of Law**

The hydroelectric water right under HE 363 is subject to conversion to an instream water right under Oregon Laws 2010 Chapter 63, ORS 543A.305(3) and OAR 690-054. Public notice was properly given on July 26, 2002, that the hydroelectric right was eligible for conversion to an instream water right.

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

Up to 500 cfs of water was used to produce hydroelectric power.

The hydroelectric water right was, and the instream right will continue to be 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 can occur and no mitigation measures are required to ensure the continuation of authorized water uses. The presumption has not been rebutted. No additional mitigation measures are required to avoid injury or to ensure the continuation of authorized water users.

**Proposed Order:**

The Department proposes 500 cfs of water authorized under Hydroelectric License HE 363 shall be converted to an instream water right for the months of December to June at the location of the former diversion point on the Umatilla River. Hydroelectric License HE 363 is terminated. A new water right for instream use shall be issued with a priority date of October 21, 1981. The water right shall be subordinated to other beneficial consumptive uses as originally conditioned, per the attached draft proposed water right certificate.

Issued FEB 16 2024



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