



Oregon

Kate Brown, Governor

Water Resources Department

North Mall Office Building
725 Summer St NE, Suite A
Salem, OR 97301
Phone (503) 986-0900
Fax (503) 986-0904
www.Oregon.gov/OWRD

MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item G, June 16, 2022
Water Resources Commission

Division 54 Rulemaking - Conversion of a Hydroelectric Water Right to an Instream Water Right

I. Introduction

Tom Byler, Director; Dwight French, Water Right Services Division Administrator; and Mary Grainey, Hydroelectric Coordinator; will present a request to adopt new rules governing the conversion of hydroelectric water rights to instream water rights.

II. Background

Division 54 is a proposed new rule division that would establish standards and procedures for the Oregon Water Resources Department (Department) to consider the conversion of a hydroelectric water right to an instream water right in accordance with the provisions of ORS 543A.305.

In December 2011, the Department issued a proposed final order to convert a hydroelectric water right to an instream water right related to the Powerdale hydroelectric project in the Hood River Basin. PacifiCorp decommissioned the project in 2010 and voluntarily released the water right to the Department for conversion to instream. Four parties protested the Final Order. Despite help from an outside facilitator, the parties failed to resolve their differences and the Department decided to pursue rulemaking to clarify policies and procedures to implement future conversions.

The proposed Division 54 rules establish standards and procedures to implement the provisions of ORS 543A.305, including:

1. Considerations for providing notice of projects eligible for conversion instream;
2. Actual use under the hydroelectric water right;
3. Resulting impacts on actual use by other existing water right(s) as of October 23, 1999;
4. Whether the conversion would result in injury to other existing water right(s) as of October 23, 1999; and,
5. Mitigation measures to avoid injury, and to ensure the continuation of authorized water uses by other existing water right(s) as of October 23, 1999.

The proposed rules also establish procedures for providing notice of a proposed conversion of a hydroelectric water right to an instream water right, and procedures that govern the Department's review and decision-making process associated with the proposed conversion.

Proposed Division 54 rules were presented at the March 2022 Commission meeting. At that meeting, the Commission requested more time to better understand the issues and directed staff to bring the item back at a subsequent meeting for further consideration. This report references the March 2022 staff report and presents a June 2022 version of the proposed rules which includes two changes to the proposed rules that were before the Commission in March. The June proposed rules are included in Attachment 1. The March 2022 staff report is included in Attachment 2.

III. Discussion

The Division 54 rulemaking effort began in 2017 in response to the first hydroelectric project decommissioning to trigger the authority in ORS 543A.305, as referenced in Section II of this report. After a hiatus during the COVID pandemic, the rulemaking was resumed in 2020. The Department held two Rules Advisory Committee (RAC) meetings in November 2020 to seek feedback on the amended proposed rules. The RAC meetings were attended by 18 RAC members and interested parties. The March 2022 staff report includes a list of the RAC members and written comments from the RAC. It also includes the proposed rules as published in the Secretary of State's Bulletin in August 2021, nine written comments from the public on the proposed rules, and the Department's responses to comments.

The proposed rules were presented at the March 2022 Commission meeting. Commissioners deferred taking action, and instead requested additional time to better understand the issues associated with the rulemaking. At the June meeting, staff will discuss the policy choices on key issues for the rulemaking using a flowchart of the proposed conversion process and associated policy issues as contained in Attachment 3.

The March 2022 proposed rules replicated the rules proposed in the Secretary of State's Bulletin of August 2021, except for two sentences relating to the relationship between the conversion process and forfeiture under ORS 540.610 that were deleted from the section on Purpose and Applicability in OAR 690-054-0000. The March 2022 Commission staff report in Attachment 2 includes copies of the August 2021 and March 2022 versions of the proposed rules.

The June proposed rules are nearly identical to the March version, with the exception of additional modifications concerning the forfeiture issue associated with OAR 690-054-0000. After further reflection on this issue since the March meeting, staff recommend the June proposed rules restore the language identifying the conversion process for hydroelectric projects as being implemented prior to any forfeiture proceedings, as had been proposed in the August version. In addition, the sentence in the June proposed rules identifying eligible hydroelectric projects as those having ceased beneficial use within five years of the effective date of the statute is a modification from the earlier proposals. Staff will explain these recommended changes during the June meeting presentation.

IV. Conclusion

The proposed Division 54 rules are necessary to establish standards and procedures for the Department to consider the conversion of a hydroelectric water right to an instream water right in accordance with statute. Adoption of the proposed rules will help the Department implement the provisions of ORS 543A.305 and guide the conversion process.

V. Alternatives

1. Adopt the proposed rules for a new OAR Chapter 690, Division 54, as contained in Attachment 1.
2. Adopt the proposed rules for a new OAR Chapter 690, Division 54, as contained in Attachment 1, with specific modifications.
3. Direct Department staff to do further work on the rules and return to a future Commission meeting.

VI. Recommendation

The Director recommends Alternative 1, to adopt the proposed rules for a new OAR Chapter 690, Division 54, as contained in Attachment 1.

Attachments:

1. OAR Chapter 690 Division 54 Proposed Rules - June 16, 2022
2. March 2022 Commission Staff Report
3. Process Flowchart and Policy Issues

Dwight French
(503) 871-7292

Mary Grainey
(503) 979-3512

**OREGON ADMINISTRATIVE RULES
DIVISION 54**

**CONVERSION OF A HYDROELECTRIC WATER RIGHT
TO AN INSTREAM WATER RIGHT**

690-054-0000 Purpose and Applicability

These rules establish definitions and procedures for the conversion of a Hydroelectric Water Right to an Instream Water Right in accordance with ORS 543A.305. The conversion process is for Hydroelectric Water Rights beneficially used and which ceased beneficial use within 5 years of October 23, 1999, or later. Conversion of a Hydroelectric Water Right to an Instream Water Right is not a new allocation of water within a stream basin. A Hydroelectric Water Right subject to these rules shall be considered for conversion to an Instream Water Right prior to any forfeiture proceeding under ORS 540.610. These rules do not apply to Projects on boundary waters that operate with water rights issued by the State of Oregon and by any other state, except upon the written request of the water right holder.

Statutory/Other Authority: ORS 536.027, 543A.305

Statutes/Other Implemented: ORS 543A.305

690-054-0010 Definitions

Unless the context requires otherwise, the following definitions apply in OAR Chapter 690, Division 54:

(1) “Actual Use” means:

(a) For a Project, the maximum amount of water, expressed in cubic feet per second (cfs), legally diverted through the hydroelectric turbine to produce electricity for each month of the year, including those months in which no water was used, pursuant to a Hydroelectric Water Right, based on documents available to the Department; or

(b) For Other Existing Water Right(s) as of October 23, 1999, the amount of water, expressed in cfs, legally diverted and beneficially used, based on documents available to the Department;

(2) “Continuation of Authorized Water Uses” means that Other Existing Water Right(s) as of October 23, 1999, shall not be required to curtail Actual Use under their existing water rights as a result of the conversion of a Hydroelectric Water Right to an Instream Water Right;

(3) “Department” means the Oregon Water Resources Department;

(4) “Director” means the Department Director or staff authorized by the Director to administer these rules;

(5) “Holder” has the meaning given that term in ORS 543.075;

(6) “Hydroelectric Water Right” is a water right issued and used for hydroelectric purposes including: hydroelectric licenses containing time-limited water rights issued under ORS 543; water right certificates issued under ORS 543A; water right permits or certificates issued under ORS 537; and power claimants under ORS 543.705 to 543.730 whether certificated or uncertificated;

(7) “Injury” means the proposed conversion of up to the full amount of a Hydroelectric Water Right associated with a Project to an Instream Water Right would result in Other Existing Water Rights as of October 23, 1999 not receiving previously available water, based on the Actual Use of both the Project and the Other Existing Water Right(s) as of October 23, 1999, to which the Other Existing Water Right(s) as of October 23, 1999 are legally entitled, pursuant to the considerations of OAR 690-054-0040(6);

(8) “Instream Water Right” means a water right held in trust by the Department for the benefit of the people of the State of Oregon to maintain water in stream for public use. An instream water right does not require a diversion or any other means of physical control over the water;

(9) “Mitigation Measures” means conditions to the Instream Water Right that avoid, abate, minimize, rectify, reduce, or compensate for impacts of the conversion in order to avoid Injury and to ensure the Continuation of Authorized Water Uses;

(10) “Other Existing Water Right(s) as of October 23, 1999” means a decreed, certificated, or permitted water right(s) issued on or before October 23, 1999, or a determined claim established on or before October 23, 1999, using water from the same water source or tributary as the Hydroelectric Water Right proposed for conversion;

(11) “Project” means any hydroelectric power project;

(12) “Reauthorized” has the meaning given the term “reauthorize” in ORS 543.075; and

(13) “Subordinated” means a condition of a water right that expressly makes it inferior in right and subsequent in time to any appropriation of water upstream for beneficial use.

Statutory/Other Authority: ORS 536.027, 543A.305

Statutes/Other Implemented: ORS 543A.305

690-054-0020 Notice of Consideration for Conversion: Eligibility Determinations and Preliminary Findings of Fact

For the purposes of a notice of consideration for conversion to an Instream Water Right, the Director shall make the following eligibility determinations and preliminary findings of fact:

(1) The Director shall determine whether a Hydroelectric Water Right associated with a Project is eligible for conversion to an Instream Water Right. A Hydroelectric Water Right is eligible for conversion if one of the following criteria is met:

(a) Use of water under the Hydroelectric Water Right has ceased for a period of five years;

(b) A time-limited Hydroelectric Water Right has expired and has not been extended or Reauthorized;

(c) The Hydroelectric Water Right was transferred under ORS 540.520 and 540.530 and has expired; or

(d) The Director has received written consent of the Holder;

(2) The Director shall determine the amount, expressed in cfs, of the Hydroelectric Water Right associated with the Project that is eligible for conversion to an Instream Water Right. The amount of a Hydroelectric Water Right eligible for conversion is subject to the following limitations:

(a) Any portion of a Hydroelectric Water Right transferred under ORS 540.520 and 540.530 is not eligible for conversion to an Instream Water Right, except upon expiration of that time-limited water right;

(b) Any portion of a Hydroelectric Water Right for which hydroelectric production is not the sole beneficial use authorized by the right is not eligible for conversion to an Instream Water Right;

(c) Any portion of a Hydroelectric Water Right authorized in conjunction with another water right pursuant to ORS 543.765, or that is part of a larger distribution system for municipal, irrigation, or other beneficial purposes is not eligible for conversion to an Instream Water Right; and

(d) Any portion of a Hydroelectric Water Right authorized in conjunction with multi-purpose dam releases including flood control, irrigation, municipal, or other beneficial uses, is not eligible for conversion to an Instream Water Right. Conversion to an Instream Water Right may not require release of water stored for other beneficial purposes. An Instream Water Right resulting from conversion under these rules shall not have priority over waters legally stored or legally released from storage;

(3) The Director shall make a preliminary finding on Injury. In making such finding, the Director shall consider:

(a) The Actual Use of the Project. To make a preliminary finding on 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 make a preliminary finding on 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; or

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

Statutory/Other Authority: 543A.305, 536.027

Statutes/Other Implemented: 543A.305

690-054-0030 Notice of Consideration for Conversion: Requirements and Comment Period

(1) The Director shall prepare a notice of consideration for conversion with a 30 calendar day comment period. The notice shall include the following information:

(a) The eligibility determinations and preliminary findings of fact identified in OAR 690-054-0020;

(b) The county or counties in which the Project is located;

(c) The Project file number, permit, certificate, or decree volume and page;

(d) The name of the surface water source(s);

(e) The location of the point of diversion used for the Project; and

(f) A request for comments on the proposed conversion, including the date by which comments must be received.

(2) The Department shall provide a copy of the notice to the Holder and publish the notice in the Department's weekly notice publication with information about how interested persons may

comment, obtain future notices about the proposed conversion, or obtain a copy of the final proposed order.

(3) If the Hydroelectric Water Right is not Subordinated to Other Existing Water Rights as of October 23, 1999, then the notice shall provide a 30 calendar day opportunity for any interested person to propose Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses.

(4) At the discretion of the Director, if the Hydroelectric Water Right was Subordinated to Other Existing Water Rights as of October 23, 1999, then the first public notice may be given at the time of the proposed final order describing the conversion to an Instream Water Right under OAR 690-054-0040 to 690-054-0130.

Statutory/Other Authority: 543A.305, 536.027

Statutes/Other Implemented: 543A.305

690-054-0040 Proposed Final Order: Final Determinations and Findings of Fact

Following the close of the comment period under OAR 690-054-0030, the Director shall prepare a proposed final order. The proposed final order shall recommend either to approve or to deny the conversion of the Hydroelectric Water Right to an Instream Water Right. The Director shall make the following determinations and findings of fact for inclusion in the proposed final order:

(1) The Director shall determine whether the Hydroelectric Water Right is eligible for conversion to an Instream Water Right pursuant to the preliminary eligibility determination of OAR 690-054-0020 and the requirements of ORS 543A.305;

(2) The Director shall determine the amount, expressed in cfs, of the Hydroelectric Water Right that is eligible for conversion to an Instream Water Right pursuant to the eligibility determination of OAR 690-054-0020 and the requirements of ORS 543A.305;

(3) If the full amount of the Hydroelectric Water Right is not proposed for conversion to an Instream Water Right, the Director shall include an explanation of how the amount proposed for conversion was determined;

(4) The Director shall determine the priority date of the Instream Water Right, in accordance with the requirements of ORS 543A.305;

(5) The Director shall determine the point of diversion of the Instream Water Right, in accordance with the requirements of ORS 543A.305;

(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;

(7) In order to avoid Injury and to ensure the Continuation of Authorized Water Uses the Director may include Mitigation Measures as a condition to the Instream Water Right. In determining whether to include Mitigation Measures the Director may consider:

(a) Whether Mitigation Measures were proposed during the comment period pursuant to OAR 690-054-0030, and if so, may:

(A) Share Mitigation Measures proposed by interested persons during the comment period of OAR 690-054-0030 with other interested persons who responded during the comment period;

(B) Meet and confer with those interested persons who proposed Mitigation Measures during the comment period;

(C) Extend the comment period of OAR 690-054-0030, via notice in the Department's weekly notice publication, to allow discussion of Mitigation Measures, if interested persons demonstrate reasonable progress towards agreement on Mitigation Measures; or

(D) Obtain affidavits consenting to the relevant Mitigation Measure from each holder of an Other Existing Water Right as of October 23, 1999 that is potentially subject to new regulation under Chapter 690, Division 250; and

(b) Whether the conversion of a Hydroelectric Water Right to an Instream Water Right would result in Injury pursuant to the findings in section (6);

(8) If the Director determines Mitigation Measures are necessary to avoid Injury and to ensure the Continuation of Authorized Water Uses, the Director shall condition the Instream Water Right to state: “Authorized water uses by Other Existing Water Rights as of October 23, 1999, shall not be subject to regulation under Chapter 690, Division 250 to satisfy this Instream Water Right.” If the Director chooses to include other Mitigation Measures as a condition to an Instream Water Right, the Director shall condition the Instream Water Right according to the Mitigation Measures agreed-upon pursuant to section (7);

(9) No Mitigation Measures other than in section (8) above shall be included as conditions of the Instream Water Right without an affidavit consenting to the relevant Mitigation Measure from each holder of a water right that is potentially subject to new regulation under Chapter 690, Division 250; and

(10) The Director shall determine whether the conversion, together with any recommended Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses, is consistent with ORS 543A.305 and shall either approve or deny the conversion. If the Director approves the conversion to an Instream Water Right, then the proposed final order shall include a draft certificate, including any proposed Mitigation Measures.

Statutory/Other Authority: 543A.305, 536.027

Statutes/Other Implemented: 543A.305

690-054-0050 Notice of Proposed Final Order

(1) The proposed final order shall be:

(a) Distributed to the Holder and to all individuals, including all governmental entities, who have filed timely comments with the Department; and

(b) Published in the Department’s weekly notice publication.

(2) The proposed final order shall specify that all protestants have 60 calendar days from the date of the notice to file a protest.

Statutory/Other Authority: 543A.305, 536.027

Statutes/Other Implemented: 543A.305

(1) All protests and comments must be received by the Director within the time specified in the notice of proposed final order. To become a party to a contested case hearing the fees required under ORS 536.050 must also be submitted by the date specified in the notice.

(2) Any person may submit a protest against a proposed final order. A protest shall be in writing and shall include:

(a) The name, address, and telephone number of the protestant;

(b) A description of the protestant's interest in the proposed final order and, if the protestant claims to represent the public interest, a precise statement of the public interest represented;

(c) A description of how the action proposed in the proposed final order would impair or be detrimental to the protestant's interest;

(d) A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;

(e) Any citation of legal authority supporting the protest, if known; and

(f) Statements of facts which support the allegation that the proposed conversion instream should not be acted upon as proposed by the proposed final order.

(3) Any person who supports the proposed final order may request standing for purposes of participating in any contested case proceeding on the proposed final order or for judicial review of a final order. The request for standing must be in writing, signed by the requester, and include the following:

(a) The requester's name, mailing address, and telephone number;

(b) If the requester is representing a group, association or other organization, the name, address, and telephone number of the represented group;

(c) A statement that the requester supports the proposed final order as issued;

(d) A detailed statement of how the requester would be harmed if the proposed final order is modified; and

(e) The fee established under ORS 536.050.

(4) Any person who has filed a timely request for standing may later file a petition for party status in any contested case hearing subsequently held on the matter for which standing was requested, in the manner described in OAR 137-003-0535.

(5) Each person submitting a protest or a request for standing shall raise all reasonably ascertainable issues and submit all reasonably available arguments supporting the person's position by the close of the protest period.

(6) Upon receiving a protest, the Director shall:

(a) Send a copy of all protests and requests for standing timely filed to the protestant(s), if any, and to each person who requested standing;

(b) Evaluate the protest to determine whether significant issues are raised and if so, shall refer the proposed final order, with accompanying protest, to the Office of Administrative Hearings (OAH) established under ORS 183.605 to 183.685 for a contested case hearing consistent with OAR 690-054-0070. If the Director determines the protests do not raise significant issues, the Director shall issue a final order. A final order issued pursuant to this section is a final order in other than a contested case subject to judicial review under ORS 183.484. A final order shall be transmitted to all parties who have filed a protest.

Statutory/Other Authority: 543A.305, 536.027

Statutes/Other Implemented: 543A.305

690-054-0070 Time and Place of Hearings, Exceptions, Final Order

(1) The conduct of contested hearings shall be as provided in OAR 137-003-0501 to 137-003-0700.

(2) If the proposed conversion is referred for a contested case hearing, a proposed order shall be issued by the Administrative Law Judge (ALJ) after the hearing. Any party to the contested case hearing may file exceptions to the ALJ's proposed order. Exceptions must be filed with the Department within 30 calendar days of the order. If no exceptions are filed to the ALJ's proposed order within 30 calendar days, the Director shall issue a final order consistent with subsection (4).

(3) If exceptions are filed to the ALJ's proposed order, the Director may review or hear argument, either written or oral, and make the final determination for the final order.

(4) If, after the contested case hearing or, if a hearing is not held, after the close of the protest period as defined in OAR 690-054-0050, the Director determines the proposed conversion would not comply with ORS 543A.305 and OAR 690-054-0050 to 690-054-0080, the Director shall:

(a) Issue a final order denying the conversion to an Instream Water Right; or

(b) Modify the proposed order to comply with ORS 543A.305 and OAR 690-054-0050 to 690-054-0080 and issue a final order approving the conversion to an Instream Water Right.

(5) If, after the contested case hearing or, if a hearing is not held, after the close of the protest period as defined in OAR 690-054-0050, the Director determines the proposed conversion would comply with ORS 543A.305 and OAR 690-054-0050 to 690-054-0080, the Director shall issue a final order approving the conversion to an Instream Water Right.

(6) A final order may set forth any of the provisions or restrictions to be included in the Instream Water Right.

Statutory/Other Authority: 543A.305, 536.027

Statutes/Other Implemented: 543A.305

690-054-0080 Issuance of Instream Water Right Certificate

After the Director issues a final order approving the conversion of a Hydroelectric Water Right to an Instream Water Right, the Department shall issue a certificate for an Instream Water Right. Each Instream Water Right is allocated individually and shall not be additive to other Instream Water Rights. The certificate shall be in the name of the Department as trustee for the people of the State of Oregon. A certificate for an Instream Water Right supplied by stored water shall describe the reservoir.

Statutory/Other Authority: 543A.305, 536.027

Statutes/Other Implemented: 543A.305



Oregon

Kate Brown, Governor

Water Resources Department

North Mall Office Building

725 Summer St NE, Suite A

Salem, OR 97301

Phone (503) 986-0900

Fax (503) 986-0904

www.Oregon.gov/OWRD

MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item J, March 18, 2022
Water Resources Commission

Division 54 Rulemaking – Conversion of Hydroelectric Water Rights to Instream

I. Introduction

During this agenda item, Breeze Potter, Water Policy Analyst and Rules Coordinator, will present a request to adopt new rules governing the conversion of hydroelectric water rights to instream water rights.

II. Background

Division 54 is a proposed new rule division that will establish standards and procedures for the Water Resources Department Director to consider the conversion of a Hydroelectric Water Right to an Instream Water Right in accordance with the provisions of ORS 543A.305.

Prior to 1995, there was no statutory authority to relicense hydroelectric projects which came to the end of their license terms. It was expected the state would take over ownership of the hydroelectric facilities once the sponsors recovered their investments. In 1995, House Bill (HB) 3087 repealed the takeover language and created a task force to draft a process for evaluating whether, and under what conditions, existing projects should be reauthorized. In 1997, the Oregon Legislature adopted HB 2119 which set out the state's new policies and standards for relicensing hydroelectric projects. The provisions of that bill were mostly codified in a new Oregon Revised Statutes Chapter 543A.

The bill did not address policies or standards for decommissioning existing projects, so a Task Force was established to study those issues and bring forward recommendations to the 1999 Legislature. In 1999, the Oregon Legislature passed HB 2162 relating to hydroelectric projects and creating new provisions in ORS Chapter 543A related to conversion of a Hydroelectric Water Right to an Instream Water Right.

In December 2011, the Department utilized the conversion process to issue a proposed final order to convert a hydroelectric water right to an instream water right. The hydroelectric water right in question was related to the Powerdale hydroelectric project located in the Hood River basin that was owned and operated by PacifiCorp. Four parties protested the final order.

Even with the help of an outside facilitator, the parties failed to resolve their differences and the Department decided to pursue rulemaking to clarify policies and procedures to implement future conversions.

The proposed Division 54 rules establish standards and procedures to implement the provisions of ORS 543A.305, which is included in Attachment 1. Specifically, the rules propose standards for determining:

- (1) Actual Use under the Hydroelectric Water Right;
- (2) Resulting impacts on Actual Use by Other Existing Water Right(s) as of October 23, 1999;
- (3) Whether the conversion would result in Injury to Other Existing Water Right(s) as of October 23, 1999; and
- (4) Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses by Other Existing Water Right(s) as of October 23, 1999.

The proposed rules also establish procedures for providing notice of a proposed conversion of a Hydroelectric Water Right to an Instream Water Right and procedures that govern the Director's review and decision-making process associated with the proposed conversion. A copy of the final proposed rules is contained in Attachment 2.

III. Discussion

The Division 54 rulemaking effort began in 2017 in response to the first hydroelectric project decommissioning to trigger the authority in ORS 543A.305. After a hiatus during the pandemic, the rulemaking was resumed in 2020. The Department held two Rules Advisory Committee (RAC) meetings in November 2020 to seek feedback on the amended proposed rules. The RAC meetings were attended by 18 RAC members and interested parties. A copy of the RAC roster is contained in Attachment 3. The Department provided an opportunity for RAC attendees to submit written comments on the proposed rules. A copy of RAC written comments is contained in Attachment 4.

After consideration of RAC comments, the Department amended the proposed rules and filed a Notice of Proposed Rulemaking in August 2021. A copy of the Notice of Proposed Rulemaking is contained in Attachment 5. The Department received nine written comments on the proposed rules and no oral comments. A copy of the public comments received is contained in Attachment 6. Department staff reviewed the written public comments and changes were made to OAR 690-054-0000. The Department response to comments is contained in Attachment 7.

IV. Conclusion

This new rule division is necessary to establish standards and procedures for the Director to consider the conversion of a hydroelectric water right to an instream water right in accordance with statute. Adoption of the proposed rules will help the Director implement the provisions of ORS 543A.305 and guide the conversion process.

V. Alternatives

The Commission may consider the following alternatives:

1. Adopt the proposed rules for a new OAR Chapter 690, Division 54, as contained in Attachment 2.
2. Adopt the proposed rules for a new OAR Chapter 690, Division 54, as contained in Attachment 2 with specific modifications.
3. Direct Department staff to do further work on the rules and return to a future Commission meeting.

VI. Recommendation

The Director recommends Alternative 1, to adopt the proposed rules for a new OAR Chapter 690, Division 54, as contained in Attachment 2.

Attachments:

1. ORS 543A.305
2. OAR Chapter 690 Division 54 Final Proposed Rules
3. RAC Roster
4. RAC Written Comments
5. Notice of Proposed Rulemaking
6. Public Comments
7. Department Response to Comments

Breeze Potter
(971) 720-0963

543A.305 Conversion of hydroelectric water right to in-stream water right; exceptions.

(1) As used in this section:

(a) “Holder” has the meaning given that term in ORS 543.075.

(b) “In-stream water right” has the meaning given that term in ORS 537.332.

(c) “Reauthorize” has the meaning given that term in ORS 543.075.

(2) An in-stream water right shall be subject to the limitations of ORS 537.350 and shall be maintained in perpetuity, in trust for the people of the State of Oregon. The priority date of the in-stream water right shall be the same as that of the converted hydroelectric water right. The location of the in-stream water right shall be the same as the point of diversion identified in the hydroelectric water right.

(3) 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, 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.

(4) If the hydroelectric project is authorized by a pre-1909 unadjudicated claim of registration, the determination of injury shall be based upon an evaluation of the actual use as measured during the five years preceding the conversion action, and shall not constitute a determination under ORS 537.670 to 537.695 as to the underlying claim of registration of the pre-1909 use. Judicial review of a final order relating to such a conversion shall be limited to review of the conversion action.

(5) This section shall not apply to projects on boundary waters that operate with water rights issued by the State of Oregon and by any other state except upon the written request of the water right holder.

(6) If hydroelectric production is not the sole beneficial use authorized by a water right, this section shall apply only to conversion of that portion of the water right used exclusively for hydroelectric purposes.

(7) This section shall not apply if the holder, at any time prior to conversion under subsection (3) of this section, transfers the hydroelectric water right under ORS 540.520 and 540.530, except that if a time-limited hydroelectric water right is transferred under ORS 540.520 and 540.530, the provisions of this section shall apply at the time of expiration of the time-limited water right. [1999 c.873 §2]

Note: 543A.305 was added to and made a part of 543A.005 to 543A.415 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

2022 Draft Rules Post Comment

**OREGON ADMINISTRATIVE RULES
DIVISION 54**

**CONVERSION OF A HYDROELECTRIC WATER RIGHT
TO AN INSTREAM WATER RIGHT**

690-054-0000 Purpose and Applicability

These rules establish definitions and procedures for the conversion of a Hydroelectric Water Right to an Instream Water Right in accordance with ORS 543A.305. Conversion of a Hydroelectric Water Right to an Instream Water Right is not a new allocation of water within a stream basin. These rules do not apply to Projects on boundary waters that operate with water rights issued by the State of Oregon and by any other state, except upon the written request of the water right holder.

Statutes Implemented: 543A.305

Statutory Authority: 543A.305, 536.027

690-054-0010 Definitions

Unless the context requires otherwise, the following definitions apply in OAR Chapter 690, Division 54:

(1) “Actual Use” means:

(a) For a Project, the maximum amount of water, expressed in cubic feet per second (cfs), legally diverted through the hydroelectric turbine to produce electricity for each month of the year, including those months in which no water was used, pursuant to a Hydroelectric Water Right, based on documents available to the Department; or

(b) For Other Existing Water Right(s) as of October 23, 1999, the amount of water, expressed in cfs, legally diverted and beneficially used, based on documents available to the Department;

(2) “Continuation of Authorized Water Uses” means that Other Existing Water Right(s) as of October 23, 1999, shall not be required to curtail Actual Use under their existing water rights as a result of the conversion of a Hydroelectric Water Right to an Instream Water Right;

(3) “Department” means the Oregon Water Resources Department;

(4) “Director” means the Department Director or staff authorized by the Director to administer these rules;

(5) “Holder” has the meaning given that term in ORS 543.075;

(6) “Hydroelectric Water Right” is a water right issued and used for hydroelectric purposes including: hydroelectric licenses containing time-limited water rights issued under ORS 543; water right certificates issued under ORS 543A; water right permits or certificates issued under ORS 537; and power claimants under ORS 543.705 to 543.730 whether certificated or uncertificated;

(7) “Injury” means the proposed conversion of up to the full amount of a Hydroelectric Water Right associated with a Project to an Instream Water Right would result in Other Existing Water Rights as of October 23, 1999 not receiving previously available water, based on the Actual Use of both the Project and the Other Existing Water Right(s) as of October 23, 1999, to which the Other Existing Water Right(s) as of October 23, 1999 are legally entitled, pursuant to the considerations of 690-054-0040(6);

(8) “Instream Water Right” means a water right held in trust by the Department for the benefit of the people of the State of Oregon to maintain water in stream for public use. An instream water right does not require a diversion or any other means of physical control over the water;

(9) “Mitigation Measures” means conditions to the Instream Water Right that avoid, abate, minimize, rectify, reduce, or compensate for impacts of the conversion in order to avoid Injury and to ensure the Continuation of Authorized Water Uses;

(10) “Other Existing Water Right(s) as of October 23, 1999” means a decreed, certificated, or permitted water right(s) issued on or before October 23, 1999, or a determined claim established on or before October 23, 1999, using water from the same water source or tributary as the Hydroelectric Water Right proposed for conversion;

(11) “Project” means any hydroelectric power project;

(12) “Reauthorized” has the meaning given the term “reauthorize” in ORS 543.075; and

(13) “Subordinated” means a condition of a water right that expressly makes it inferior in right and subsequent in time to any appropriation of water upstream for beneficial use.

Statutes Implemented: 543A.305

Statutory Authority: 543A.305, 536.027

690-054-0020 Notice of Consideration for Conversion: Eligibility Determinations and Preliminary Findings of Fact

For the purposes of a notice of consideration for conversion to an Instream Water Right, the Director shall make the following eligibility determinations and preliminary findings of fact:

(1) The Director shall determine whether a Hydroelectric Water Right associated with a Project is eligible for conversion to an Instream Water Right. A Hydroelectric Water Right is eligible for conversion if one of the following criteria is met:

(a) Use of water under the Hydroelectric Water Right has ceased for a period of five years;

(b) A time-limited Hydroelectric Water Right has expired and has not been extended or Reauthorized;

(c) The Hydroelectric Water Right was transferred under ORS 540.520 and 540.530 and has expired; or

(d) The Director has received written consent of the Holder;

(2) The Director shall determine the amount, expressed in cfs, of the Hydroelectric Water Right associated with the Project that is eligible for conversion to an Instream Water Right. The amount of a Hydroelectric Water Right eligible for conversion is subject to the following limitations:

(a) Any portion of a Hydroelectric Water Right transferred under ORS 540.520 and 540.530 is not eligible for conversion to an Instream Water Right, except upon expiration of that time-limited water right;

(b) Any portion of a Hydroelectric Water Right for which hydroelectric production is not the sole beneficial use authorized by the right is not eligible for conversion to an Instream Water Right;

(c) Any portion of a Hydroelectric Water Right authorized in conjunction with another water right pursuant to ORS 543.765, or that is part of a larger distribution system for municipal, irrigation, or other beneficial purposes is not eligible for conversion to an Instream Water Right; and

(d) Any portion of a Hydroelectric Water Right authorized in conjunction with multi-purpose dam releases including flood control, irrigation, municipal, or other beneficial uses, is not eligible for conversion to an Instream Water Right. Conversion to an Instream Water Right may not require release of water stored for other beneficial purposes. An Instream Water Right resulting from conversion under these rules shall not have priority over waters legally stored or legally released from storage;

(3) The Director shall make a preliminary finding on Injury. In making such finding, the Director

shall consider:

(a) The Actual Use of the Project. To make a preliminary finding on 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 make a preliminary finding on 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; or

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

Statutes Implemented: 543A.305

Statutory Authority: 543A.305, 536.027

690-054-0030 Notice of Consideration for Conversion: Requirements and Comment Period

(1) The Director shall prepare a notice of consideration for conversion with a 30 calendar day comment period. The notice shall include the following information:

(a) The eligibility determinations and preliminary findings of fact identified in OAR 690-054-0020;

(b) The county or counties in which the Project is located;

(c) The Project file number, permit, certificate, or decree volume and page

(d) The name of the surface water source(s);

(e) The location of the point of diversion used for the Project; and

(f) A request for comments on the proposed conversion, including the date by which comments must be received.

(2) The Department shall provide a copy of the notice to the Holder and publish the notice in the Department's weekly notice publication with information about how interested persons may comment, obtain future notices about the proposed conversion, or obtain a copy of the final proposed order.

(3) If the Hydroelectric Water Right is not Subordinated to Other Existing Water Rights as of October 23, 1999, then the notice shall provide a 30 calendar day opportunity for any interested person to propose Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses.

(4) At the discretion of the Director, if the Hydroelectric Water Right was Subordinated to Other Existing Water Rights as of October 23, 1999, then the first public notice may be given at the time of the proposed final order describing the conversion to an Instream Water Right under OAR 690-054-0040 to 690-054-0130.

Statutes Implemented: 543A.305

Statutory Authority: 543A.305, 536.027

690-054-0040 Proposed Final Order: Final Determinations and Findings of Fact

Following the close of the comment period under OAR 690-054-0030, the Director shall prepare a proposed final order. The proposed final order shall recommend either to approve or to deny the conversion of the Hydroelectric Water Right to an Instream Water Right. The Director shall make the following determinations and findings of fact for inclusion in the proposed final order:

(1) The Director shall determine whether the Hydroelectric Water Right is eligible for conversion to an Instream Water Right pursuant to the preliminary eligibility determination of OAR 690-054-0020 and the requirements of ORS 543A.305;

(2) The Director shall determine the amount, expressed in cfs, of the Hydroelectric Water Right that is eligible for conversion to an Instream Water Right pursuant to the eligibility determination of OAR 690-054-0020 and the requirements of ORS 543A.305;

(3) If the full amount of the Hydroelectric Water Right is not proposed for conversion to an Instream Water Right, the Director shall include an explanation of how the amount proposed for conversion was determined;

(4) The Director shall determine the priority date of the Instream Water Right, in accordance with the requirements of ORS 543A.305;

(5) The Director shall determine the point of diversion of the Instream Water Right, in accordance with the requirements of ORS 543A.305;

(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;

(7) In order to avoid Injury and to ensure the Continuation of Authorized Water Uses the Director may include Mitigation Measures as a condition to the Instream Water Right. In determining whether to include Mitigation Measures the Director may consider:

(a) Whether Mitigation Measures were proposed during the comment period pursuant to OAR 690-054-0030, and if so, may:

(A) Share Mitigation Measures proposed by interested persons during the comment period of OAR 690-054-0030 with other interested persons who responded during the comment period;

(B) Meet and confer with those interested persons who proposed Mitigation Measures during the comment period;

(C) Extend the comment period of OAR 690-054-0030, via notice in the Department's weekly notice publication, to allow discussion of Mitigation Measures, if interested persons demonstrate reasonable progress towards agreement on Mitigation Measures; or

(D) Obtain affidavits consenting to the relevant Mitigation Measure from each holder of an Other Existing Water Right as of October 23, 1999 that is potentially subject to new regulation under Chapter 690, Division 250; and

(b) Whether the conversion of a Hydroelectric Water Right to an Instream Water Right would result in Injury pursuant to the findings in section (6);

(8) If the Director determines Mitigation Measures are necessary to avoid Injury and to ensure the Continuation of Authorized Water Uses, the Director shall condition the Instream Water Right to state: "Authorized water uses by Other Existing Water Rights as of October 23, 1999, shall not be subject to regulation under Chapter 690, Division 250 to satisfy this Instream Water Right." If the Director chooses to include other Mitigation Measures as a condition to an Instream Water Right, the Director shall condition the Instream Water Right according to the Mitigation Measures agreed-upon pursuant to section (7);

(9) No Mitigation Measures other than in section (8) above shall be included as conditions of the Instream Water Right without an affidavit consenting to the relevant Mitigation Measure from each holder of a water right that is potentially subject to new regulation under Chapter 690, Division 250; and

(10) The Director shall determine whether the conversion, together with any recommended Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses, is consistent with ORS 543A.305 and shall either approve or deny the conversion. If the Director approves the conversion to an Instream Water Right, then the proposed final order shall include a draft certificate, including any proposed Mitigation Measures.

Statutes Implemented: 543A.305

Statutory Authority: 543A.305, 536.027

690-054-0050 Notice of Proposed Final Order

(1) The proposed final order shall be:

- (a) Distributed to the Holder and to all individuals, including all governmental entities, who have filed timely comments with the Department; and
 - (b) Published in the Department's weekly notice publication.
- (2) The proposed final order shall specify that all protestants have 60 calendar days from the date of the notice to file a protest.

Statutes Implemented: 543A.305
Statutory Authority: 543A.305, 536.027

690-054-0060 Filing of Protests

- (1) All protests and comments must be received by the Director within the time specified in the notice of proposed final order. To become a party to a contested case hearing the fees required under ORS 536.050 must also be submitted by the date specified in the notice.
- (2) Any person may submit a protest against a proposed final order. A protest shall be in writing and shall include:
 - (a) The name, address, and telephone number of the protestant;
 - (b) A description of the protestant's interest in the proposed final order and, if the protestant claims to represent the public interest, a precise statement of the public interest represented;
 - (c) A description of how the action proposed in the proposed final order would impair or be detrimental to the protestant's interest;
 - (d) A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;
 - (e) Any citation of legal authority supporting the protest, if known; and
 - (f) Statements of facts which support the allegation that the proposed conversion instream should not be acted upon as proposed by the proposed final order.
- (3) Any person who supports the proposed final order may request standing for purposes of participating in any contested case proceeding on the proposed final order or for judicial review of a final order. The request for standing must be in writing, signed by the requester, and include the following:

- (a) The requester's name, mailing address, and telephone number;
 - (b) If the requester is representing a group, association or other organization, the name, address, and telephone number of the represented group;
 - (c) A statement that the requester supports the proposed final order as issued;
 - (d) A detailed statement of how the requester would be harmed if the proposed final order is modified; and
 - (e) The fee established under ORS 536.050.
- (4) Any person who has filed a timely request for standing may later file a petition for party status in any contested case hearing subsequently held on the matter for which standing was requested, in the manner described in OAR 137-003-0535.
- (5) Each person submitting a protest or a request for standing shall raise all reasonably ascertainable issues and submit all reasonably available arguments supporting the person's position by the close of the protest period.
- (6) Upon receiving a protest, the Director shall:
- (a) Send a copy of all protests and requests for standing timely filed to the protestant(s), if any, and to each person who requested standing.
 - (b) Evaluate the protest to determine whether significant issues are raised and if so, shall refer the proposed final order, with accompanying protest, to the Office of Administrative Hearings (OAH) established under ORS 183.605 to 183.685 for a contested case hearing consistent with OAR 690-054-0070. If the Director determines the protests do not raise significant issues, the Director shall issue a final order. A final order issued pursuant to this section is a final order in other than a contested case subject to judicial review under ORS 183.484. A final order shall be transmitted to all parties who have filed a protest.

Statutes Implemented: 543A.305
Statutory Authority: 543A.305, 536.027

690-054-0070 Time and Place of Hearings, Exceptions, Final Order

- (1) The conduct of contested hearings shall be as provided in OAR 137-003-0501 to 137-003-0700.
- (2) If the proposed conversion is referred for a contested case hearing, a proposed order shall be issued by the Administrative Law Judge (ALJ) after the hearing. Any party to the contested case

hearing may file exceptions to the ALJ's proposed order. Exceptions must be filed with the Department within 30 calendar days of the order. If no exceptions are filed to the ALJ's proposed order within 30 calendar days, the Director shall issue a final order consistent with subsection (4).

(3) If exceptions are filed to the ALJ's proposed order, the Director may review or hear argument, either written or oral, and make the final determination for the final order.

(4) If, after the contested case hearing or, if a hearing is not held, after the close of the protest period as defined in OAR 690-054-0050, the Director determines the proposed conversion would not comply with ORS 543A.305 and OAR Chapter 690 Division 54, the Director shall:

(a) Issue a final order denying the conversion to an Instream Water Right; or

(b) Modify the proposed order to comply with ORS 543A.305 and OAR Chapter 690, Division 54 and issue a final order approving the conversion to an Instream Water Right.

(5) If, after the contested case hearing or, if a hearing is not held, after the close of the protest period as defined in OAR 690-054-0050, the Director determines the proposed conversion would comply with ORS 543A.305 and OAR Chapter 690, Division 54, the Director shall issue a final order approving the conversion to an Instream Water Right.

(6) A final order may set forth any of the provisions or restrictions to be included in the Instream Water Right.

Statutes Implemented: 543A.305

Statutory Authority: 543A.305, 536.027

690-054-0080 Issuance of Instream Water Right Certificate

After the Director issues a final order approving the conversion of a Hydroelectric Water Right to an Instream Water Right, the Department shall issue a certificate for an Instream Water Right. Each Instream Water Right is allocated individually and shall not be additive to other Instream Water Rights. The certificate shall be in the name of the Department as trustee for the people of the State of Oregon. A certificate for an Instream Water Right supplied by stored water shall describe the reservoir.

Statutes Implemented: 543A.305

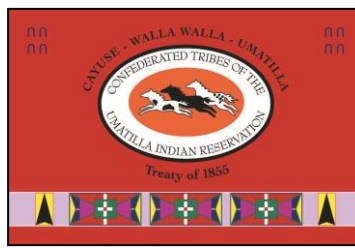
Statutory Authority: 543A.305, 536.027

RAC Roster: Conversions of Hydroelectric Water Rights to Instream Water Rights OAR 690, Division 054

RAC Members			
Patty Boyle	Eugene Water & Electric Board	541-685-7406	Patty.Boyle@eweb.org
Chris Brun	Confederated Tribes of the Warm Springs Reservation	541-352-3548	cbrun@hrecn.net
Jer Camarata	Swalley Irrigation District	541-388-0658	jer@swalley.com
Heather Tugaw	Oregon Dept of Environmental Quality	503-229-6804	Tugaw.heather@deq.state.or.us
David Haire	Confederated Tribes of the Umatilla Indian Reservation	541-429-7288	DavidHaire@ctuir.org
Anna Pakenham Stevenson	Oregon Dept of Fish and Wildlife	503-947-6084	anna.p.stevenson@state.or.us
Brenna Vaughn	Northwest Hydroelectric Asso.	503-502-7262	brenna@nwhydro.org
Chandra Ferrari	Trout Unlimited	916-214-9731	CFerrari@tu.org
Kimberley Priestley	WaterWatch of Oregon	503-295-4039 X 3	kjp@waterwatch.org
Tracy Rutten	League of Oregon Cities	503-588-6550	Trutten@orcities.org
Craig DeHart	Middle Fork Irrigation District	541-352-6468	craig@mfidp.com
Steven Odell	Marten Law	503-241-2648	sodell@martenlaw.com
John Buckley	East Fork Irrigation District	541-354-1185	johnfid@hoodriverelectric.net
Josh Newton	Karnopp Petersen LLP	541-382-3011	jn@karnopp.com

November 2020

April Snell	Oregon Water Resources Congress	503-363-0121	aprils@owrc.org
Interested Persons			
Mary Anne Cooper	Oregon Farm Bureau	503.399.1701 x.306	maryannecooper@oregonfb.org
Douglas MacDougal	Marten Law	503-241-2656	dmacdougal@martenlaw.com
Marilyn Fonseca	Oregon Department Environmental Quality	503-229-6804	Marilyn.Fonseca@state.or.us
Ken Homolka	Oregon Department of Fish and Wildlife	503-947-6090	Ken.Homolka@state.or.us
Anton Chiono	Confederated Tribes of Umatilla Indian Reservation	541-429-7268	AntonChiono@ctuir.org
David Filippi	Stoel Rives		David.filippi@stoel.com
Brian Nakamura	East Fork Irrigation District		bcnakamura@hoodriverelectric.net
Jaylene Hattig	East Fork Irrigation District		Jaylene.efid@hrecn.net
Staff			
Dwight French	WRD		Dwight.w.French@oregon.gov
Breeze Potter	WRD		Breeze.k.Potter@oregon.gov
Mary Grainey	WRD		Mary.s.grainey@oregon.gov
Craig Kohanek	WRD		Ron.c.kohanek@oregon.gov



Mary S. Graine
Hydroelectric Program Coordinator
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301

January 11, 2021

Re: Rules Advisory Committee – OAR 690-54 Conversion of a Hydroelectric Water Right to an Instream Water Right

Dear Ms. Graine,

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Water Resources Program is pleased to participate on the Rules Advisory Committee for the rulemaking on the conversion of a hydroelectric right in accordance with Oregon Revised Statute (ORS) 543A.305.

In November 2020, the Oregon Water Resources Department issued a draft of this proposed rule, which would provide for the conversion of hydroelectric water rights to instream water rights for hydroelectric projects that were decommissioned on or after October 23, 1999. We appreciate the opportunity to comment on this draft, and would like to raise the following concerns:

- **The proposed rule’s definition of “Actual Use” should reflect all water actually used under a hydroelectric water right, not just the water run through the turbines (690-054-0010).**

In the proposed rule, the term “Actual Use” for a hydroelectric project is defined as only the water that is run through a project’s hydroelectric turbines (690-054-0010(1)(a)). However, the Federal Energy Regulatory Commission (FERC) sets specific minimum instream flow requirements that must be met by a hydroelectric facility in order for that facility to operate. The instantaneous rate legally authorized by an Oregon hydroelectric water right may include sufficient water to satisfy these minimum instream flow requirements as established by FERC. Accordingly, a hydroelectric facility may call for the regulation of upstream junior water rights in order to meet its FERC minimum instream flow requirements.

By not including the minimum flow requirements of the FERC license in the definition of “Actual Use,” the proposed rule would reduce the amount of the water eligible for conversion to an instream water right as compared to the amount of water actually used by a hydroelectric water right. This would shortchange the amount of water converted to an instream water right without any statutory authority to do so under ORS 543A.305.

Accordingly, the water flowing through turbines and the water necessary to satisfy minimum instream flow requirements pursuant to a project’s FERC license should be included in the proposed rules definition of “Actual Use” for a hydroelectric project under 690-054-0010(1)(a) and 690-054-0040(6)(a).

- **The proposed rule’s subordination of all converted hydroelectric rights lacks statutory authority and is unnecessary if the proposed rule accurately defines the “Actual Use” of hydroelectric projects under 690-054-0010(1)(a) (690-054-0040).**

Under 690-054-0040(8), the proposed rule would subordinate (i.e., make of junior priority date) all converted hydroelectric rights to “Authorized water uses by Other Existing Water Rights as of October 23, 1999.” In effect, this would prohibit any “Authorized water use[s]” from being regulated off in favor of a hydroelectric right converted to an instream water right.

However, the statute is clear that the priority date of the instream water right “shall be the same as that of the converted hydroelectric water right” under ORS 543A.305(2). Unless used as a mitigation measure to prevent injury to an existing water user as directed under ORS 543A.305(3), any change to a converted hydroelectric water right priority date through subordination would lack statutory authority.

For the proposed rule to be consistent with the statute, the definition of “Authorized water uses” becomes paramount. Under 690-054-0010(2), the definition of “Authorized water uses” is given as “Other Existing Water Right(s) as of October 23, 1999, [that] shall not be required to curtail Actual Use under their existing water rights as a result of the conversion of a Hydroelectric Water Right to an Instream Water Right.”

This definition in turn relies on the definition of “Actual Use” of “Other Existing Water Right(s).” Under 690-054-0010(b), the “Actual Use” for “Other Existing Water Right(s)” is defined as “the amount of water, expressed in cfs, legally diverted.” Water that is “legally diverted” must not cause other water users “injury,” which is “a water right transaction that would result in another, existing water right not receiving previously available water to which it is legally entitled” according to OAR 690-380-0100.

Taken together, the proposed rule in essence stipulates that when a hydroelectric right is converted to an instream right, that instream right cannot result in another existing right not receiving previously available water to which it is legally entitled. However, if the actual use of the hydroelectric right is accurately converted to an instream right, then the regulation of the system by priority date should be unaffected by the conversion of a hydroelectric right to an instream water right.

In other words, if the proposed rule’s definition of “Actual Use” is accurate for both “Other Existing Water Rights” and hydroelectric “Projects”—therefore includes both water run through a project’s turbine and the water the project called for to meet FERC minimum flow requirements—there should be no difference in the regulation of a stream before or after the conversion of a hydroelectric water right. This would render the subordination of all converted hydroelectric water rights unnecessary to prevent injury to other water users.

- **The proposed rule creates a new “Injury” definition and potentially creates inconsistencies with the existing definition in the Oregon Administrative Rules (690-054-0010).**

Under 690-054-0010(7), the proposed rule defines “injury” as “the proposed conversion of up to the full amount of a Hydroelectric Water Right associated with a Project to an Instream Water Right [that] would result in Other Existing Water Rights as of October 23, 1999 not receiving previously available water to which those rights are legally entitled, pursuant to the considerations of 690-054-0040(6).”

However, the term “injury” is clearly defined in Oregon Administrative Rules (OAR) Chapter 690 as “a water right transaction that would result in another, existing water right not receiving previously available water to which it is legally entitled (690-380-0100).” Despite this existing definition of “injury,” the proposed rule adopts its own definition of injury without apparent guidance to do so from ORS 543A.305, which could create potential inconsistencies among “injury” definitions in the OARs.

- **The proposed rule’s injury analysis is unclear with respect to the determination of impacts (690-054-0040).**

Under 690-054-0040(6) of the proposed rule, the Director is required to conduct an injury analysis, which includes a determination of the “Actual Use” of the hydroelectric project under 690-054-0040(6)(a). In the following subparagraph, 690-054-0040(6)(b), it needs to be clarified whether the Director is to determine the impacts of other water rights *on* the “Actual Use” of the hydroelectric project or *by* the “Actual Use” of the hydroelectric project.

Under 690-054-0040(6)(b), the proposed rule currently states that in determining whether a conversion will result in injury, the Director shall consider:

“(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 of Other Existing Water Rights as of October 23, 1999, the Director may consider: . . . [emphasis added] “

From the underlined prepositions above, it currently is unclear whether or not this subparagraph is requiring a consideration of the impacts of “Other Existing Water Rights” on hydroelectric projects or vice versa. It is also unclear whether “Actual Use” in 690-054-0040(6)(b) is referring to that of the hydroelectric project or that of “Other Existing Water Rights.” The language of the final rule needs to resolve this ambiguity.

- **The proposed rule unnecessarily stipulates that the Director determine the priority date of the instream water right (690-054-0040).**

Under 690-054-0040(4), the proposed rule stipulates that the Director shall determine the priority date of the instream water right in accordance with ORS 543A.305. However, the statute already specifies in paragraph (2) that “The priority date of the in-stream water right shall be the same as that of the converted hydroelectric water right,” making this section of the proposed rule appear unnecessary.

- **The proposed rule language is unclear with respect to the issuance of instream water right certificates of converted hydroelectric rights (690-054-0080).**

Under 690-054-0080, the proposed rule states that “Each Instream Water Right is allocated individually and shall not be additive to other Instream Water Rights.” As written, the intent of this paragraph is unclear. However, in a reading of ORS 543A.305, we see nothing that suggests that hydroelectric rights converted to instream water rights under this statute should not be managed in addition to other instream water rights, where other instream water rights may already exist.

In other words, water rights converted under this program should not *subsume* other, existing instream water rights or be added to their certificates. Rather, the instantaneous rates of these converted rights should be managed as additive to the instantaneous rates of any other existing instream water rights, and regulated in accordance of priority date. However, as currently written, it is ambiguous that this is the desired intent, and this point bears clarification in the final rule language.

OREGON REVISED STATUTES

543A.305 Conversion of hydroelectric water right to in-stream water right; exceptions.

(1) As used in this section:

- (a) “Holder” has the meaning given that term in ORS 543.075.
- (b) “In-stream water right” has the meaning given that term in ORS 537.332.
- (c) “Reauthorize” has the meaning given that term in ORS 543.075.

(2) An in-stream water right shall be subject to the limitations of ORS 537.350 and shall be maintained in perpetuity, in trust for the people of the State of Oregon. The priority date of the in-stream water right shall be the same as that of the converted hydroelectric water right. The location of the in-stream water right shall be the same as the point of diversion identified in the hydroelectric water right.

(3) 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, 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.

(4) If the hydroelectric project is authorized by a pre-1909 unadjudicated claim of registration, the determination of injury shall be based upon an evaluation of the actual use as measured during the five years preceding the conversion action, and shall not constitute a determination under ORS 537.670 to 537.695 as to the underlying claim of registration of the pre-1909 use. Judicial review of a final order relating to such a conversion shall be limited to review of the conversion action.

(5) This section shall not apply to projects on boundary waters that operate with water rights issued by the State of Oregon and by any other state except upon the written request of the water right holder.

(6) If hydroelectric production is not the sole beneficial use authorized by a water right, this section shall apply only to conversion of that portion of the water right used exclusively for hydroelectric purposes.

(7) This section shall not apply if the holder, at any time prior to conversion under subsection (3) of this section, transfers the hydroelectric water right under ORS 540.520 and 540.530, except that if a time-limited hydroelectric water right is transferred under ORS 540.520 and 540.530, the provisions of this section shall apply at the time of expiration of the time-limited water right. [1999 c.873 §2]



Confederated Tribes of Warm Springs, Oregon
PO Box C
Warm Springs, OR 97761
Phone: 541-553-1161
Fax: 541-553-1924

January 11, 2021

Via Email: Dwight.W.French@oregon.gov

Dwight French
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301

Re: Rulemaking for Conversion of a Hydroelectric Water Right to an Instream Water Right, OAR Chapter 690, Division 054 – Supplemental Comments

Dear Mr. French:

The Confederated Tribes of the Warm Springs Reservation of Oregon (“Tribe”) appreciates the opportunity to have served on the Rules Advisory Committee for the adoption of rules intended to implement ORS 543A.305. The purpose of this letter is to provide written comments to the November 2020 Draft Rules and to the draft Fiscal and Economic Impact Statement. The comments are intended to supplement the Tribe’s prior written comments dated May 29, 2018, which are incorporated by reference.

The Tribe’s continuing goal is to provide the Oregon Water Resources Department (“Department”) with its unique perspective as a sovereign, federally-recognized Indian tribe, a holder of treaty-reserved rights pursuant to the Treaty with the Tribes of Middle Oregon, June 25, 1855 (“1855 Treaty”), and a party to the Settlement Agreement Concerning the Interim Operation and Decommissioning of the Powerdale Hydroelectric Project, FERC Project No. 2659, dated June 6, 2003 (“Powerdale Agreement”). The Tribe remains focused on assisting the Department to develop rules that are fair, workable, and consistent with the legislature’s statutory policy direction contained in ORS 543A.305.



I. November 2020 Draft Rules

OAR 690-054-0000 - Purpose and Applicability

The current draft provides that the rules do not apply to hydroelectric power projects “on boundary waters that operate with water rights issued by the State of Oregon and by any other state, except upon request of the water right holder.” The Tribe does not fully understand the purpose for this geographical limitation. Depending on the purpose of the limitation, it may make sense to include within the exception those hydroelectric power projects that operate on boundary waters between the State of Oregon and federally-recognized Indian tribes. The Pelton Round Butte Hydroelectric Project would be an example of such a project. The Tribe requests further consultation regarding this issue to assure that its sovereign interests are adequately considered and not impaired.

OAR 690-054-0010 – Definitions

OAR 360-054-0010(1)(a) – The proposed definition for the “actual use” of a hydroelectric project is too narrow and is not consistent with ORS 543A.305. The definition must include bypass flows required by licenses issued by the Federal Energy Regulatory Commission (“FERC”). Not doing so ignores the actual use of hydroelectric projects whose turbines are located adjacent to the river, which commonly include FERC mandated minimum instream flows in the “bypass” reach.¹ The failure to include bypass flows in the definition of “actual use” risks creating an arbitrary distinction between decommissioned hydroelectric projects whose turbines are located adjacent to the river and those whose turbines are located in the river itself. Finally, the proposed definition is also inconsistent with the Powerdale Agreement, which considers FERC bypass flows as part of PacifiCorp’s use of water under its hydroelectric water right. The Department is a party to the Powerdale Agreement, which was entered into after the enactment of ORS 543A.305. The Tribe cannot understand how the Department can both be a party to the Powerdale Agreement and propose a definition of actual use that excludes FERC bypass flows. The Tribe expressly incorporates by reference its comments from its May 28, 2018 letter addressing this issue.

OAR 360-054-0010(1)(b) – The proposed definition of “actual use” for other existing water rights as of October 23, 1999 should be clarified to unambiguously include the amount of water that was both legally *and in fact* diverted in accordance with those existing water rights.

¹ A bypass reach is commonly understood as the reach of a river between the dam that diverts water into a penstock for delivery to an off-channel powerhouse, and the point of return of the diverted water after it passes through the powerhouse.



OAR 360-054-0010(7) – ORS 543A.305(3) requires an inquiry into any “injury” that may be caused by converting a hydroelectric water right to an in-stream water right. The provision requires the Department to “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 proposed regulatory definition of “injury” should be revised to align with ORS 543A.305(3), which appears to be narrower than the general injury test that applies to water right transfers. *See* OAR 690-380-0100(3).

OAR 690-054-0020 – Notice of Consideration for Conversion: Eligibility Determinations and Preliminary Findings of Fact

OAR 360-054-0020(3) – The statutory injury inquiry provides that the Department “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.” ORS 543A.305(3). *OAR 360-054-0020(3)(a)* appears to align with the statutory language, especially with the requirement to consider “historical bypass practices or requirements.” The Tribe observes, however, that the consideration of bypass flows is not consistent with the definition of “Actual Use” in *OAR 690-054-0010(1)(a)* of the draft rules, which improperly omits bypass flows for the reasons explained above.

OAR 360-54-0020(3)(b) is more problematic. ORS 543.305(3) merely instructs the Department to consider the “resulting impacts on actual use by other existing water rights as of October 23, 1999.” The statute does not authorize the Department to consider whether “new regulation under Chapter 690, Division 250 would likely be required for the proposed conversion to an Instream Water Right * * *” as set forth in *OAR 360-54-0020(3)(b)(B)*. Further regulation of existing water rights is simply not relevant to the statutory injury inquiry provided in ORS 543.305(3). Further, *OAR 360-54-0020(3)(b)(D)* is overbroad; the statute does not authorize the Department to consider “[a]ny other evidence” that it deems helpful for making an injury determination.

OAR 690-054-0040 – Proposed Final Order: Final Determinations and Findings of Fact

OAR 360-054-0040(6) – The Tribe incorporates by reference its comments to proposed *OAR 360-054-0020(3)*, provided above.

OAR 360-054-0040(7) – ORS 543A.305(3) authorizes the Department to impose mitigation measures only to “avoid injury *and* to ensure the continuation of authorized water uses by other existing water rights.” (Emphasis added.) Stated differently, the statute does not authorize the Department to impose any mitigation measure unless it is necessary to *both* (a) avoid injury and (b) ensure the continuation of authorized water uses by other water users. *OAR 360-054-0040(7)* should be revised to clarify the Department’s limited authority to impose mitigation measures.



OAR 360-054-0040(8) – ORS 543A.305 does not authorize the Department to unilaterally subordinate the instream water right to any other water right, including other existing water rights as of October 23, 1999. In contrast, the statute requires that the “priority date of the in-stream water right shall be the same as that of the converted hydroelectric water right.” ORS 543A.305(2). *OAR 360-054-0040 (8)* is contrary the express legislative intent. The Department should delete this subsection in its entirety.

OAR 690-054-0060 – Filing of Protests

This proposed rule should be revised to acknowledge the sovereign interests of federally-recognized Indian tribes located in the State of Oregon, which hold treaty-reserved rights to fish, hunt, and gather culturally important foods. For example, pursuant to the 1855 Treaty, the Tribe has legally-enforceable reserved rights to take fish at its usual and accustomed areas throughout much of Oregon. The Tribe’s right to take fish includes the right to have a harvestable population of fish, which depend on instream flows. *See United States v. Washington*, 853 F.3d 946, 966 (9th Cir. 2017), *aff’d by equally div’d court* 138 S.Ct. 1832 (2018). The Tribe, thus, has a treaty-reserved right to minimum instream flows necessary to maintain a harvestable population of fish. *See generally Baley v. United States*, 942 F.3d 1312 (Fed. Cir. 2019). The priority date of that right is time immemorial. *Cf. United States v. Adair*, 723 F.2d 1394, 1412 – 14 (9th Cir. 1983). The rule should also be revised to provide automatic party status to any federally-recognized Oregon “treaty tribe” that chooses to commence a protest or to participate in any protest initiated by other parties with respect to the conversion of a hydroelectric water right in waters for which the tribe holds treaty-reserved rights.

II. Draft Fiscal and Economic Impact Statement

The Tribe focuses its comments to the Fiscal and Economic Impact section located on pp. 2-3 of the statement. The Tribe has several concerns. First, the summary of the statute is not accurate and not complete. For example, the statement provides that the statute requires the Department to “make a finding that the conversion will not result in injury to other existing water rights” but omits the statutory language “as of October 23, 1999.” In that way, the statement creates the misimpression that the conversion must not result in injury to any other water right regardless of priority date. Second, the statement’s description of “three scenarios” is confusing and appears unrelated to any analysis of the fiscal and economic impact of the rules. In addition, the third scenario misstates the statutory injury inquiry set forth in ORS 543A.305(3). Finally, the statement mistakenly provides that the Department will subordinate new instream water rights to other existing uses as of October 23, 1999, which is not authorized by (and is contrary to) ORS 543A.305. The Department should redraft the Fiscal and Economic Impact section of the statement to address these issues.





WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

January 11, 2021

Mary Graine, Hydroelectric Program Coordinator
Oregon Water Resources Department
725 Summer St, NE Suite A
Salem, OR 97301

Re: Comments, Draft Instream Conversion Rules

Dear Mary,

Below please find WaterWatch's comments on the draft rules as presented at the last RAC meeting. These are informal comments to the OWRD for purposes of the RAC; as such we are simply providing comments in outline form. We will submit official comments into the rulemaking record once the rules are out for public comment.

Comments follow the ordering of the draft rules.

Purpose, OAR 690-054-0000: The purpose section includes a number of provisions that are not found in statute, including limiting application to projects in operation on or after October 23, 1999¹, allocation limitations, etc. We suggest the whole section be struck and/or rewritten so that it is consistent with statutory language and legislative intent.

Definitions, OAR 690-054-0010

OAR 690-054-0010 (1) "Actual Use"

- (a) For a project: The proposed rules limit the definition of actual use of a hydro right to water that is legally diverted through the hydroelectric turbine. This definition ignores minimum flow requirements determined by FERC that are part and parcel of any hydroelectric use. The rules should be amended to include minimum flows as required by FERC.
- (b) For Other Existing Water Rights as of October 23, 1999: this should be narrowed to diversions before October 23, 1999. The statute does not provide support for the premise that all use, whether developed or not, under a water right issued by October 23, 1999 is protected. The statute is very purposeful in the term "actual use".

¹ This appears to be a direct attempt to exempt Warm Springs Hydro (Powder Basin) from the conversion statutes. The statutes do not support this narrowing.

OAR 690-054-0010 (2) “Continuation of Authorized Water Uses”:

Two points:

- (i) We support the limitation to Other Existing Water Rights as of October 23, 1999. Any argument by stakeholders that this should be expanded to cover all authorized uses lacks statutory authority.
- (ii) Similar to the statement above, the term “actual use” here should be amended to read “actual use as of October 23, 1999” to be consistent with statute.

OAR 690-054-0010 (6) “Hydroelectric Water Right”: Under the definition of hydroelectric water right, the reference to “water right permits or certificates issue under ORS 537” should be narrowed to read “water right permits or certificates issues under ORS 537 for hydroelectric power”.

OAR 690-054-0010 (7) “Injury”: This definition instructs that injury will be evaluated “pursuant to the considerations of 690-054-0040(6)”. In turn, OAR 690-054-0040(6) brings in considerations that are inconsistent with both the Department’s current definition and application of the state’s injury standard, as the narrowing of this standard as directed by ORS 543.305(3). OAR 690-380-0010(3) definition of “injury” was in existence at the time the conversion statute passed, thus it reasonable to infer that the Legislature understood the meaning of injury as used broadly by the OWRD, and therefore understood both the baseline and the narrowing of this that was applied by the statute. The OWRD draft rules, on the other hand, contemplate broadening the definition of injury to include considerations not contemplated by statute, most notably the direction of analysis of future regulation for any reason (e.g. changed hydrological considerations due to climate change) in the injury analysis. Absent amendments to that section, the OWRD should delete the qualifier noted in this definition.

OAR 690-054-0010 (10) “Other existing water right as of October 23, 1999”: We support the OWRD’s definition that makes clear that these are water rights in existence (have been issued) as of 1999. Past assertions by stakeholders that this should be expanded to include water rights with priority dates of 1999 (e.g. permits later issued under Reservations for Future Economic Development) have no merit.

Notice of Consideration for Conversion: Eligibility Determinations and Preliminary Findings of Facts, OAR 690-054-0020

As a general matter we think that the introduction to this section could be clearer that the governing statutes require the Director to convert these hydro rights to instream rights, subject only to a few statutory considerations of injury, etc. In other words, it is not a discretionary action. The rule’s approach to the decision matrix in the rules does not make this clear.

690-054-0020(2): This subsection should state upfront that the full amount of the water right is subject to conversion, subject to (a)-(d). As written, it presents a false premise that the Director has wide discretion as to the amount.

690-054-0020 (2)(c): There is nothing in the statute that allows the OWRD to exempt stand-alone hydro rights that are “part of a larger distribution system for municipal, irrigation or other beneficial uses”. Rather, the statute is clear that if hydro production is not the sole beneficial use authorized by a water right, the statute only applies to conversion of that portion of the water right used exclusively for hydro power (ORS 543A.300(6)). The rule is correct in exempting water rights pursuant to ORS

543.765 (in conduit hydro), but is in error for attempting to exempt stand-alone hydro rights that might happen to flow through a distribution system (for instance, hydro rights that use irrigation canals that are not in-conduit hydro rights but stand-alone rights). As such, the rule should delete the language that follows “ORS 543.765”.

690-054-0020 (2)(d): This section is confusing as to the limitations on storage, and appears to go beyond the statutory authority of the conversion statute. I would like to flag this for discussion.

690-054-0020 (3):

(a) Determination of actual use of the project: We support the OWRD’s inclusion of “historical bypass practices or requirements” but will note that this is, in the end, somewhat meaningless given the definition of “actual use” set forth in Section OAR 690-054-0010 (1) does not include minimum bypass flows required as part of the project. As noted, the definition of actual use of the project needs to be broadened to include minimum bypass flows so as to be consistent with statute.

(b) The resulting impacts on actual use by Other Existing Water Rights as of October 23, 1999: as noted in the definition section, the resulting impacts should be applied to the actual use as of October 23, 1999. The problems with that definition carry over here.

(b)(B) Future Regulation is irrelevant. This is not supported by statute, and grants Other Existing Water Rights as of October 23, 1999 protection against a host of unknowns, including climate change.

Notice of Consideration for Conversion: Requirements and Comment Period, OAR 690-054-0030

690-054-0030(3) appears to limit public comment to “propose Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses.” Assuming this narrow standard was not intentional, the language should be broadened so that it is clear that commenters are free to comment on any piece of the preliminary findings they have an interest in.

Proposed Final Order: Final Determination and Findings of Fact, OAR 690-054-0040

As noted previously, the rules would benefit from language that makes the mandate to issue (subject to injury, etc.) a bit more clear. As written, the rules appear to grant the Director broader authority to deny than exists. This could be confusing to people trying to interpret the rules.

690-054-0040(4): This subsection should be deleted. Per statute, the priority date of the instream right must be that of the underlying hydro right. The Director does not have discretion to “determine” the priority date of this right.

690-054-0040(6)(a) and (b): Same comments as 690-054-0020 (3) as to the determination of Actual Use of the Project and Other Existing Water Rights as of 1993.

690-054-0040 (7)(a)(A), (B), (C), and (D): The rule proposal on mitigation is confusing on a number of levels, and, importantly, because of the directive in (8) makes no sense. At its core, this rule section appears to let water right holders or other interested parties propose mitigation measures, and without any review by the OWRD as to the legality or efficacy of the mitigation measures, direct a process to

have interested parties meet, extend the comment period, allow discussions to continue if interested parties show “reasonable progress” and obtain affidavits to consent to said mitigation measures. But then, even if everyone in section (7) comes to agreement, in (8) the OWRD will subordinate all authorized water uses by Other Existing Water Rights as of October 23, 1999”. We will comment on the subordination separately, but we will note that having both provisions appears to go well beyond what is contemplated by statute, and appears to have the sole purpose of undermining the amount converted instream.

690-054-0020 (8): Section 8 is essentially a subordination directive. We do not believe the language as proposed is supported by statute. The statute protects against injury at the time of conversion, this is true. That said, this statutory protection is limited to protection against injury of the “actual use” of “other existing water rights as of October 23, 1999”. So in other words, for those water rights in existence as of October 23, 1999, the statute protects the actual use of those rights (so in other words, undeveloped water rights are not protected under the statute) against injury at the moment in time the right is converted. The statute purposefully used the term injury, one that has applied to transfers for years and was in existence at the time this statute was passed. The legislature then narrowed this term as noted previously. To assert wholesale subordination of the whole of the water right exceeds statutory intent because it does so with no tie to a finding of injury, for the whole of the water right (not actual use as of 1999) and against possible impacts that are unrelated to the conversion (e.g. hydrology changes due to climate changes). Had the legislature contemplated such a sweeping undermining of the water right to be converted instream, it would have surely included explicit language in the statute. It did not.

As a practical matter, this path also generally moots the need for any other provision of proposed rules. If the OWRD is going to take the position that the full amount of the water rights in existence as of October 23, 1999 (regardless of “actual use” and regardless of injury) shall not be subject to regulation into the future, period, then there is no logical reason for the rules to call for the determination of actual use, injury, mitigation, etc. The inclusion of this provision, as well as all the other sections that serve only to undermine the conversion, serve as double hit, so to speak and shows a clear bias against protecting water instream.

Filing of Protests, 690-054-0060

If the OWRD is going to allow for protests, it should also provide for standing statements. The rules should also ensure that standing statements allow filers of those statements to participate in any settlement negotiations.

Issuance of Instream Water Right Certificate, 690-054-0080

There is nothing in any portion of the Oregon Revised Statutes, including the governing statute here, that allows the OWRD to limit instream water rights from being “additive”. As such, any water right that results from an instream conversion would in fact be additive. The OWRD has no authority to limit as proposed.

Fiscal and Economic Impact Statement: We would suggest OWRD look over the document to ensure that all terms follow the structure as set forth in rule, including the use of CAPS for defined terms. For instance, “injury to other existing water rights” should be “injury to Actual Use of Other Existing Water

Rights as of October 23, 1999”, “other existing water rights” should be “Other Existing Water Rights as of October 23, 1999”, “actual use” should be “Actual Use”, etc. Narrowing of the terms is important for ensuring that the rules follow statutory construct; as currently drafted the fiscal and economic impact statement is much broader than statutory authority would allow.

The description of the statute should make clear the OWRD is directed to convert hydro rights to instream rights, subject to a few standards.

It is unclear why the fiscal and economic impact goes into such detail on scenarios, etc. We would suggest deleting most of the narrative.

There is no statutory authority to allow the “objective” that these rules ensure that other existing water rights as of October 23, 1999 are not fiscally or economically impacted by the rules. The statute only protects against injury to “actual use” of other existing water rights as of October 23, 1999. This is a different standard than protecting against financial impacts into the future, regardless of climate change, actual use as of 1999, etc.

Conclusion: As noted herein, it is our assessment that a number of the OWRD’s provisions are inconsistent with statute. We urge the OWRD to amend the rules so that they will provide the instream benefits as contemplated by the legislature.

Sincerely,

A handwritten signature in blue ink, appearing to read "K. Priestley", is written on a light-colored rectangular background.

Kimberley Priestley
Sr. Policy Analyst



Oregon

Kate Brown, Governor

Department of Fish and Wildlife

Hydropower Program
4034 Fairview Industrial Drive SE
Salem, OR 97302
(503) 947-6201
FAX (503) 947-6202
www.dfw.state.or.us/

January 11, 2021

Mary S. Grainey P.E., C.W.R.E.
Hydroelectric Program Coordinator
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301

Via Electronic Mail



Subject: Water Resources Department Division 54 Draft Rules for Conversion of a Hydroelectric Water Right to an Instream Water Right

Dear Ms. Grainey,

The Oregon Department of Fish and Wildlife (ODFW) has been participating as a member of the Oregon Water Resources Department's (OWRD) Rules Advisory Committee (RAC) since OWRD initiated formal meetings in September 2017. The rules are being developed to implement ORS 543A.305 to convert a hydroelectric water right to an instream water right. The rules will guide OWRD into the future for determining how much of a decommissioned hydroelectric water right will be converted instream and how to mitigate for injury to actual use of other existing water rights as of October 23, 1999. ODFW believes the overarching goal of the statute is to maintain the status quo for both instream and out-of-stream uses and mitigate for any injury.

In addition to being particularly pertinent to the conversion of the Powerdale hydroelectric water right certificate on the Hood River, ODFW's review suggests that these rules have statewide implications for up to 46 existing hydroelectric facilities that have unsubordinated water rights. ODFW has attended four formal RAC meetings; September 2017, April and June 2018, and November 2020. ODFW understands that OWRD is planning to consider edits and comments filed by 5 p.m. on January 11, 2021 from the RAC members, and then prepare the final draft rules for the Secretary of State notice filing and public hearing in 2021.

ODFW's is providing the following comments on the proposed rules:

Determine actual use:

The standards for identification of "Actual Use" for the hydroelectric water rights are different than those for actual use for other existing water rights (i.e., only what passed through the turbine for the hydroelectric facility and full water right for other uses). The 1999 Hydro Task Force report to the Legislature indicated that "The injury test will consider the actual use of the hydroelectric right and the actual use of the other existing water rights." ODFW recommends that the rules adopt the same definition of "Actual Use" for hydroelectric projects and Other Existing Water Right(s) (as of October 23, 1999).

ODFW recommends that the injury should be calculated based on actual use as of October 23, 1999, and not projected into the future to protect the existing water rights at the expense of the instream water right due to unpredictable hydrologic changes.

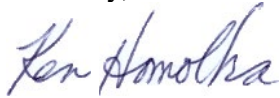
Bypassed flows that are required by a Federal Energy Regulatory Commission (FERC) license, §401 water quality certification, or water right should be added to the actual use of the hydroelectric project up to, but not to exceed, the full water right granted by OWRD. Bypassed flows are often integral to hydroelectric uses and operations as conditioned in a FERC license (federal law), §401 water quality certification, or water right.

Ensure no injury:

OWRD is proposing to subordinate all of the hydroelectric water right to other existing uses as of October 23, 1999, even when the hydroelectric water right is substantially senior to the other uses. The draft rules require that no “injury” occur into the future. If a hydropower project operator did not make a call on its senior hydroelectric water right, the amount of water it did divert, and was required to bypass, should be converted instream unsubordinated, as its historical use did not cause injury to the other existing water rights.

Thank you for the opportunity to comment on OWRD’s Division 54 draft rules for conversion of a hydroelectric water right to an instream water right. If you have questions about these comments, please contact me at Ken.Homolka@state.or.us, or 503-947-6090.

Sincerely,



Ken Homolka
Hydropower Program Leader

cc: Adrienne W. Averett Acting Water Program Manager, ODFW



Oregon

Kate Brown, Governor

Department of Environmental Quality

Western Region Medford Office

221 Stewart Avenue, Suite 201

Medford, OR 97501

541-776-6010

FAX 541-776-6262

TTY 711

January 11, 2021

Mary Grainey P.E., C.W.R.E.
Hydroelectric Program Coordinator
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301

Via Electronic Mail

Re: Comments on Water Resources Department Division 54 Draft Rules for Conversion of a Hydroelectric Water Right to an Instream Water Right


Dear Ms. Grainey,

Thank you for the opportunity to participate on Oregon Water Resource Department's Rules Advisory Committee to develop Division 54 draft rules for conversion of a hydroelectric water right to an instream water right, implementing ORS 543A.305. The Department of Environmental Quality believes the overarching goal of the statute is to maintain the status quo for both instream and out-of-stream uses and mitigate for any injury to actual use of other existing water rights as of October 23, 1999. DEQ appreciates the effort OWRD has made to attain this goal and is providing the following comments on the proposed rules:

- To maintain the intent of the 1999 Hydro Task Force, the definition of a Project and Other Existing Water Right(s), as of October 23, 1999, should be the same.
- To fully capture a Project's actual use, bypass flows required by a Federal Energy Regulatory Commission license must be included in the actual use of a Project. DEQ recommends including required bypass flows as part of the actual use for the Project, up to, but not to exceed, the full water right granted by OWRD. This water would likely have been used for power generation, if not required to be bypassed.
- A transferred hydroelectric right that is not currently unsubordinated should not automatically be subordinated to other uses. If a hydroelectric water right is unsubordinated and the operator did not make a call, the amount of water diverted, and used to meet the required bypass flows, should be converted to an unsubordinated instream water right.
- DEQ supports OWRD's decision to not include reserved stream flow allocations in this evaluation.

Thank you again for the opportunity to comment on the draft Division 54 rules and participate on the Rules Advisory Committee. Please contact me at tugaw.heather@deq.state.or.us or 541-776-6091 if you have any questions regarding these comments.

Best regards,

A handwritten signature in cursive script, appearing to read "Heather Tugaw".

Heather Tugaw
Natural Resource Specialist

cc: Zach Loboy, Watershed Manager, DEQ
Dwight French, Water Rights Division Administrator, OWRD

OFFICE OF THE SECRETARY OF STATE
SHEMIA FAGAN
SECRETARY OF STATE

CHERYL MYERS
DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION
STEPHANIE CLARK
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 690
WATER RESOURCES DEPARTMENT

FILED

07/27/2021 5:05 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Conversion of a Hydroelectric Water Right to an Instream Water Right

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 09/01/2021 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

CONTACT: Breeze Potter
971-720-0963
breeze.k.potter@oregon.gov

725 Summer St. NE Suite A
Salem, OR 97301

Filed By:
Breeze Potter
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 08/23/2021

TIME: 10:00 AM

OFFICER: Breeze Potter

ADDRESS: Remote

Zoom Videoconference

Salem, OR 97301

SPECIAL INSTRUCTIONS:

Due to COVID-19, the public hearing will held by videoconference call. To join the hearing use this link:
<https://us02web.zoom.us/j/89996754038?pwd=aitSWFFXTG10dVVtdlVaaKNHOEJpZz09> and enter the meeting ID (899 9675 4038) and passcode (1e6bW9). To join by telephone, dial +1 253 215 8782 and enter the meeting ID (899 9675 4038) and passcode (840838). Upon joining the videoconference call, you will be asked to announce your name. To prevent background noise, attendees may be muted. Individuals who want to submit oral testimony must email (breeze.k.potter@oregon.gov) or call (971) 720-0963 to sign up no later

than 10:15 AM August 23, 2021. The hearing will close no later than 11:00 AM but may close as early as 10:20 AM if all individuals that have signed up to testify have had the opportunity to enter their comments into the record. Auxiliary aids for persons with disabilities are available upon advance request. Please notify the contact listed above as soon as possible, but at least 48 hours in advance of the meeting.

NEED FOR THE RULE(S):

This is a new rule division that establishes standards and procedures for the Water Resources Department Director to consider the conversion of a Hydroelectric Water Right to an Instream Water Right in accordance with the provisions of ORS 543A.305.

Prior to 1995, there was no statutory authority to relicense hydroelectric projects which came to the end of their license terms. It was expected the state would take over ownership of the hydroelectric facilities once the sponsors recovered their investments. In 1995, House Bill (HB) 3087 repealed the takeover language and created a task force to draft a process for evaluating whether, and under what conditions, existing projects should be reauthorized. In 1997, the Oregon Legislature adopted HB 2119 which set out the state's new policies and standards for relicensing hydroelectric projects. The provisions of that bill were mostly codified in a new Oregon Revised Statutes Chapter 543A. The bill did not address policies or standards for decommissioning existing projects, so a Task Force was established to study those issues and bring forward recommendations to the 1999 Legislature.

In 1999, the Oregon Legislature passed HB 2162 relating to hydroelectric projects and creating new provisions in ORS Chapter 543A related to conversion of a Hydroelectric Water Right to an Instream Water Right. These proposed rules establish standards and procedures to implement the provisions of ORS 543A.305. Specifically, these rules propose standards for determining: (1) Actual Use under the Hydroelectric Water Right; (2) Resulting impacts on Actual Use by Other Existing Water Right(s) as of October 23, 1999; (3) Whether the conversion would result in Injury to Other Existing Water Right(s) as of October 23, 1999; and (4) Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses by Other Existing Water Right(s) as of October 23, 1999. These proposed rules also establish procedures for providing notice of a proposed conversion of a Hydroelectric Water Right to an Instream Water Right and procedures that govern the Director's review and decision-making process associated with the proposed conversion.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Oregon Water Resources Department Hydroelectric database:

https://apps.wrd.state.or.us/apps/sw/hydro_electric_query/

Hydroelectric Reauthorization Task Force Report to the Sixty-ninth Legislative Assembly 1997

Hydroelectric Task Force Report to the 70th Legislative Assembly House Bill 2162, April 1999

Hydroelectric Task Force Report to the 71st Legislative Assembly 2001

FISCAL AND ECONOMIC IMPACT:

Prior to conversion of a Hydroelectric Water Right to An Instream Water Right, ORS 543A.305 requires the Director to make a finding that the conversion will not result in Injury to Other Existing Water Right(s) as of October 23, 1999. As part of the Injury analysis, the Director must consider the Actual Use of the Project and the resulting impacts on Actual Use by Other Existing Water Right(s) as of October 23, 1999. These proposed rules establish standards and procedures to implement the Injury analysis of ORS 543A.305 and are therefore expected to protect Other Existing Water Right(s) as of October 23, 1999 from fiscal and economic impacts. The statute also provides the Director authority to consider 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 Right(s) as of October 23, 1999. The statute does not provide protections to water rights authorized after October 23, 1999.

There are three scenarios in which the conversion of a Hydroelectric Water Right to an Instream Water Right would occur. The first scenario is one in which the Hydroelectric Water Right is already Subordinated to other beneficial uses. In this case, the water right cannot be enlarged as part of the conversion process, so the Instream Water Right would be Subordinated in the same manner as the original Hydroelectric Water Right. The Instream Water Right would be considered junior to other beneficial uses and no regulation or distribution actions would be required of the watermaster to shut off other water users to benefit the Instream Water Right. No fiscal or economic impacts would be expected for any other water users.

The second scenario is if the Project is in the upper reaches of a watershed and there are no junior users upstream of the Project. Therefore, no water users would ever have been shut off to provide water to the Project. No fiscal or economic impacts would be expected for any other water users.

The third scenario is if there are junior water users upstream of the Project. Then, if the Hydroelectric Water Right is converted to an Instream Water Right, there could be new calls for water distribution to satisfy the Instream Water Right, even if the Project had never made a call for water. In this scenario, the Director would be required to make a finding that the conversion would not result in Injury as described above. If the Director determines Mitigation Measures are necessary to avoid Injury and to ensure the Continuation of Authorized Water Uses for Other Existing Water Right(s) as of October 23, 1999, the Director shall condition the Instream Water Right. This scenario could occur in several river basins with existing Projects and a larger number of other water users that are upstream and junior to a senior Hydroelectric Water Right.

Since the Oregon Water Code was originally enacted by the legislature in February 1909, a basic tenet of the law has been to protect existing water rights from injury caused by new water authorizations or by changes to existing water rights. The Department is the keeper of the State Record of Water Rights. In times of drought or low water, any water right holder may request that the watermaster distribute water among users on a particular stream according to the priority dates of the water right records. The distribution activity requires first that any illegal uses of water are shut off. Then, other water users are shut off in order of most junior priority to most senior priority until there is sufficient water in the stream to meet the needs of the senior water user who called for the water. Although the normal regulation activities of a watermaster to distribute water according to legal water right priorities can have significant fiscal and economic impacts to junior water users, those actions are not considered injury to other water uses. Such outcomes are

assumed in the statutory design of Oregon's priority system for water management.

If the Director determines Mitigation Measures are necessary to avoid Injury and to ensure the Continuation of Authorized Water Uses of Other Existing Water Right(s) as of October 23, 1999, these proposed rules state that the Director shall condition a newly converted Instream Water Right to state: "Authorized water uses by Other Existing Water Right(s) as of October 23, 1999 shall not be subject to regulation under Chapter 690, Division 250 to satisfy this Instream Water Right." In addition, any other Mitigation Measure considered by the Director shall have an affidavit consenting to the relevant measure from each water right holder that is potentially subject to new regulation by the conversion action. These actions are taken to minimize the fiscal and economic impacts of these rules on farmers, orchardists, ranchers, domestic water providers, commercial and municipal water users, and others regarding the conversion of a Hydroelectric Water Right to an Instream Water Right.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) These proposed rules are not expected to impose additional costs on state agencies, units of local government, or the general public as compared to the current status quo. These proposed rules mainly affect the water right management and regulation activities of the Oregon Water Resources Department.

(2)(a) There are about 120 small businesses who presently hold Hydroelectric Water Rights or licenses including individuals, small businesses, irrigation districts, or municipalities. The conversion of a Hydroelectric Water Right to an Instream Water Right happens after the Project is no longer in use, so there are not expected to be any fiscal impacts to current hydroelectric businesses.

The statute requires conversion only be allowed to the extent that there would be no Injury to Other Existing Water Right(s) as of October 23, 1999 and allows for Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses by Other Existing Water Right(s) as of October 23, 1999. These proposed rules provide standards and procedures to ensure the provisions of ORS 543A.305 are met.

(b) The conversion to an Instream Water Right mainly affects the Water Resources Department's responsibilities for managing water rights within the state. Although the Department may ask a water right Holder about the history of Actual Use for the Project, these rules do not require small businesses to keep records or report information to the Department, therefore there would be de minimus cost in these areas to comply with these rules.

(c) The rules do not require small businesses to obtain professional services, equipment, supplies, labor, or other administrative abilities to comply with an Instream Water Right. These proposed rules provide an opportunity for interested persons to contest the proposed final order on the conversion of a Hydroelectric Water Right to an Instream Water Right. While individuals could conceivably incur costs, including legal expenses, in order to contest a proposed final order, it is unknown at this time how many individuals would choose to pursue contested case hearings or what costs they would incur in taking such action.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The rules advisory committee (RAC) included representatives of groups and entities that either are or represent small businesses and water users, especially farmers, who are expected to be affected by the conversion of Hydroelectric Water Rights to Instream Water Rights. Representatives of small businesses included: Swalley, Middle Fork, and East Fork Irrigation Districts; Northwest Hydroelectric Association; Oregon Farm Bureau; and the Oregon Water Resources Congress. The RAC also included fisheries and environmental interests represented by Oregon Department of Fish and Wildlife, Trout Unlimited, WaterWatch of Oregon, representatives from the Confederated Tribes of the Warm Springs Reservation, and representatives from the Confederated Tribes of the Umatilla Indian Reservation.

The RAC reviewed and commented on four drafts of the proposed rules and on the fiscal impact statement for the proposed rules.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

690-054-0000, 690-054-0010, 690-054-0020, 690-054-0030, 690-054-0040, 690-054-0050, 690-054-0060, 690-054-0070, 690-054-0080

ADOPT: 690-054-0000

RULE SUMMARY: This new rule describes the purpose and applicability of OAR Chapter 690 Division 54.

CHANGES TO RULE:

690-054-0000

Purpose and Applicability

These rules establish definitions and procedures for the conversion of a Hydroelectric Water Right to an Instream Water Right in accordance with ORS 543A.305. The conversion process is for Hydroelectric Water Rights beneficially used on or after October 23, 1999 and which ceased beneficial use thereafter. Conversion of a Hydroelectric Water Right to an Instream Water Right is not a new allocation of water within a stream basin. A Hydroelectric Water Right subject to these rules shall be considered for conversion to an Instream Water Right prior to any forfeiture proceeding under ORS 540.610. These rules do not apply to Projects on boundary waters that operate with water rights issued by the State of Oregon and by any other state, except upon the written request of the water right holder.

Statutory/Other Authority: ORS 536.027, ORS 543A.305

Statutes/Other Implemented: ORS 543A.305

ADOPT: 690-054-0010

RULE SUMMARY: This new rule defines terms used in OAR Chapter 690 Division 54.

CHANGES TO RULE:

690-054-0010

Definitions

Unless the context requires otherwise, the following definitions apply in OAR Chapter 690, Division 54:

(1) "Actual Use" means:

(a) For a Project, the maximum amount of water, expressed in cubic feet per second (cfs), legally diverted through the hydroelectric turbine to produce electricity for each month of the year, including those months in which no water was used, pursuant to a Hydroelectric Water Right, based on documents available to the Department; or

(b) For Other Existing Water Right(s) as of October 23, 1999, the amount of water, expressed in cfs, legally diverted and beneficially used, based on documents available to the Department;

(2) "Continuation of Authorized Water Uses" means that Other Existing Water Right(s) as of October 23, 1999, shall not be required to curtail Actual Use under their existing water rights as a result of the conversion of a Hydroelectric Water Right to an Instream Water Right;

(3) "Department" means the Oregon Water Resources Department;

(4) "Director" means the Department Director or staff authorized by the Director to administer these rules;

(5) "Holder" has the meaning given that term in ORS 543.075;

(6) "Hydroelectric Water Right" is a water right issued and used for hydroelectric purposes including: hydroelectric licenses containing time-limited water rights issued under ORS 543; water right certificates issued under ORS 543A; water right permits or certificates issued under ORS 537; and power claimants under ORS 543.705 to 543.730 whether certificated or uncertificated;

(7) "Injury" means the proposed conversion of up to the full amount of a Hydroelectric Water Right associated with a Project to an Instream Water Right would result in Other Existing Water Rights as of October 23, 1999 not receiving previously available water, based on the Actual Use of both the Project and the Other Existing Water Right(s) as of October 23, 1999, to which the Other Existing Water Right(s) as of October 23, 1999 are legally entitled, pursuant to the considerations of OAR 690-054-0040(6);

(8) "Instream Water Right" means a water right held in trust by the Department for the benefit of the people of the State of Oregon to maintain water in stream for public use. An instream water right does not require a diversion or any other means of physical control over the water;

(9) "Mitigation Measures" means conditions to the Instream Water Right that avoid, abate, minimize, rectify, reduce, or compensate for impacts of the conversion in order to avoid Injury and to ensure the Continuation of Authorized Water Uses;

(10) "Other Existing Water Right(s) as of October 23, 1999" means a decreed, certificated, or permitted water right(s) issued on or before October 23, 1999, or a determined claim established on or before October 23, 1999, using water from the same water source or tributary as the Hydroelectric Water Right proposed for conversion;

(11) "Project" means any hydroelectric power project;

(12) "Reauthorized" has the meaning given the term "reauthorize" in ORS 543.075; and

(13) "Subordinated" means a condition of a water right that expressly makes it inferior in right and subsequent in time to any appropriation of water upstream for beneficial use.

Statutory/Other Authority: ORS 536.027, ORS 543A.305

Statutes/Other Implemented: ORS 543A.305

ADOPT: 690-054-0020

RULE SUMMARY: This new rule describes the process of preparing a notice of consideration for conversion to an instream water right, including making eligibility determinations and preliminary findings of fact.

CHANGES TO RULE:

690-054-0020

Notice of Consideration for Conversion: Eligibility Determinations and Preliminary Findings of Fact

For the purposes of a notice of consideration for conversion to an Instream Water Right, the Director shall make the following eligibility determinations and preliminary findings of fact:

(1) The Director shall determine whether a Hydroelectric Water Right associated with a Project is eligible for conversion to an Instream Water Right. A Hydroelectric Water Right is eligible for conversion if one of the following criteria is met:

(a) Use of water under the Hydroelectric Water Right has ceased for a period of five years;

(b) A time-limited Hydroelectric Water Right has expired and has not been extended or Reauthorized;

(c) The Hydroelectric Water Right was transferred under ORS 540.520 and 540.530 and has expired; or

(d) The Director has received written consent of the Holder;

(2) The Director shall determine the amount, expressed in cfs, of the Hydroelectric Water Right associated with the Project that is eligible for conversion to an Instream Water Right. The amount of a Hydroelectric Water Right eligible for conversion is subject to the following limitations:

(a) Any portion of a Hydroelectric Water Right transferred under ORS 540.520 and 540.530 is not eligible for conversion to an Instream Water Right, except upon expiration of that time-limited water right;

(b) Any portion of a Hydroelectric Water Right for which hydroelectric production is not the sole beneficial use authorized by the right is not eligible for conversion to an Instream Water Right;

(c) Any portion of a Hydroelectric Water Right authorized in conjunction with another water right pursuant to ORS 543.765, or that is part of a larger distribution system for municipal, irrigation, or other beneficial purposes is not eligible for conversion to an Instream Water Right; and

(d) Any portion of a Hydroelectric Water Right authorized in conjunction with multi-purpose dam releases including flood control, irrigation, municipal, or other beneficial uses, is not eligible for conversion to an Instream Water Right. Conversion to an Instream Water Right may not require release of water stored for other beneficial purposes. An Instream Water Right resulting from conversion under these rules shall not have priority over waters legally stored or legally released from storage;

(3) The Director shall make a preliminary finding on Injury. In making such finding, the Director shall consider:

(a) The Actual Use of the Project. To make a preliminary finding on 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 make a preliminary finding on 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; or

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

Statutory/Other Authority: ORS 536.027, ORS 543A.305

Statutes/Other Implemented: ORS 543A.305

ADOPT: 690-054-0030

RULE SUMMARY: This new rule describes the required content and notice process for a notice of consideration for conversion to an instream water right.

CHANGES TO RULE:

690-054-0030

Notice of Consideration for Conversion: Requirements and Comment Period

(1) The Director shall prepare a notice of consideration for conversion with a 30 calendar day comment period.

The notice shall include the following information:¶

(a) The eligibility determinations and preliminary findings of fact identified in OAR 690-054-0020;¶

(b) The county or counties in which the Project is located;¶

(c) The Project file number, permit, certificate, or decree volume and page¶

(d) The name of the surface water source(s);¶

(e) The location of the point of diversion used for the Project; and¶

(f) A request for comments on the proposed conversion, including the date by which comments must be received.¶

(2) The Department shall provide a copy of the notice to the Holder and publish the notice in the Department's weekly notice publication with information about how interested persons may comment, obtain future notices about the proposed conversion, or obtain a copy of the final proposed order.¶

(3) If the Hydroelectric Water Right is not Subordinated to Other Existing Water Rights as of October 23, 1999, then the notice shall provide a 30 calendar day opportunity for any interested person to propose Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses.¶

(4) At the discretion of the Director, if the Hydroelectric Water Right was Subordinated to Other Existing Water Rights as of October 23, 1999, then the first public notice may be given at the time of the proposed final order describing the conversion to an Instream Water Right under OAR 690-054-0040 to 690-054-0050.

Statutory/Other Authority: ORS 536.027, ORS 543A.305

Statutes/Other Implemented: ORS 543A.305

ADOPT: 690-054-0040

RULE SUMMARY: This new rule describes the proposed final order, including the process for making final determinations and findings of fact.

CHANGES TO RULE:

690-054-0040

Proposed Final Order: Final Determinations and Findings of Fact

Following the close of the comment period under OAR 690-054-0030, the Director shall prepare a proposed final order. The proposed final order shall recommend either to approve or to deny the conversion of the Hydroelectric Water Right to an Instream Water Right. The Director shall make the following determinations and findings of fact for inclusion in the proposed final order:¶

(1) The Director shall determine whether the Hydroelectric Water Right is eligible for conversion to an Instream Water Right pursuant to the preliminary eligibility determination of OAR 690-054-0020 and the requirements of ORS 543A.305:¶

(2) The Director shall determine the amount, expressed in cfs, of the Hydroelectric Water Right that is eligible for conversion to an Instream Water Right pursuant to the eligibility determination of OAR 690-054-0020 and the requirements of ORS 543A.305:¶

(3) If the full amount of the Hydroelectric Water Right is not proposed for conversion to an Instream Water Right, the Director shall include an explanation of how the amount proposed for conversion was determined:¶

(4) The Director shall determine the priority date of the Instream Water Right, in accordance with the requirements of ORS 543A.305:¶

(5) The Director shall determine the point of diversion of the Instream Water Right, in accordance with the requirements of ORS 543A.305: ¶

(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:¶

(7) In order to avoid Injury and to ensure the Continuation of Authorized Water Uses the Director may include Mitigation Measures as a condition to the Instream Water Right. In determining whether to include Mitigation Measures the Director may consider:¶

(a) Whether Mitigation Measures were proposed during the comment period pursuant to OAR 690-054-0030, and if so, may:¶

(A) Share Mitigation Measures proposed by interested persons during the comment period of OAR 690-054-0030 with other interested persons who responded during the comment period:¶

(B) Meet and confer with those interested persons who proposed Mitigation Measures during the comment

period;

(C) Extend the comment period of OAR 690-054-0030, via notice in the Department's weekly notice publication, to allow discussion of Mitigation Measures, if interested persons demonstrate reasonable progress towards agreement on Mitigation Measures; or

(D) Obtain affidavits consenting to the relevant Mitigation Measure from each holder of an Other Existing Water Right as of October 23, 1999 that is potentially subject to new regulation under Chapter 690, Division 250; and

(b) Whether the conversion of a Hydroelectric Water Right to an Instream Water Right would result in Injury pursuant to the findings in section (6);

(8) If the Director determines Mitigation Measures are necessary to avoid Injury and to ensure the Continuation of Authorized Water Uses, the Director shall condition the Instream Water Right to state: "Authorized water uses by Other Existing Water Rights as of October 23, 1999, shall not be subject to regulation under Chapter 690, Division 250 to satisfy this Instream Water Right." If the Director chooses to include other Mitigation Measures as a condition to an Instream Water Right, the Director shall condition the Instream Water Right according to the Mitigation Measures agreed-upon pursuant to section (7);

(9) No Mitigation Measures other than in section (8) shall be included as conditions of the Instream Water Right without an affidavit consenting to the relevant Mitigation Measure from each holder of a water right that is potentially subject to new regulation under Chapter 690, Division 250; and

(10) The Director shall determine whether the conversion, together with any recommended Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses, is consistent with ORS 543A.305 and shall either approve or deny the conversion. If the Director approves the conversion to an Instream Water Right, then the proposed final order shall include a draft certificate, including any proposed Mitigation Measures.

Statutory/Other Authority: ORS 536.027, ORS 543A.305

Statutes/Other Implemented: ORS 543A.305

ADOPT: 690-054-0050

RULE SUMMARY: This new rule describes the required content and notice process for notice of a proposed final order on a conversion.

CHANGES TO RULE:

690-054-0050

Notice of Proposed Final Order

(1) The proposed final order shall be:

(a) Distributed to the Holder and to all individuals, including all governmental entities, who have filed timely comments with the Department; and

(b) Published in the Department's weekly notice publication.

(2) The proposed final order shall specify that all protestants have 60 calendar days from the date of the notice to file a protest.

Statutory/Other Authority: ORS 536.027, ORS 543A.305

Statutes/Other Implemented: ORS 543A.305

RULE SUMMARY: This new rule describes the filing process and requirements for protests of the proposed final order and for requests for standing and describes the actions required upon receipt of a protest.

CHANGES TO RULE:

690-054-0060

Filing of Protests

(1) All protests and comments must be received by the Director within the time specified in the notice of proposed final order. To become a party to a contested case hearing the fees required under ORS 536.050 must also be submitted by the date specified in the notice.¶

(2) Any person may submit a protest against a proposed final order. A protest shall be in writing and shall include:¶

(a) The name, address, and telephone number of the protestant;¶

(b) A description of the protestant's interest in the proposed final order and, if the protestant claims to represent the public interest, a precise statement of the public interest represented;¶

(c) A description of how the action proposed in the proposed final order would impair or be detrimental to the protestant's interest;¶

(d) A detailed description of how the proposed final order is in error or deficient and how to correct the alleged error or deficiency;¶

(e) Any citation of legal authority supporting the protest, if known; and¶

(f) Statements of facts which support the allegation that the proposed conversion instream should not be acted upon as proposed by the proposed final order. ¶

(3) Any person who supports the proposed final order may request standing for purposes of participating in any contested case proceeding on the proposed final order or for judicial review of a final order. The request for standing must be in writing, signed by the requester, and include the following:¶

(a) The requester's name, mailing address, and telephone number;¶

(b) If the requester is representing a group, association or other organization, the name, address, and telephone number of the represented group; ¶

(c) A statement that the requester supports the proposed final order as issued;¶

(d) A detailed statement of how the requester would be harmed if the proposed final order is modified; and ¶

(e) The fee established under ORS 536.050. ¶

(4) Any person who has filed a timely request for standing may later file a petition for party status in any contested case hearing subsequently held on the matter for which standing was requested, in the manner described in OAR 137-003-0535. ¶

(5) Each person submitting a protest or a request for standing shall raise all reasonably ascertainable issues and submit all reasonably available arguments supporting the person's position by the close of the protest period. ¶

(6) Upon receiving a protest, the Director shall:¶

(a) Send a copy of all protests and requests for standing timely filed to the protestant(s), if any, and to each person who requested standing;¶

(b) Evaluate the protest to determine whether significant issues are raised and if so, shall refer the proposed final order, with accompanying protest, to the Office of Administrative Hearings (OAH) established under ORS 183.605 to 183.685 for a contested case hearing consistent with OAR 690-054-0070. If the Director determines the protests do not raise significant issues, the Director shall issue a final order. A final order issued pursuant to this section is a final order in other than a contested case subject to judicial review under ORS 183.484. A final order shall be transmitted to all parties who have filed a protest.

Statutory/Other Authority: ORS 536.027, ORS 543A.305

Statutes/Other Implemented: ORS 543A.305

ADOPT: 690-054-0070

RULE SUMMARY: This new rule describes the contested case process for protests of the proposed final order on a conversion and describes available actions after the contested case hearing or in the event a hearing is not held.

CHANGES TO RULE:

690-054-0070

Time and Place of Hearings, Exceptions, Final Order

(1) The conduct of contested hearings shall be as provided in OAR 137-003-0501 to 137-003-0700. ¶

(2) If the proposed conversion is referred for a contested case hearing, a proposed order shall be issued by the Administrative Law Judge (ALJ) after the hearing. Any party to the contested case hearing may file exceptions to the ALJ's proposed order. Exceptions must be filed with the Department within 30 calendar days of the order. If no exceptions are filed to the ALJ's proposed order within 30 calendar days, the Director shall issue a final order consistent with section (4). ¶

(3) If exceptions are filed to the ALJ's proposed order, the Director may review or hear argument, either written or oral, and make the final determination for the final order. ¶

(4) If, after the contested case hearing or, if a hearing is not held, after the close of the protest period as defined in OAR 690-054-0050, the Director determines the proposed conversion would not comply with ORS 543A.305 and OAR Chapter 690 Division 54, the Director shall: ¶

(a) Issue a final order denying the conversion to an Instream Water Right; or ¶

(b) Modify the proposed order to comply with ORS 543A.305 and OAR Chapter 690, Division 54 and issue a final order approving the conversion to an Instream Water Right. ¶

(5) If, after the contested case hearing or, if a hearing is not held, after the close of the protest period as defined in OAR 690-054-0050, the Director determines the proposed conversion would comply with ORS 543A.305 and OAR Chapter 690, Division 54, the Director shall issue a final order approving the conversion to an Instream Water Right. ¶

(6) A final order may set forth any of the provisions or restrictions to be included in the Instream Water Right. Statutory/Other Authority: ORS 536.027, ORS 543A.305

Statutes/Other Implemented: ORS 543A.305

ADOPT: 690-054-0080

RULE SUMMARY: This new rule describes the process and requirements related to issuance of an instream water right certificate after a conversion is approved.

CHANGES TO RULE:

690-054-0080

Issuance of Instream Water Right Certificate

After the Director issues a final order approving the conversion of a Hydroelectric Water Right to an Instream Water Right, the Department shall issue a certificate for an Instream Water Right. Each Instream Water Right is allocated individually and shall not be additive to other Instream Water Rights. The certificate shall be in the name of the Department as trustee for the people of the State of Oregon. A certificate for an Instream Water Right supplied by stored water shall describe the reservoir.

Statutory/Other Authority: ORS 536.027, ORS 543A.305

Statutes/Other Implemented: ORS 543A.305

From: [Stephen J. Odell](#)
Sent: Tuesday, November 30, 2021 4:53 PM
To: [POTTER Breeze K * WRD](#)
Cc: craig@mfidp.com
Subject: Comments on Proposed Rules of Oregon Water Resources Department re: Conversion of a Hydroelectric Water Right to an Instream Water Right

Ms. Breeze Potter
725 Summer Street, N.E., Suite A
Salem, OR 97301
breeze.k.potter@oregon.gov

Comments on proposed rulemaking by Oregon Water Resources Department, Chapter 690
Submitted via e-mail

Dear Ms. Potter:

Please accept these comments on the proposed rules the Oregon Water Resources Department filed on July 27, 2021, and circulated for public review and comment pursuant to Chapter 690, Division 54, regarding conversion of a hydroelectric water right to an instream water right in accordance with ORS 543A.305 on behalf of the Middle Fork Irrigation District.

First, the following sentence needs to be deleted from Proposed Rule 690-054-0000, entitled "Purpose and Applicability": "A Hydroelectric Water Right subject to these rules shall be considered for conversion to an Instream Water Right prior to any forfeiture proceeding under ORS 540.610." This attempted administrative prioritization and time frame reflects an end run around and is plainly inconsistent with the statutory language in both ORS 540.610, which requires forfeiture if a water right is not put to beneficial use for five years, and ORS 543A.305, which requires conversion no later than "five years after" the Hydroelectric Water Right has ceased to be used. As such, the time frames already established by these respective statutes are perfectly complementary to each other. In ordinary circumstances, there is no reason to expect that the Department should not be able to make the necessary finding to ensure that the conversion as ultimately effected will not result in injury to other existing water rights, in particular given the critically important condition that Proposed Rule 690-054-0040(8) requires to be included in any Proposed Final Order of Conversion, as follows: "Authorized water uses by Other Existing Water Rights as of October 23, 1999, shall not be subject to regulation under Chapter 690, Division 250 to satisfy this Instream Water Right." That condition can therefore govern the conversion during the resolution of any protests and comments that are submitted to the Proposed Final Order pursuant to Proposed Rule 690-054-0060. The Oregon Court of Appeals also recently held that a temporary lease for instream use of a non-converted hydroelectric water right constitutes a beneficial use under Oregon Water Law that sufficed to avoid conversion under ORS 543A.305 based on use that avoided complete cessation for five years (and therefore, would similarly suffice to avoid forfeiture under the same rationale). See *WaterWatch of Oregon v. Water Res. Dept.*, 304 Or. App. 617 (2020).

Second, the definition of “Injury” in Proposed Rule 690-054-0010(7) needs to be modified to track the language of the statute at ORS 543A.305(3). In particular, this definition as currently constituted in the proposed rule provides that the requisite finding of non-injury is to “based on the Actual Use of both the Project and the Other Existing Water Right(s) as of October 23, 1999,” pursuant to considerations set forth in Proposed Rule OAR 690-054-0040(6). But the statute instead provides that the injury that must be avoided is to other existing water rights, not any regulatory definition of “Actual Use,” and that the Director is simply to consider “actual use” in making the statutory evaluation and finding. This a critical distinction that the proposed rules wholly confuse and elide, and thus, the definition needs to be amended accordingly.

Third, the definition of “Mitigation Measures” in Proposed Rule 690-054-0010(9) needs to be truncated to be made consistent with the language in ORS 543A.305. More specifically, the definition needs to delete all of the verbs following, “avoid” (which include “abate, minimize, rectify, reduce, or compensate for”), and instead should read simply that “‘Mitigation Measures’ means conditions to the Instream Water Right that will ensure its conversion in accordance with ORS 543A.305 will not result in Injury to other existing water rights by avoiding such Injury and ensuring the continuation of authorized water uses by other existing water rights.”

Third, Proposed Rule 690-054-0020(1) needs to be revised to remove the discretion it would confer on the Director to “determine whether a Hydroelectric Water Right associated with a Project is eligible for conversion to an Instream Water Right.” This follows because the language of ORS 543A.305(3) is not discretionary, but instead states that the Department “shall convert” up the full amount of the water right associated with the hydroelectric project to an instream water right upon finding “that the conversion will not result in injury to other existing water rights.” Thus, the only discretion the Director has in this regard is to find and ensure that the requisite conversion will not result in such injury; there is no discretion otherwise. That is, if any of the three criteria are satisfied, which are all straightforward and objective metrics that therefore do not require the exercise of agency discretion, then conversion is required subject to the statutory requirement that it not result in injury to other existing water rights.

Fourth, the District strongly supports maintaining the condition set forth in Proposed Rule 690-054-0040(8), but as slightly revised to actually reflect the controlling language in ORS 543A.305. By way of explanation, that statutory provision provides that the predicate finding the Director needs to make and to which the conversion from a hydroelectric water right to an instream water right must be expressly conditioned is that “the conversion will not result in injury to other existing water rights.” The final sentence of that subsection, in contrast, states that the Director “may include” mitigation measures that both (a) “avoid injury,” in an obvious shorthand reference to the controlling above-referenced condition; AND (b) “ensure the continuation of authorized water uses by other existing water rights.” The proposed rule in its present formulation only reflects the second of these two elements that are to comprise any potential mitigation measures, and thus, needs to be revised to provide as follows, consistent with the statute: “Other Existing Water Rights as of October 23, 1999, shall not be subject to regulation under Chapter 690 to satisfy this Instream Water Right.” In sum, it is imperative that the final rule retain a condition in this regard to comply with the requirement in the statute that conversions “will not result in injury to other existing water rights,” which can be accomplished by the minor revision set forth above.

Thank you for your consideration, and please do not hesitate to let me know if you have any questions or need clarification of any of these comments.

Steve Odell
Marten Law, LLC
Counsel, Middle Fork Irrigation District

Steve Odell

Partner

D - 503 . 241 . 2648

M - 503 . 880 . 6949

E - sodell@martenlaw.com

martenlaw.com

1050 SW Sixth Ave, Suite 2150

Portland, OR 97204



This e-mail may contain confidential and privileged information and is sent for the sole use of the intended recipient. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

IRS CIRCULAR 230 NOTICE: To the extent that this message or any attachment concerns tax matters, it is not intended to be used and cannot be used by a taxpayer for the purpose of avoiding penalties that may be imposed by law.

From: [Stephen J. Odell](#)
Sent: Tuesday, November 30, 2021 5:00 PM
To: [POTTER Breeze K * WRD](#)
Cc: craig@mfidp.com
Subject: RE: Comments on Proposed Rules of Oregon Water Resources Department re: Conversion of a Hydroelectric Water Right to an Instream Water Right

Thanks very much for confirming receipt of the comments. I would quickly advise that the final two substantive paragraphs containing comments should begin, Fourth and Fifth, rather than Third and Fourth, and therefore submit this slightly revised version of the District's comments to rectify that language.

Ms. Breeze Potter
725 Summer Street, N.E., Suite A
Salem, OR 97301
breeze.k.potter@oregon.gov

Comments on proposed rulemaking by Oregon Water Resources Department, Chapter 690
Submitted via e-mail

Dear Ms. Potter:

Please accept these comments on the proposed rules the Oregon Water Resources Department filed on July 27, 2021, and circulated for public review and comment pursuant to Chapter 690, Division 54, regarding conversion of a hydroelectric water right to an instream water right in accordance with ORS 543A.305 on behalf of the Middle Fork Irrigation District.

First, the following sentence needs to be deleted from Proposed Rule 690-054-0000, entitled "Purpose and Applicability": "A Hydroelectric Water Right subject to these rules shall be considered for conversion to an Instream Water Right prior to any forfeiture proceeding under ORS 540.610." This attempted administrative prioritization and time frame reflects an end run around and is plainly inconsistent with the statutory language in both ORS 540.610, which requires forfeiture if a water right is not put to beneficial use for five years, and ORS 543A.305, which requires conversion no later than "five years after" the Hydroelectric Water Right has ceased to be used. As such, the time frames already established by these respective statutes are perfectly complementary to each other. In ordinary circumstances, there is no reason to expect that the Department should not be able to make the necessary finding to ensure that the conversion as ultimately effected will not result in injury to other existing water rights, in particular given the critically important condition that Proposed Rule 690-054-0040(8) requires to be included in any Proposed Final Order of Conversion, as follows: "Authorized water uses by Other Existing Water Rights as of October 23, 1999, shall not be subject to regulation under Chapter 690, Division 250 to satisfy this Instream Water Right." That condition can therefore govern the conversion during the resolution of any protests and comments that are submitted to the Proposed Final Order pursuant to Proposed Rule 690-054-0060. The Oregon Court of Appeals also recently held that a temporary lease for instream use of a non-converted hydroelectric water right constitutes a beneficial use under Oregon Water Law that sufficed to avoid conversion

under ORS 543A.305 based on use that avoided complete cessation for five years (and therefore, would similarly suffice to avoid forfeiture under the same rationale). See *WaterWatch of Oregon v. Water Res. Dept.*, 304 Or. App. 617 (2020).

Second, the definition of “Injury” in Proposed Rule 690-054-0010(7) needs to be modified to track the language of the statute at ORS 543A.305(3). In particular, this definition as currently constituted in the proposed rule provides that the requisite finding of non-injury is to “based on the Actual Use of both the Project and the Other Existing Water Right(s) as of October 23, 1999,” pursuant to considerations set forth in Proposed Rule OAR 690-054-0040(6). But the statute instead provides that the injury that must be avoided is to other existing water rights, not any regulatory definition of “Actual Use,” and that the Director is simply to consider “actual use” in making the statutory evaluation and finding. This a critical distinction that the proposed rules wholly confuse and elide, and thus, the definition needs to be amended accordingly.

Third, the definition of “Mitigation Measures” in Proposed Rule 690-054-0010(9) needs to be truncated to be made consistent with the language in ORS 543A.305. More specifically, the definition needs to delete all of the verbs following, “avoid” (which include “abate, minimize, rectify, reduce, or compensate for”), and instead should read simply that “‘Mitigation Measures’ means conditions to the Instream Water Right that will ensure its conversion in accordance with ORS 543A.305 will not result in Injury to other existing water rights by avoiding such Injury and ensuring the continuation of authorized water uses by other existing water rights.”

Fourth, Proposed Rule 690-054-0020(1) needs to be revised to remove the discretion it would confer on the Director to “determine whether a Hydroelectric Water Right associated with a Project is eligible for conversion to an Instream Water Right.” This follows because the language of ORS 543A.305(3) is not discretionary, but instead states that the Department “shall convert” up the full amount of the water right associated with the hydroelectric project to an instream water right upon finding “that the conversion will not result in injury to other existing water rights.” Thus, the only discretion the Director has in this regard is to find and ensure that the requisite conversion will not result in such injury; there is no discretion otherwise. That is, if any of the three criteria are satisfied, which are all straightforward and objective metrics that therefore do not require the exercise of agency discretion, then conversion is required subject to the statutory requirement that it not result in injury to other existing water rights.

Fifth, the District strongly supports maintaining the condition set forth in Proposed Rule 690-054-0040(8), but as slightly revised to actually reflect the controlling language in ORS 543A.305. By way of explanation, that statutory provision provides that the predicate finding the Director needs to make and to which the conversion from a hydroelectric water right to an instream water right must be expressly conditioned is that “the conversion will not result in injury to other existing water rights.” The final sentence of that subsection, in contrast, states that the Director “may include” mitigation measures that both (a) “avoid injury,” in an obvious shorthand reference to the controlling above-referenced condition; AND (b) “ensure the continuation of authorized water uses by other existing water rights.” The proposed rule in its present formulation only reflects the second of these two elements that are to comprise any potential mitigation measures, and thus, needs to be revised to provide as follows, consistent with the statute: “Other Existing Water Rights as of October 23, 1999, shall not be subject to regulation under Chapter 690 to satisfy this Instream Water Right.” In sum, it is imperative that the final rule retain a condition in this regard to comply with the requirement in the

statute that conversions “will not result in injury to other existing water rights,” which can be accomplished by the minor revision set forth above.

Thank you for your consideration, and please do not hesitate to let me know if you have any questions or need clarification of any of these comments.

Steve Odell
Marten Law, LLC
Counsel, Middle Fork Irrigation District

Steve Odell

Partner

D - 503 . 241 . 2648

M - 503 . 880 . 6949

E - sodell@martenlaw.com

martenlaw.com

1050 SW Sixth Ave, Suite 2150

Portland, OR 97204



From: POTTER Breeze K * WRD <Breeze.K.POTTER@water.oregon.gov>

Sent: Tuesday, November 30, 2021 4:55 PM

To: Stephen J. Odell <sodell@martenlaw.com>

Cc: craig@mfidp.com

Subject: RE: Comments on Proposed Rules of Oregon Water Resources Department re: Conversion of a Hydroelectric Water Right to an Instream Water Right

Hi Steve,

This email is to acknowledge receipt of your comment on the Division 54 rulemaking.

Best,

[Breeze Potter](#) (she/her/hers)

Water Policy Analyst

Rules/IWRS Coordinator

725 Summer Street NE, Suite A, Salem, OR 97301 | Direct Phone: 971-720-0963 | General Phone: 503-986-0900



From: Stephen J. Odell <sodell@martenlaw.com>
Sent: Tuesday, November 30, 2021 4:53 PM
To: POTTER Breeze K * WRD <Breeze.K.POTTER@water.oregon.gov>
Cc: craig@mfidp.com
Subject: Comments on Proposed Rules of Oregon Water Resources Department re: Conversion of a Hydroelectric Water Right to an Instream Water Right

Ms. Breeze Potter
725 Summer Street, N.E., Suite A
Salem, OR 97301
breeze.k.potter@oregon.gov

Comments on proposed rulemaking by Oregon Water Resources Department, Chapter 690
Submitted via e-mail

Dear Ms. Potter:

Please accept these comments on the proposed rules the Oregon Water Resources Department filed on July 27, 2021, and circulated for public review and comment pursuant to Chapter 690, Division 54, regarding conversion of a hydroelectric water right to an instream water right in accordance with ORS 543A.305 on behalf of the Middle Fork Irrigation District.

First, the following sentence needs to be deleted from Proposed Rule 690-054-0000, entitled "Purpose and Applicability": "A Hydroelectric Water Right subject to these rules shall be considered for conversion to an Instream Water Right prior to any forfeiture proceeding under ORS 540.610." This attempted administrative prioritization and time frame reflects an end run around and is plainly inconsistent with the statutory language in both ORS 540.610, which requires forfeiture if a water right is not put to beneficial use for five years, and ORS 543A.305, which requires conversion no later than "five years after" the Hydroelectric Water Right has ceased to be used. As such, the time frames already established by these respective statutes are perfectly complementary to each other. In ordinary circumstances, there is no reason to expect that the Department should not be able to make the necessary finding to ensure that the conversion as ultimately effected will not result in injury to other existing water rights, in particular given the critically important condition that Proposed Rule 690-054-0040(8) requires to be included in any Proposed Final Order of Conversion, as follows: "Authorized water uses by Other Existing Water Rights as of October 23, 1999, shall not be subject to regulation under Chapter 690, Division 250 to satisfy this Instream Water Right." That condition can therefore govern the conversion during the resolution of any protests and comments that are submitted to the Proposed Final Order pursuant to Proposed Rule 690-054-0060. The Oregon Court of Appeals also recently held that a temporary lease for instream use of a non-converted hydroelectric water right constitutes a beneficial use under Oregon Water Law that sufficed to avoid conversion under ORS 543A.305 based on use that avoided complete cessation for five years (and therefore, would similarly suffice to avoid forfeiture under the same rationale). See *WaterWatch of Oregon v. Water Res. Dept.*, 304 Or. App. 617 (2020).

Second, the definition of “Injury” in Proposed Rule 690-054-0010(7) needs to be modified to track the language of the statute at ORS 543A.305(3). In particular, this definition as currently constituted in the proposed rule provides that the requisite finding of non-injury is to “based on the Actual Use of both the Project and the Other Existing Water Right(s) as of October 23, 1999,” pursuant to considerations set forth in Proposed Rule OAR 690-054-0040(6). But the statute instead provides that the injury that must be avoided is to other existing water rights, not any regulatory definition of “Actual Use,” and that the Director is simply to consider “actual use” in making the statutory evaluation and finding. This a critical distinction that the proposed rules wholly confuse and elide, and thus, the definition needs to be amended accordingly.

Third, the definition of “Mitigation Measures” in Proposed Rule 690-054-0010(9) needs to be truncated to be made consistent with the language in ORS 543A.305. More specifically, the definition needs to delete all of the verbs following, “avoid” (which include “abate, minimize, rectify, reduce, or compensate for”), and instead should read simply that ““Mitigation Measures’ means conditions to the Instream Water Right that will ensure its conversion in accordance with ORS 543A.305 will not result in Injury to other existing water rights by avoiding such Injury and ensuring the continuation of authorized water uses by other existing water rights.”

Third, Proposed Rule 690-054-0020(1) needs to be revised to remove the discretion it would confer on the Director to “determine whether a Hydroelectric Water Right associated with a Project is eligible for conversion to an Instream Water Right.” This follows because the language of ORS 543A.305(3) is not discretionary, but instead states that the Department “shall convert” up the full amount of the water right associated with the hydroelectric project to an instream water right upon finding “that the conversion will not result in injury to other existing water rights.” Thus, the only discretion the Director has in this regard is to find and ensure that the requisite conversion will not result in such injury; there is no discretion otherwise. That is, if any of the three criteria are satisfied, which are all straightforward and objective metrics that therefore do not require the exercise of agency discretion, then conversion is required subject to the statutory requirement that it not result in injury to other existing water rights.

Fourth, the District strongly supports maintaining the condition set forth in Proposed Rule 690-054-0040(8), but as slightly revised to actually reflect the controlling language in ORS 543A.305. By way of explanation, that statutory provision provides that the predicate finding the Director needs to make and to which the conversion from a hydroelectric water right to an instream water right must be expressly conditioned is that “the conversion will not result in injury to other existing water rights.” The final sentence of that subsection, in contrast, states that the Director “may include” mitigation measures that both (a) “avoid injury,” in an obvious shorthand reference to the controlling above-referenced condition; AND (b) “ensure the continuation of authorized water uses by other existing water rights.” The proposed rule in its present formulation only reflects the second of these two elements that are to comprise any potential mitigation measures, and thus, needs to be revised to provide as follows, consistent with the statute: “Other Existing Water Rights as of October 23, 1999, shall not be subject to regulation under Chapter 690 to satisfy this Instream Water Right.” In sum, it is imperative that the final rule retain a condition in this regard to comply with the requirement in the statute that conversions “will not result in injury to other existing water rights,” which can be accomplished by the minor revision set forth above.

Thank you for your consideration, and please do not hesitate to let me know if you have any questions or need clarification of any of these comments.

Steve Odell
Marten Law, LLC
Counsel, Middle Fork Irrigation District

Steve Odell

Partner

D - 503 . 241 . 2648

M - 503 . 880 . 6949

E - sodell@martenlaw.com

martenlaw.com

1050 SW Sixth Ave, Suite 2150

Portland, OR 97204



This e-mail may contain confidential and privileged information and is sent for the sole use of the intended recipient. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

IRS CIRCULAR 230 NOTICE: To the extent that this message or any attachment concerns tax matters, it is not intended to be used and cannot be used by a taxpayer for the purpose of avoiding penalties that may be imposed by law.

This e-mail may contain confidential and privileged information and is sent for the sole use of the intended recipient. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

IRS CIRCULAR 230 NOTICE: To the extent that this message or any attachment concerns tax matters, it is not intended to be used and cannot be used by a taxpayer for the purpose of avoiding penalties that may be imposed by law.



WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

August 13, 2021

Breeze Potter, Rulemaking Coordinator
Oregon Water Resources Department, and
Oregon Water Resources Commission
725 Summer St, NE Suite A
Salem, OR 97301

Re: Comments, Draft Instream Conversion Rules

Dear Ms. Potter and the Oregon Water Resources Commission,

WaterWatch of Oregon is a river conservation group dedicated to protecting and restoring streamflows statewide. WaterWatch served on the multi-year RAC for this rulemaking, and has also been involved in a number of OWRD matters related to the hydro conversion statute¹.

WaterWatch has spent years working with the OWRD to try to ensure that conversions proceed according to statute. We are disappointed in the proposed rules, which reach far beyond statutory authority to protect consumptive water right holders to the detriment of the intended instream gains.

We have provided detailed comments by section but did want to highlight three major concerns. First, the statutes very clearly direct that the injury determination evaluate the actual use of the hydro project and the resulting impacts on the actual use of water rights in existence as of October 23, 1999. That said, the rules set forth protections for the full paper value of water rights in existence as of October 23, 1999 rather than the amount actually used by that date. This is an expansion of protection that is not supported by statute. Second, the OWRD has created a wholly new structure for determining “injury” for this narrow class of transfers that is not directed or supported by statute. Of greatest concern is the direction to look to past regulation, as well as the possibility of regulation into the future (regardless of the cause, for instance changed hydrographs due to climate change). And third, the rules direct the OWRD to subordinate the instream water right to water rights in existence as of October 23, 1999. By doing this, the OWRD is providing protection of those rights to a whole host of unknowns, including the effects of climate change. All in all, the OWRD’s proposed rule language as to these three issues undermines the intended instream benefits of the conversion statute.

Purpose, 690-054-0000: The purpose section includes a number of provisions that are not found in statute. Of concern, the language limits the statutory application to projects in operation on or after October 23, 1999. There is nothing in statute that limits application to projects in operation after this date. This rule provision appears to be a direct attempt to exempt Warm Springs Hydro (Powder

¹ E.g. Savage Rapids Dam (Rogue River) Conversion of 800 cfs, Marmot Dam Conversion of 600/200 cfs (Sandy/Little Sandy rivers), Warm Springs Hydro (currently in front of the Oregon Supreme Court), Powerdale (Hood River) negotiations, etc.

River)², Stayton-Santiam Water Control District (Santiam) and likely others from conversion under this statute. Nothing in the statute allows the narrowing proposed in the rules. Additionally, the language suggests that a hydro right subject to conversion can be forfeited; this is something the OWRD is disputing in court. Remedy: Strike all but the first sentence of this section

Definitions, OAR 690-054-0010: We have a number of comments as to the proposed definitions, which are set forth in order.

OAR 690-054-0010 (1) “Actual Use”: As noted throughout the RAC, WaterWatch believes that there needs to be parity between the definitions of actual use for the project and actual use of water rights as of October 23, 1999.

- (a) For a project: The proposed rules limit the definition of actual use of a hydro right to water that is legally diverted through the hydroelectric turbine. This definition ignores minimum flow requirements determined by FERC that are part and parcel of any hydroelectric use (minimum flows that must be met from water under the hydro right’s water right). The statutes do not speak to diversions, they speak to “use.” Moreover, OWRD has considered minimum flow requirements to be a “use” under a hydro right in the past.³ To the extent water allowed under a hydro right is required to remain instream as part of FERC’s conditions, this is a use and should be considered such in these rules.
- (b) For Other Existing Water Rights as of October 23, 1999: if the OWRD is going to tie to diversions it should be limited to diversions before October 23, 1999. The statute does not provide support for the premise that all use, whether developed or not, under a water right issued by October 23, 1999 is protected. The statute is very purposeful in protecting “actual use” as of October 23, 1999 and not the full amount of the permit issued (regardless of development) as of 1999. Moreover, to the extent the rules require that project “actual use” is determined by month (see sub (a)), then the “actual use” of the consumptive rights should also be looked at through this monthly lens.

Remedy: We would suggest a definition that applies to both (a) the Project and (b) Other Existing Water Rights and is tied to water legally used under the permit/certificate prior to October 23, 1999 (including water used to satisfy minimum flow requirements by FERC).

OAR 690-054-0010 (2) “Continuation of Authorized Water Uses”: Two points:

- (i) We support the limitation to Other Existing Water Rights as of October 23, 1999. Any argument by stakeholders that this should be expanded to cover all authorized uses regardless of priority lacks statutory authority.

² This narrowing is not only not supported by statute, but is inconsistent with documents in the FERC record for Warm Springs Hydro’s license surrender, which said the conversion statute would be used to transfer the hydro right instream even though the plant stopped operating in 1995. Moreover, in ensuring litigation to compel OWRD to convert the water right to an instream right – litigation that has now been briefed and argued at three different levels of review including the Oregon Supreme Court – neither OWRD nor Warm Springs has argued that the conversion statute only applies to hydroelectric water rights used after October 22, 1999.

³E.g. OWRD was a signatory to the June 6, 2003 Powerdale Settlement Agreement that had as a point of agreement that the instream flow requirements under the agreement, FERC order or license were to be considered part of Pacific Corp’s use of water under its Pacific Corp hydroelectric right, but only to the extent the water available to Pacific Corp is needed to satisfy the instream right.”

- (ii) Similar to the statement above, the term “actual use” here should be amended to include only “actual use as of October 23, 1999” to be consistent with statute.

OAR 690-054-0010 (7) “Injury”: This definition instructs that injury will be evaluated “pursuant to the considerations of 690-054-0040(6)”. In turn, OAR 690-054-0040(6) brings in considerations that are inconsistent with both the Department’s current definition and application of OWRD’s injury standard for transfers generally, OAR 690-380-0010(3), as well as the narrowing of this standard as directed by ORS 543.150. The OWRD draft rules contemplate broadening the definition of injury in a way that is not contemplated under statute, most notably by directing analysis of future regulation for any reason (e.g. changed hydrological considerations due to climate change) in the injury analysis. Absent amendments to that section, the OWRD should delete the qualifier noted in this definition. This is a significant departure from decades of injury analysis by the OWRD, and shows a clear bias to consumptive users.

OAR 690-054-0010 (10) “Other existing water right as of October 23, 1999”: We support the OWRD’s definition that makes clear that these are water rights in existence (have been issued) as of 1999. Past assertions by stakeholders that this should be expanded to include water rights with priority dates of 1999 (e.g. permits later issued under Reservations for Future Economic Development) have no merit. However, this definition also should be qualified to make clear that such rights take priority over the instream right only as to actual use as of October 23, 1999.

Notice of Consideration for Conversion: Eligibility Determinations and Preliminary Findings of Facts, OAR 690-054-0020

As a general matter we think that the introduction to this section could be clearer that the governing statutes require the Director to convert these hydro rights to instream rights, subject only to a few statutory considerations of injury, etc. In other words, it is not a discretionary action. ORS 543A.305(3) says the water right “shall” convert the water right. The rule’s approach to the decision matrix in the rules does not make this clear.

690-054-0020(2): This subsection should state upfront that the full amount of the water right is subject to conversion, subject to (a)-(d). As written, it presents a false premise that the Director has wide discretion as to the amount.

690-054-0020(1)(c): The language here is not as clear as it could be. The statute allows conversion of a time limited hydro-electric water right that is transferred under ORS 540.520 and 540.530 at the time the time of expiration of the time limited right. We would suggest mimicking the statutory language.

690-054-0020 (2)(c): There is nothing in the statute that allows the OWRD to exempt stand-alone hydro rights that are “part of a larger distribution system for municipal, irrigation or other beneficial uses”. Rather, the statute is clear that if hydro production is not the sole beneficial use authorized by a water right, the statute only applies to conversion of that portion of the water right used exclusively for hydro power (ORS 543A.300(6)). In other words, it requires conversion of the hydro portion of the water right. The rule is correct in exempting water rights pursuant to ORS 543.765 (in conduit hydro), but is in error for attempting to exempt stand-alone hydro rights that might happen to flow through a distribution system (for instance, hydro rights that use irrigation canals that are not in-conduit hydro rights but stand-alone rights). As such, the rule should delete the language that follows “ORS 543.765”.

690-054-0020 (2)(d): This section is confusing as to the limitations on storage, and appears to go beyond the statutory authority of the conversion statute. The first sentence should be amended to state that only the portion of the stored water right dedicated to hydro can be converted.

690-054-0020 (3), Injury determination: As noted previously, WaterWatch has significant concerns with the OWRD's wholly new approach to injury proposed in these rules. This is not consistent with past practice of the OWRD, or the definition of injury that existed in rule for transfers at the time of bill passage (and still exists today).

(a) Determination of actual use of the project: Earlier drafts included "historical bypass practices or requirements" as something that would be considered in the determination of actual use (even though it was not in the governing definition of "actual use"), despite broad support by NGOs, Tribes and ODFW, this has been deleted. As we pointed out in the definition section, required bypass flows should be included in the definition of actual use. Minimum flow requirements are conditions of use and are part and parcel of part of the beneficial use of the hydro right.

(b) The resulting impacts on actual use by Other Existing Water Rights as of October 23, 1999
(B): Regulation: The possibility of future regulation is not a factor that is included in any other rule or internal guidance documents relating to injury. This is a wholly new concept that is not supported by rule. This will allow protection of a water right against a host of unknowns not connected to the transfer, including climate change. We would urge the Commission to strike subsection 3(b)(B).

Proposed Final Order: Final Determination and Findings of Fact, OAR 690-054-0040

As noted previously, the rules would benefit from language that makes the mandate to issue (subject to injury, etc.) a bit more clear. As written, the rules appear to grant the Director broader authority to deny than exists. This could be confusing to people trying to interpret the rules.

690-054-0040(4): This subsection should be deleted. Per statute, the priority date of the instream right must be that of the underlying hydro right. The Director does not have discretion to "determine" the priority date of this right.

690-054-0040(6): Same comments as made previously as to the determination of Actual Use of the Project and Other Existing Water Rights as of 1993 and the determination of injury.

690-054-0040 (7)(a)(A), (B), (C), and (D): The rule proposal on mitigation is confusing on a number of levels, and, importantly, because the directive in (8) makes no sense. At its core, this rule section appears to let water right holders or other interested parties propose mitigation measures, and without any review by the OWRD as to the legality or efficacy of the mitigation measures, direct a process to have interested parties meet, extend the comment period, allow discussions to continue if interested parties show "reasonable progress" and obtain affidavits to consent to said mitigation measures. But then, even if everyone in section (7) comes to agreement, in (8) the OWRD will subordinate all authorized water uses by Other Existing Water Rights as of October 23, 1999". We will comment on the subordination separately, but we will note that having both provisions appears to go well beyond what is contemplated by statute.

690-054-0020 (8): Section 8 is essentially a subordination directive. We do not believe the language as proposed is supported by statute. The statute protects against injury at the time of conversion, this is true. That said, this statutory protection is limited to protection against injury of the “actual use” of “other existing water rights as of October 23, 1999”. So in other words, for those water rights in existence as of October 23, 1999, the statute protects the actual use of those rights (so in other words, undeveloped water rights are not protected under the statute) against injury at the moment in time the right is converted. The statute purposefully used the term injury, one that has applied to transfers for years and was in existence at the time this statute was passed. The legislature then narrowed this term as noted previously. To assert wholesale subordination exceeds statutory intent because it protects the whole of the water right at full build out in perpetuity against a whole host of unknowns, including hydrology changes due to climate change. This grants the full amount (not the actual use) of pre-October 23, 1999 water rights protection that is not seen in any other forum.

This path also generally moots the need for any other provision of proposed rules. If the OWRD is going to take the position that the full amount of Other Existing Water Rights as of October 23, 1999 shall not be subject to regulation into the future, period, then all other provisions of the rules should be mooted. The inclusion of this provision, as well as all the other sections that serve only to undermine the full conversion of the power right, serve as double hit, so to speak, and shows a clear bias against protecting water instream.

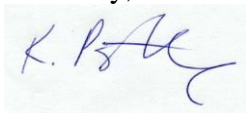
Exceptions, OAR 690-054-0070: The rules should allow exceptions to the OWRD Order to go to the Commission for final determination.

Issuance of Instream Water Right Certificate, 690-054-0080: There is no authority found in any section of the Oregon Revised Statutes, including the Hydro Conversion Statutes or the Instream Water Rights Act, that allow the OWRD to limit instream water rights from being “additive”. In addition to the fact there is no legal authority for this, it makes no biological sense. The OWRD has no authority to limit the instream conversions as proposed. This should be struck from the rules.

Conclusion: As we have stated in previous comments and in RAC meetings, we do not believe that the proposed rule language conforms to the plain language of the statute. As drafted, the proposed rules will minimize instream gains meant to be granted by the conversion statute. We urge the Department to amend the rules to align with statutory directives and intent. If OWRD does not do this in the final proposed draft that goes to the Commission, we urge the Commission to direct OWRD to amend the rules to align with statute.

Thank you for consideration of our comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "K. Priestley", is written over a light blue rectangular background.

Kimberley Priestley
Sr. Policy Analyst

From: skaser@forgepacific.com
Sent: Tuesday, August 10, 2021 2:35 PM
To: [POTTER Breeze K * WRD](#)
Subject: Conversion of a Hydroelectric Water Right to an Instream Water Right

To Whom it May Concern,

The rule change of Hydroelectric Water Right to an Instream Water Right is very troublesome to me based on we are already experiencing over allocation of our surface waters. If any water right is no longer in use, it should not be sold or transferred, but rather it should be returned to the body of water it was allocated from, thus, making it available for a new water right by going through the current process for obtaining water rights. Many of these hydroelectric water rights were issued long ago when the issues with depletion of surface waters were not as they are today.

Using surface water for generating electricity does not deplete the instream quantity of water. By transferring a hydroelectric permit to an instream permit we are circumventing the process currently in place to protect against over allocation of our surface water. I'm under the impression that currently if an instream water right is not used for a period it is terminated. The same should apply to hydroelectric water rights.

End runs are not acceptable when dealing with Oregon's most precious resource.

Thank you

Steve Kaser
Groundwater Protection Service LLC
502 Lewis Street
Silverton Oregon 97381
Oregon Water Well Contractor Lic. 1962



DESCHUTES RIVER
CONSERVANCY

November 30, 2021

Breeze Potter, Rulemaking Coordinator
Oregon Water Resources Department and
Oregon Water Resources Commission
725 Summer St. NE, Suite A
Salem, OR 97301
Breeze.k.potter@oregon.gov

Re: Conversion of a Hydroelectric Water Right to an Instream Water Right
Comments, Draft Instream Conversion Rules, Oregon Administrative Rules Chapter 690, Division 54

Dear Ms. Potter and the Oregon Water Resources Commission:

Thank you for the opportunity to provide comment on the draft revision to Oregon Administrative Rules Chapter 690, Division 54 regarding the conversion of a hydroelectric right to an instream water right. The Deschutes River Conservancy (DRC) is a non-profit conservation group with the mission to restore streamflow and water quality in the Deschutes Basin. The DRC achieves this mission with collaborative and market-based solutions and has an obligation to monitor streamflows that have been protected instream with the use of public, foundation and donated funds.

Hydroelectric water rights relate to instream water rights in that they require a specific amount/rate of water in a stream at a specific point. We are concerned that some of the proposed rules may impact public investments in streamflow restoration:

- We are concerned that the proposed rules expand the definition and determination of injury (OAR 690-054-0010(7)) in a way that is not consistent with statute.
- Director discretion to alter priority date (does not exist). See 690-054-0040(4) - priority date of the instream right should be that of the underlying hydro right, per statute.
- The proposed rule on mitigation appears to allow the water right holder or other parties to propose mitigation measures without OWRD review of effectiveness or value of the mitigation measure (690-054-0040(7) and (8 - subordination) allows OWRD to subordinate all authorized water uses by other existing water rights as of October 23, 1999. What is the impact to public investments in stream restoration?
- The proposed rule appears to limit the instream water right and not allow it to be additive (Issuance of Instream Water Right Certificate, 690-054-0080). "Each Instream Water Right is allocated individually and shall not be additive to other Instream Water Rights." No authority to limit instream water rights from being additive and this is counter to current practice.

As drafted the proposed rules could minimize and even restrict instream gains meant to be granted by the conversion statute. We appeal to the Commission to direct OWRD to assure that the rules align with statute and that instream flows are not harmed.

The DRC appreciates having the opportunity to continue to participate in matters related to the protection of instream water rights, including rules advisory committees and providing public comment on proposed rules revisions. We look forward to ongoing communications with the Department and stakeholders and discussions on how best to protect instream flow rights in the interest of healthy streams in the Deschutes Basin.

Best Regards,

A handwritten signature in cursive script that reads "Kate Fitzpatrick".

Kate Fitzpatrick
Executive Director
kate@deschutesriver.org
Deschutes River Conservancy



Oregon

Kate Brown, Governor

Department of Fish and Wildlife

Fish Division

4034 Fairview Industrial Drive SE

Salem, OR 97302-1142

(503) 947-6000

FAX: (503) 947-6202

Internet: www.dfw.state.or.us

November 30, 2021

Breeze Potter
Rules Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301



Re: Comments on Water Resources Department Division 54 Draft Rules

Dear Ms. Potter,

Thank you for the opportunity to provide comments on Oregon Water Resources Department's (OWRD) Draft Rules for Conversion of a Hydroelectric Water Right to an Instream Right (Division 54 Rules). The Oregon Department of Fish and Wildlife (ODFW) has appreciated the opportunity to participate as a member of the Division 54 Rules Advisory Committee (RAC). The RAC was initiated by OWRD in 2017 to consider rules to convert a hydroelectric water right to an instream water right pursuant to Oregon Revised Statute (ORS) 543A.305. The RAC met several times to consider different iterations of the proposed rule language, however, the RAC was unable to reach consensus. OWRD proceeded to release the draft Division 54 Rules for public comment. As articulated more fully below, ODFW is concerned that the draft Division 54 Rules are inconsistent with its enabling statute, the statutory policy direction provided by the legislature, and the State's broader water policy goals. Accordingly, the rules will not meaningfully advance the legislative direction to secure instream "up to the full amount" of expiring water rights nor the State's goal to balance instream and out-of-stream water needs as articulated in OWRD's Integrated Water Resources Strategy (IWRS).

ODFW is the agency established to manage the fish and wildlife resources of the State of Oregon (ORS 496.080, ORS 496.012, ORS 496.118, and ORS 496.124). ODFW is authorized to implement the State fish and wildlife policies and is uniquely qualified to further those policies through its recommendations to protect, conserve, and improve fish and wildlife resources in the State. Legally protecting water instream for fish and wildlife is a key strategy articulated in the IWRS and advanced by ODFW to help ensure balanced water management. ORS 543A.305 provides a mechanism to secure legally protected water instream while ensuring that water users in existence when the statute was enacted will not be injured. In effect, the statute aims to minimize impacts to fish and wildlife and water users that would materialize with the cessation of a hydropower project.

Hydroelectric production under hydroelectric water rights and licenses is a non-consumptive use. Without utilization of the conversion process authorized by ORS 543A.305, cessation of hydroelectric projects would result in water being diverted out of stream by consumptive users who were previously junior to the hydroelectric project creating an impairment to fish and wildlife habitat. Recognizing this, the Legislature and the Hydroelectric Task Force that advanced the instream conversion statutory language clearly contemplated that the full amount of the hydroelectric water right would be converted instream subject to reduction only if injury to the "actual use" of a water right in existence on the date of enactment of ORS 543A.305 was found. Contrary to this goal, however, the Division 54 Rule is structured to offer OWRD multiple opportunities in the process to reduce or erode the amount that will actually be protected instream. This is likely to lead to the outcome that the statute was intended to

avoid: impairment to fish and wildlife habitat. ODFW respectfully requests that OWRD reconsider its rule language to address the comments below, ensure consistency with the statute, and help ensure advancement of the State's IWRS goals.

Specific Comments

- 1) ORS 543A.305(3) states that up to full amount of water right "associated with the hydroelectric project" shall be converted to an instream water right if it will not result in injury to other existing water rights. In making the determination, the director shall consider "the actual use of the hydroelectric project." It is ODFW's position that bypass flows that are required by a Federal Energy Regulatory Commission (FERC) license, §401 water quality certification, or state water right are part of the actual use of the hydroelectric project up to, but not exceeding, the full water right granted by OWRD. OWRD's proposed definition for the "actual use" of a hydroelectric project is too narrow and is not consistent with ORS 543A.305. For instance, language regarding bypass flows has been omitted from OWRD's current draft rule definition. Bypass flows are a required condition of the project operations (that is, if bypass flows are not released, hydropower production is not authorized). If the project has a State water right of record, then bypass flows should be eligible for conversion to instream water rights pursuant to the statute. ODFW recommends that OWRD take bypass flows into consideration when determining the appropriate amount eligible for conversion to an instream water right. This recommendation applies to bypass flows that are expressly included in the hydroelectric licenses and bypass flows that are required and thus determined to be a "beneficial use" under FERC requirements. *See* ORS 543A.305(3); proposed OAR 690-054-0010(1).
- 2) One of the draft rules allow OWRD to limit instream rights so that they are not "additive." *See* proposed OAR 690-054-0080. ODFW's recommendation is to remove this language as currently drafted because it appears inconsistent with ORS 543A.305. All water rights (including the converted instream water right) should be regulated in accordance with priority date with no artificial constraints imposed on the quantity of instream water right.
- 3) Another draft rule limits the amount of water that can be converted instream from a multi-purpose dam. *See* proposed OAR 690-054-0020(d). If a water right authorizes multiple beneficial uses, the statute allows the portion that is solely used for hydropower to be converted instream. Language in the rule around larger distribution systems is too broad. There could be sole hydropower rights that flow through distribution systems that are not in-conduit and thus those rights should still be able to be converted instream. ODFW suggests that the rule mirror the statutory language.
- 4) The governing statute clearly requires that the priority date of the in-stream water right be the same as that of the converted hydroelectric water right. *See* OAR 543A.305(2). The rule language seems to imply there is discretion on this point. ODFW suggests clear language that a water right converted to an in-stream water right shall retain the priority date of the underlying hydroelectric water right.
- 5) ORS 543A.305(3) is very purposeful in its use of the term "actual use." *See* ORS 543A.305(3). For example, in OWRD's evaluation, including its assessment of injury, the OWRD Director is required to consider the "actual use" of the hydroelectric project and the resultant impacts on the "actual use" by other existing water rights as of October 23, 1999. However, the proposed rule language defines *actual use* in a narrow manner in the context of a hydroelectric project (attempting to precisely determine the amount that goes through a turbine and excluding bypass flows) and in a broader manner in the context of an existing water right (not explicitly limiting it to the amount that was actually diverted pursuant to the water right as of October 23, 1999). ODFW recommends consistent definitions and applications of "actual use" for both hydroelectric water rights and existing water rights. Additionally, ODFW believes that the statute supports an

interpretation that existing water rights as of October 23, 1999 are only to be protected from injury up to the amount that was actually being “used” as of October 23, 1999.

- 6) The draft rule language incorporates factors in the injury analysis that are not supported by statute and, in some cases, improperly avoids an injury analysis by subordinating ISWR to all existing water users. Specifically, ODFW is concerned that: (1) the proposed rule OAR 690-054-0040(6)(b) (e.g., subordination) is over broad, because absent a threshold finding of injury the Director has no authority to condition the ISWR; and (2) the rule improperly allows the likelihood of future regulation in its injury analysis (*see* OAR 690-054-0020(3)(b)(B)). ODFW recommends that proposed rules clarify that mitigation may not be imposed until an injury finding is made by the OWRD Director. And significantly, mitigation should be exclusively focused on avoiding identified injury to the “actual use” of an existing water right as of October 23, 1999, not protecting future water uses or insulating “existing” water users from the effects of future conditions (such as climate change) at the expense of the converted instream water right.
- 7) Pursuant to OAR 690-054-0030(4) “[a]t the discretion of the Director, if the Hydroelectric Water Right was Subordinated to Other Existing Water Rights as of October 23, 1999, then the first public notice may be given at the time of the proposed final order describing the conversion to an Instream Water Right under OAR 690-054-0040 to 690-054-0050.” This proposed rule does not provide the public and ODFW sufficient notice to communicate concerns on behalf of public trust resources such as fish and wildlife. This rule will limit the ability of ODFW and the public to review the adequacy of the proposed final order in situations where a subordination clause is imposed. ODFW recommends that this rule be changed to allow not less than 30 days and no more than 60 days for a notice and comment period to allow for consultation and public comment.

Thank you for the opportunity to comment on OWRD’s draft Division 54 Rules. Please contact me if you have any questions or need additional information.

Respectfully,



Chandra Ferrari
Water Program Manager
Oregon Department of Fish and Wildlife
4034 Fairview Industrial Dr. SE
Salem, OR 97302
Chandra.a.ferrari@odfw.oregon.gov
(503) 910-4586



September 29, 2021

Breeze Potter
Rules Coordinator
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301-1271

SENT VIA EMAIL (breeze.k.potter@oregon.gov)

RE: Comments on Proposed Division 54 Rulemaking, Conversion of a Hydroelectric Water Right to an Instream Water Right

Dear Ms. Potter:

The Oregon Water Resources Congress (OWRC) is providing comments on the Oregon Water Resources Department's (WRD) proposed changes to Division 54 rules under OAR Chapter 690, Conversion of a Hydroelectric Water Right to an Instream Water Right. OWRC was a member of the Rules Advisory Committee and appreciates the time and efforts that you and other OWRD staff have invested in this rulemaking. We are providing comments and suggested clarifications to the proposed rules.

OWRC is a nonprofit association of irrigation districts, water control districts, water improvement districts, drainage districts and other local government entities delivering agricultural water supplies. The water stewards we represent operate complex water management systems, including water supply reservoirs, canals, pipelines, and hydropower facilities. Our members directly deliver water to roughly 1/3 of all irrigated land in Oregon.

Our primary concern is the wording of the proposed "Actual Use" and related "Injury" definitions. We recommend modifying the definitions to clarify and better match the underlying statutory authority. We are also concerned about the potential impacts to districts who manage hydroelectric projects and suggest revising the rules to avoid unintended impacts to those water rights when leased instream.

We are concerned the definition of "Actual Use" as proposed in OAR 690-054-0010(1), which currently reads "the amount of water, expressed in cfs, legally diverted and beneficially used, based on documents available to the Department," leaves out language that could lead to unintended injury of senior water right holders. Because this definition is applied to Other Existing Water Rights under the proposed OAR 690-054-0010(1)(b), which presumably includes irrigation and other agricultural water rights that could be injured by a permanent conversion, the rules should be modified to better align with existing statutory language and practice. We suggest the following change, with added wording in bold italics:

"(b) For Other Existing Water Right(s) as of October 23, 1999, the ***maximum*** amount of water, expressed in cfs, ***that could be*** legally diverted and beneficially used, based on documents available to the Department."

Changing the definition is necessary to ensure the water use covered under “Other Existing Water Rights” is properly protected from injury, which includes both the historic use of such rights, as well as the maximum amount that could be used. In other words, consistent with ORS 540.310(3), so long as the holder of an “Other Existing Water Right” has facilities capable of handling the entire rate and duty authorized under the right, and is otherwise ready, willing, and able to make full use of the right, then the right should be protected from injury, even if such full use does not occur in a given year or period of years. To be clear, the conversion of a hydroelectric water right to permanent instream use should not impede or preclude an “Other Existing Water Right” holder from fully exercising the right in the future, even if the right had only been partially exercised in the past.

We would further note that the definition of “Injury” in proposed OAR 690-054-0010(7) incorporates the proposed definition of “Actual Use” set forth above, which makes the definition as currently proposed even more problematic. Injury review needs to include potentially impacted water right holders and the effects the proposed instream conversion would have on the maximum amount of water legally available to divert under the water right.

Along these same lines, and to ensure that the Department is considering the full potential for injury to Other Existing Water Rights, we would expect the Department to address the potential to use water up to the full rate and duty under an Other Existing Water Right as part of its preliminary finding on injury pursuant to proposed OAR 690-054-0020(3)(b)(D), and as part of its determination on injury pursuant to proposed OAR 690-054-0040(6)(b)(D). We would propose that these two proposed rule provisions be revised to explicitly account for the use of water protected by ORS 540.310(3). In the alternative, the Department could also respond to this comment by agreeing the term “[a]ny other available evidence” as used in these two proposed rule provisions would include the full rate and duty of an Other Existing Water Right, where such full rate and duty was protected under ORS 540.310(3).

Additionally, for districts who also operate hydroelectric projects, it is important to ensure the water rights associated with those projects are not injured or jeopardized. Irrigation districts and other operators of dams and reservoirs occasionally need to stop operations for repairs, upgrades, or other financial factors. The proposed rules should clarify a hydroelectric water right that has been temporarily leased instream is still considered a beneficial use and aligns with the 2020 Oregon Court of Appeals opinion in *WaterWatch of Oregon v. Water Resources Department*, (304 Or. App. 617). Language should be added to proposed OAR 690-054-0020(1)(a) to make clear that when a hydroelectric water right has been leased to temporary instream purposes, use of water under the right (and pursuant to the temporary instream lease terms and conditions) has not “ceased” as that term is used in the corresponding statute and proposed rule. Furthermore, language should be added to the proposed OAR 690-054-0000 to make clear that the beneficial use of water under a hydroelectric water right includes temporary instream leasing of the right.

Lastly, OWRC is supportive of other components of the proposed rule changes, including the default Mitigation Measure language set forth in OAR 690-054-0040(8) and (9).

Thank you for the opportunity to provide comments on the proposed Division 54 Rulemaking.

Sincerely,
April Snell
Executive Director



September 28, 2021

David E. Filippi
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
D. 503.294.9529
david.filippi@stoel.com

VIA EMAIL (breeze.k.potter@oregon.gov)

Breeze Potter
Rules Coordinator
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301-1271

Re: Comments on OWRD Division 54 Rulemaking

Dear Breeze Potter,

We represent East Fork Irrigation District (“EFID”) with respect to the Department’s Division 54 rulemaking, and we hereby submit these comments on EFID’s behalf. Representatives of EFID participated as part of the Rule Advisory Committee, and we appreciate the time that you and other Department staff have spent on this rulemaking. We have several comments on the proposed rules.

First, EFID has concerns with the definitions of “Actual Use” in proposed OAR 690-054-0010(1). The definition of “Actual Use” as applied to Other Existing Water Rights, which we understand would include irrigation rights that could be injured by a permanent conversion, is “the amount of water, expressed in cfs, legally diverted and beneficially used, based on documents available to the Department.” OAR 690-054-0010(1)(b) (as proposed). This definition should be modified to read as follows:

“(b) For Other Existing Water Right(s) as of October 23, 1999, the *maximum* amount of water, expressed in cfs, *that could be legally* diverted and beneficially used, based on documents available to the Department.”

This modification is necessary to ensure that the water use pursuant to Other Existing Water Rights that is to be protected from injury includes both the historic use of such rights, as well as the maximum amount that could be used. In other words, consistent with ORS 540.310(3), so long as the holder of an Other Existing Water Right has a facility capable of handling the entire rate and duty authorized under the right, and is otherwise ready, willing, and able to make full use of the right, then the right should be protected from injury, even if such full use does not

Breeze Potter
September 28, 2021
Page 2

occur in a given year or period of years. To be clear, the conversion of a hydroelectric water right to permanent instream use should not impede or preclude an “Other Existing Water Right” holder from fully exercising the right in the future, even if the right had only been partially exercised in the past.

We would further note that the definition of “Injury” in proposed OAR 690-054-0010(7) incorporates the proposed definition of “Actual Use” set forth above, which makes the definition as currently proposed all the more problematic.

Along these same lines, and to ensure that the Department is considering the full potential for injury to Other Existing Water Rights, we would expect the Department to address the potential to use water up to the full rate and duty under an Other Existing Water Right as part of its preliminary finding on injury pursuant to proposed OAR 690-054-0020(3)(b)(D), and as part of its determination on injury pursuant to proposed OAR 690-054-0040(6)(b)(D). We would propose that these two proposed rule provisions be revised to explicitly account for the use of water protected by ORS 540.310(3). In the alternative, the Department could also respond to this comment by agreeing that the term “[a]ny other available evidence” as used in these two proposed rule provisions would include the full rate and duty of an Other Existing Water Right, where such full rate and duty was protected under ORS 540.310(3).

Finally, EFID would like to express support with respect to the default Mitigation Measure language set forth in OAR 690-054-0040(8) and (9).

We appreciate the opportunity to provide comments.

Sincerely,



David E. Filippi
Of Counsel for East Fork Irrigation District

cc: Client



September 28, 2021

Via EMAIL
breeze.k.potter@oregon.gov

Breeze Potter
Oregon Water Resources Department
725 Summer St. NE, Suite A,
Salem, OR 97301-1271

**RE: Conversion of a Hydroelectric Water Right to an Instream Water Right;
Comments on Proposed Rules Pursuant to Oregon Revised Statutes (ORS)
543A.305**

Dear Breeze Potter,

The Northwest Hydroelectric Association (NWAHA) appreciates the opportunity to comment on the proposed rules establishing standards and procedures for the Oregon Water Resources Department (OWRD) Director to consider the conversion of a Hydroelectric Water Right to an Instream Water Right in accordance with the provisions of Oregon Revised Statutes (ORS) 543A.305.

NWAHA is a non-profit trade association that represents and advocates on behalf of the Northwest hydroelectric industry. NWAHA has over 130 members from all segments of the industry, including electric utilities, water districts, and other hydroelectric project owners and operators. A third of NWAHA members are located in Oregon. NWAHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the Northwest region. NWAHA recognizes the role that hydropower plays in fighting climate change, supporting the state's renewable portfolio standards, and keeping energy affordable.

NWAHA appreciate the efforts of the OWRD and its Rules Advisory Committee (RAC) to establish standards for determining: (1) Actual Use under the Hydroelectric Water Right; (2) Resulting impacts on Actual Use by Other Existing Water Right(s) as of October 23, 1999; (3) Whether the conversion would result in Injury to Other Existing Water Right(s) as of October 23, 1999; and (4) Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses by Other Existing Water Right(s) as of October 23, 1999.

General Comments:

Of primary concern to hydroelectric project operators is the ability to ensure continued operation of existing projects, for which water rights are essential.

BRENNA VAUGHN
Executive Director

PO Box 441
Lake Oswego, OR 97034

(503) 502-7262
(866) 329-6525 Fax

www.nwhydro.org
brenna@nwhydro.org

*For a list of Directors,
please visit our website.*

In practice, it is not uncommon for a project to suspend operations for long periods for a variety of dam safety, operational, or economic factors. The proposed rules should clarify that a hydroelectric water right that has been leased to temporary instream use is currently considered a beneficial use, as set forth by the Oregon Court of Appeals in its recent opinion in *WaterWatch of Oregon v. Water Resources Department*, 304 Or. App. 617 (2020).

Under current practice and law, ORS 537.348 authorizes holders of water rights to lease their rights for instream use for a specified period without losing the original priority date of the water right. ORS 543A.305(3) was enacted in 1999 and provides that water rights associated with a hydroelectric project shall be converted to a permanent instream water right for the public trust “[f]ive years after the use of water under a hydroelectric water right ceases.” Recently, the Oregon Court of Appeals properly read these two provisions together to recognize that a hydropower facility can lease its water rights as provided for in ORS 537.348 without risking the permanent conversion of those rights under ORS 543A.305, as cited above. This decision is currently pending review by the Oregon Supreme Court, and we understand a decision is anticipated next year. (*WaterWatch of Oregon v. Water Resources Department*, Or. Sup. Ct. No. S067938.) The principles in the ongoing court case are also important for consideration in this rulemaking:

- (i) hydropower generation is important to Oregon and reliable water rights are key to its preservation;
- (ii) hydroelectric water rights must be administered in accordance with both ORS 537.348 and ORS 543A.305(3); and
- (iii) a “hydroelectric water right” refers to a right owned or held by a hydroelectric project, not the actual use of the water right for hydropower generation.

NWHA believes that it is critical to ensure that the holders of hydroelectric water rights maintain the ability to lease their rights temporarily to instream use to preserve the ability to re-start or re-develop hydropower operations at a later date, in a manner similar to the temporary instream leasing opportunity afforded to all other water rights under Oregon law.


Specific Comments:

Consistent with the principles above, NWHA has reviewed the most current version of the proposed rules and has the following specific comments, which are offered to help ensure that the final rules continue to preserve operational and economic flexibility provided for by statute to holders of hydroelectric water rights:

- Language should be added to proposed OAR 690-054-0020(1)(a) to make clear that when a hydroelectric water right has been leased to temporary instream purposes, use of water under the right (and pursuant to the temporary instream lease terms and conditions) has not “ceased” as that term is used in the corresponding statute and proposed rule.
- Similarly, language should be added to the purpose and applicability paragraph in proposed OAR 690-054-0000 to make clear that the beneficial use of water under a hydroelectric water right includes temporary instream leasing of the right.

We thank the OWRD for the opportunity to comment and would be happy to provide additional information, or examples of where temporary instream leasing of hydroelectric water rights may provide critical flexibility for operators to address persistent dam safety and other, similar concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Brenna Vaughn". The signature is fluid and cursive, with a large initial "B" and a long, sweeping tail.

Brenna Vaughn, Executive Director



Confederated Tribes of Warm Springs, Oregon
PO Box C
Warm Springs, OR 97761
Phone: 541-553-1161
Fax: 541-553-1924

September 28, 2021

Via First Class Mail and Email: Breeze.K.POTTER@oregon.gov

Oregon Water Resources Commission
c/o Breeze K. Potter, Rules Coordinator
Oregon Water Resources Department
725 Summer St, NE Suite A
Salem, OR 97301-1271

Re: Rulemaking for Conversion of a Hydroelectric Water Right to an Instream Water Right, OAR Chapter 690, Division 054 – Comments

Dear Ms. Potter:

I am the General Manager of the Branch of Natural Resources for The Confederated Tribes of the Warm Springs Reservation of Oregon (“Tribe”). On behalf of the Tribe, I am offering comments to the proposed rules in OAR Chapter 690, Division 054, which relate to the conversion of a hydroelectric water right to an instream water right pursuant to ORS 543A.305 (“Proposed Rules”).

The Tribe served on the Rules Advisory Committee assisting the Oregon Water Resources Department (“Department”) with the development of the Proposed Rules. Throughout the process, we have sought to provide the Department with our perspective as a sovereign, federally-recognized Indian tribe, a holder of treaty-reserved rights pursuant to the Treaty with the Tribes of Middle Oregon, June 25, 1855 (“1855 Treaty”), and a party to the Settlement Agreement Concerning the Interim Operation and Decommissioning of the Powerdale Hydroelectric Project, FERC Project No. 2659, dated June 6, 2003 (“Powerdale Agreement”). We also endeavored to help the Department to develop rules that are fair, workable, and consistent with the legislative policy contained in ORS 543A.305. Unfortunately, the Proposed Rules fall short of that standard and are inconsistent with the statute. We ask that the Commission not approve the Proposed Rules



and, instead, instruct the Department to revise the Proposed Rules so that they are consistent with ORS 543A.305.¹

OAR 690-054-0010 – Definitions

OAR 360-054-0010(1)(a) – The proposed definition for the “actual use” of a hydroelectric project is too narrow and is not consistent with ORS 543A.305. The statute requires that “*up to the full amount of the water right associated with the hydroelectric project*” be converted to an in-stream water right as long as the conversion will not result in injury to other existing water rights. ORS 543A.305(3) (emphasis added). There is nothing in the text of the statute that can be reasonably construed as limiting the conversion of a hydroelectric water right to that portion of the water “legally diverted through the hydroelectric turbine to produce electricity * * *” as the proposed rule provides. The definition must include bypass flows required by licenses issued by the Federal Energy Regulatory Commission (“FERC”). Not doing so ignores the actual use of hydroelectric projects whose turbines are located adjacent to the river, which commonly include FERC mandated minimum instream flows in the “bypass” reach.² The failure to include bypass flows in the definition of “actual use” risks creating an arbitrary distinction between decommissioned hydroelectric projects whose turbines are located adjacent to the river and those whose turbines are located in the river itself. The proposed definition is also inconsistent with the Powerdale Agreement § 4.3.1, which considers FERC bypass flows as part of PacifiCorp’s use of water under its hydroelectric water right. The Department is a party to the Powerdale Agreement, which was entered into after the enactment of ORS 543A.305. As noted in my earlier comment letter, the Department should not propose a definition of actual use that excludes FERC bypass flows in a manner that is not consistent with the Powerdale Agreement.

OAR 360-054-0010(1)(b) – The proposed definition of “actual use” for other existing water rights as of October 23, 1999 should be clarified to unambiguously include the amount of water that was both legally *and in fact* diverted in accordance with those existing water rights.

¹ On May 29, 2018, Josh Newton, one of the Tribe’s attorneys, sent a letter to the Department on behalf of the Tribe raising concerns about the draft rules as they existed at that time. On January 11, 2021, I sent the Department a letter providing supplemental comments on behalf of the Tribe. To ensure that the administrative record is complete, I am enclosing copies of Mr. Newton’s letter and my prior letter and incorporating them by reference here. I am also enclosing a copy of the Powerdale Agreement.

² A bypass reach is commonly understood as the reach of a river between the dam that diverts water into a penstock for delivery to an off-channel powerhouse, and the point of return of the diverted water after it passes through the powerhouse.



OAR 360-054-0010(7) – ORS 543A.305(3) requires that the Water Resources Director find that a conversion of a hydroelectric water right “will not result in injury to other existing water rights.” In making that determination, the director must 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 proposed regulatory definition of “injury” focuses on whether those other existing water rights will receive “previously available water.” This inquiry is based on the “Actual Use” of both the hydroelectric project and the other water users. As noted, the proposed rules do not define “Actual Use” to include bypass flows mandated by FERC. As a result, the comparison of the actual use of a hydroelectric project with the actual use of other existing water rights as of October 23, 1999 is flawed. The proposed definition of “injury” should be revised to align with ORS 543A.305(3).

OAR 690-054-0020 – Notice of Consideration for Conversion: Eligibility Determinations and Preliminary Findings of Fact

OAR 360-054-0020(3) – By statute, the Department is required to evaluate whether the conversion will result in injury to other existing water rights, in part by considering “the actual use of the hydroelectric project and the resulting impacts on actual use by other existing water rights as of October 23, 1999.” ORS 543A.305(3). *OAR 360-054-0020(3)(a)* does not align with the statute because it relies on the flawed definition of “Actual Use” in *OAR 360-054-0010(1)(a)*, which, as noted, omits any consideration of historical bypass flows associated with the hydroelectric project.

OAR 360-54-0020(3)(b) is also problematic. ORS 543.305(3) instructs the Department to consider the “resulting impacts on Actual Use by Other Existing Water Rights as of October 23, 1999.” The statute does not authorize the Department to consider whether “new regulation under Chapter 690, Division 250 would likely be required for the proposed conversion to an Instream Water Right * * *” as set forth in *OAR 360-54-0020(3)(b)(B)*. Speculation about future regulation of existing water rights is not relevant to the statutory injury inquiry provided in ORS 543.305(3).

OAR 690-054-0040 – Proposed Final Order: Final Determinations and Findings of Fact

OAR 360-054-0040(6) – The Tribe incorporates by reference its comments to proposed *OAR 360-054-0020(3)*, provided above.

OAR 360-054-0040(7) – ORS 543A.305(3) authorizes the Department to impose mitigation measures only to “avoid injury *and* to ensure the continuation of authorized water uses by other existing water rights.” (Emphasis added.) *OAR 360-054-0040(7)* should be revised to clarify the Department’s limited authority to impose mitigation measures only when it is necessary to *both* (a) avoid injury and (b) ensure the continuation of authorized water uses by other water users.



OAR 360-054-0040(8) – ORS 543A.305 does not authorize the Department to unilaterally subordinate the instream water right to any other water right, including “Other Existing Water Rights as of October 23, 1999.” Instead, the statute requires that the “priority date of the in-stream water right shall be the same as that of the converted hydroelectric water right.” ORS 543A.305(2). OAR 360-054-0040(8) is contrary to the express legislative intent. The Department should delete this subsection in its entirety.


OAR 690-054-0060 – Filing of Protests

This proposed rule should be revised to acknowledge the sovereign interests of federally-recognized Indian tribes located in the State of Oregon, which hold treaty-reserved rights to fish, hunt, and gather culturally important foods. For example, pursuant to the 1855 Treaty, the Tribe has legally-enforceable reserved rights to take fish at its usual and accustomed areas throughout much of Oregon. The Tribe’s right to take fish includes the right to have a harvestable population of fish, which depend on instream flows. *See United States v. Washington*, 853 F.3d 946, 966 (9th Cir. 2017), *aff’d by equally div’d court* 138 S.Ct. 1832 (2018). The Tribe, thus, has a treaty-reserved right to minimum instream flows necessary to maintain a harvestable population of fish. *See generally Baley v. United States*, 942 F.3d 1312 (Fed. Cir. 2019). The priority date of that right is time immemorial. *Cf. United States v. Adair*, 723 F.2d 1394, 1412 – 14 (9th Cir. 1983).

The proposed rule should also be revised to provide automatic party status to any federally-recognized Oregon “treaty tribe” that chooses to commence a protest, or to participate in any protest initiated by other parties, with respect to the conversion of a hydroelectric water right in waters for which the tribe holds an interest, including treaty-reserved rights.

Thank you for considering the Tribe’s comments.

Very truly yours,


ROBERT A. BRUNOE
General Manager, Branch of Natural Resources
RAB/jn

Enclosures

cc: The Hon. Raymond C. Tsumpti, Chairman, Tribal Council
The Hon. Brigette McConville, Vice-Chairwoman, Tribal Council
Josh Newton, Tribal attorney





May 29, 2018

Via Email: Mary.S.Grainey@oregon.gov

Mary S. Grainey
Hydroelectric Program Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301

Re: Rules Advisory Committee (RAC) – OAR 690-54 Conversion of a Hydroelectric Water Right to an Instream Water Right

Dear Ms. Grainey:

The Confederated Tribes of the Warm Springs Reservation of Oregon (“Tribe”) appreciates the opportunity to serve on the RAC for the adoption of rules intended to implement ORS 543A.305. The Tribe’s goal is to provide the Water Resources Department (“Department”) with its perspective as a sovereign, federally-recognized Indian tribe and as a holder of treaty-reserved rights pursuant to the Treaty with the Tribes of Middle Oregon, June 25, 1855 (“1855 Treaty”). The Tribe also endeavors to provide the Department with its perspective as party to the Settlement Agreement Concerning the Interim Operation and Decommissioning of the Powerdale Hydroelectric Project, FERC Project No. 2659, dated June 6, 2003 (“Powerdale Agreement”).¹ The Tribe is focused on assisting the Department develop rules that are fair, workable, and consistent with the legislature’s statutory policy direction contained in ORS 543A.305.

¹ The Tribe observes that the Department along with the Oregon Department of Fish and Wildlife and the Oregon Department of Environmental Quality are parties to the Powerdale Agreement.

W1108.38(a)1\1311721_5

The Tribe is concerned that the RAC may not have provided the Department with sufficient assistance as to the legislative policy direction contained in ORS 543A.305. The Tribe fears that the RAC members – including the Tribe – have over-focused on how the rules would affect implementation of the Powerdale Agreement’s requirement to convert PacifiCorp’s hydroelectric water right to an instream right pursuant to ORS 543A.305.² While the rulemaking process should accommodate the Powerdale Agreement, it should not be the sole driver the RAC process.

The Tribe suggests that the RAC devote time at its next meeting to discussing the legislative policy direction in ORS 543A.305. The discussion should be guided by the Oregon Supreme Court’s interpretive framework set forth in *State v. Gaines*, 346 Or 160, 206 P2d 1042 (2009), which principally focuses on the text and context of the statute together with relevant legislative history, if any. It is the Tribe’s hope that focusing on the legislative policy direction will allow the RAC members to better assist the Department in discerning the intent of the legislature to ensure that any rules that it promulgates do not exceed its statutory authority.

I. The Legislative Policy Directive in ORS 543A.305.

Subsection (3) of ORS 543A.305 has been the principal focus of the Department and the RAC. Subject to certain conditions, subsection (3) provides that after use of water under a hydroelectric water right ceases, “up to a full amount of the water right associated with the hydroelectric project shall be converted to an in-stream right, upon a finding by the Water Resources Director that the conversion will not result in injury to other existing water rights.” In making that finding, subsection (3) further provides that 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.” *Id.* 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 uses.” *Id.*

A plain reading of the statutory text reveals that the legislature contemplated that the “full amount” of the “water right associated with [a] hydroelectric project” be converted to an in-stream right, unless the Department finds that there is injury to existing water rights. In making the injury determination, the Department must consider the “actual use of the hydroelectric project” and the “resulting impacts on other existing water rights as of October 23, 1999.” To avoid injury to other existing water rights and ensure continuation of the authorized uses of those rights, the Department may, but is not required to, include mitigation measures as conditions of any water right associated with the use of a hydroelectric project that is converted to an in-stream water right.

² In 1978, the Department issued a certificate of water right (Certificate No. 46965) to PacifiCorp for the Powerdale Project.

II. The “RAC 3 May 2018 Draft” Rules.

The Tribe has reviewed the “RAC 3 May 2018 Draft” (“Draft Rules”). The Tribe is concerned that the Draft Rules do not comport to the legislative policy direction in ORS 543A.305 for at least the following four reasons.³

First, the Draft Rules do not appear to provide a mechanism for the Department to make an initial determination as to what constitutes the “full amount of the water right associated with the hydroelectric project.” Without such a determination, the Tribe does not know how the Department can assure itself that it has satisfied the legislature’s direction to convert “up to a full amount” of the water right associated with the hydroelectric project. ORS 543A.305(3). It seems to the Tribe that determination is the necessary starting point for the analysis. Unless the Department finds that the conversion results in injury to other existing uses, the Tribe believes that the legislative policy direction is for the “full amount of the water right associated with the hydroelectric project” be converted to an in-stream water right. *Id.*

The foregoing begs the following question: What is a “water right associated with the hydroelectric project”? The Draft Rules do not attempt to define that provision. To the extent that OAR 690-054-0010(4) is intended to supply that definition, the Tribe suggests that it be revised to define the statutory provision rather than “[h]ydroelectric water right.” The Department should consider why the legislature chose the phrase “water right *associated* with the hydroelectric project.” (Emphasis added.) The use of the word “associated” seems to connote that the legislature intended for the Department to consider the total amount of water use associated with a hydroelectric project, not simply a limited portion or part of the water right. The statutory text also does not support limiting the definition of the hydroelectric water right to that portion of the right actually used for at this step in the analysis.

Second, the statute requires that the Department find that the conversion of the hydroelectric right to an in-stream water right will not injure existing uses, by comparing the “actual use of the hydroelectric project” with the “resulting impacts on actual use by other existing water rights as of October 23, 1999.” *Id.* If there is no injury, then the full amount of the water right associated with the hydroelectric project must be converted to an in-stream water right.⁴ *Id.* The Tribe believes that the definition of “Actual Use of the Hydroelectric Project” in

³ The Tribe expressly reserves the right to raise other concerns that it may have with the Draft Rules at a future RAC meeting.

⁴ In making that determination, the legislature instructs the Department to consider the “impacts on actual use by other existing water rights as of October 23, 1999.” OAR 543A.305(3).

OAR 690-054-0010(1) of the Draft Rules does not comport with the statute or the Powerdale Agreement.

Section 4.3.1 of the Powerdale Agreement provides:

“Instream flows required under this Agreement * * * by a FERC * * * license *shall be considered* part of PacifiCorp’s use of water under its PacifiCorp Hydroelectric Water Right, but only to the extent that that water available to PacifiCorp under its PacifiCorp Water Right is needed to satisfy the instream flows.”

(Emphasis added.) Article 29 of the FERC license for the Powerdale Project, dated March 14, 1980, contained minimum instream flow requirements as does Section 3.3 of the Powerdale Agreement. The definition of “Actual Use of the Hydroelectric Project” in OAR 690-054-0010(1) of the Draft Rules cannot be squared with the Powerdale Agreement or the plain language of the statute.⁵ The instream flows required by the FERC license for the Powerdale Project are plainly part of the “water right associated” with the Project; as such, the definition in OAR 690-054-0010(1) of the Draft Rules must be revised to include such required instream flows.

Third, the Tribe does not believe that the presumption contained in OAR 690-054-0060(3) of the Draft Rules is supported by the statute. The statute does not authorize the Department to employ any presumptions as a substitute for fact-finding, including any presumptions as to injury or impact to other water rights. Rather, the statute requires that the Department compare the actual use of the hydroelectric project with the “actual use by other existing water as of October 23, 1999.” There is nothing in the statute indicating that the legislature intended for the senior water right associated with a hydroelectric project to bear the risk that other water holders are not able to evidence of actual use. The Tribe cannot think of a valid policy reason for burdening the hydroelectric water right subject to conversion with that obligation. Certainly, there can be no reasonable dispute that the other existing water right holders themselves are the best source of information regarding the use of their water rights. If those holders cannot or will not supply the necessary information, the Department may either find no evidence of actual use for those water rights or resort to other sources of information. In

⁵ ORS 543A.350(6) provides context reinforcing that conclusion. That subsection authorizes conversion of the portion of the water right used solely for hydroelectric purposes. To the extent that a FERC license requires instream flows as part of a project authorization for hydroelectric power generation, those instream flows must be considered part of the water right associated with the hydroelectric project.

the Tribe's view, the foregoing would appear to be a more principled approach than applying the broad, threshold presumption that is contained in the Draft Rules.⁶

Fourth, the statute provides that the Department may – but is not required – to include “mitigation measures” as conditions of the in-stream water right to “avoid injury and to ensure continuation of authorized water uses by other existing water rights.” The Tribe believes that the legislature intended that mitigation measures be considered only upon a finding of injury. The statutory text does not support including mitigation measures as conditions of the in-stream water right in the absence of an injury finding. For that reason, the Tribe thinks that OAR 690-054-0070 in the Draft Rules needs to be revised. The Tribe also cautions against over-reliance on subordination as a mitigation measure. The legislative policy is clearly to retain the priority date of the hydroelectric right after it is converted into an in-stream water right. ORA 543A.305(2). The Department should honor that policy choice so that the seniority of the hydroelectric right is maintained after conversion to an in-stream water right.

Thank you for your consideration. Please feel free to circulate this letter among the RAC members. The Tribe looks forward to the next RAC meeting.

Very truly yours,



JOSH NEWTON

JN/njh

⁶ The conclusion is also consistent with the memorandum prepared Oregon Assistant Attorney General, Ian Whitlock, which is dated May 18, 1998. In that memorandum, AAG Whitlock responds to a question about how to apply the injury test as follows:

“Your question assumes a transfer from power generation to in-stream uses, which would involve neither a change in the point of diversion, the point of return flow, nor the nonconsumptive nature of the use. If, in addition, there is no change in either the quantity of the water claimed, or the time at which it is asserted, it is difficult to envision how injury would result, either upstream or downstream. Downstream users would continue to receive flows in the manner previously available, and upstream uses would remain subject to an identical call.”

The Department should consider using AAG Whitlock's analysis as a guide for its injury determination.

Mary Graine
May 29, 2018
Page 6

cc (via email only):

Dwight French
R. Craig Kohanek
Kenneth Homolka
Robert A. Brunoe
Chris Brun



Confederated Tribes of Warm Springs, Oregon
PO Box C
Warm Springs, OR 97761
Phone: 541-553-1161
Fax: 541-553-1924

January 11, 2021

Via Email: Dwight.W.French@oregon.gov

Dwight French
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301

Re: Rulemaking for Conversion of a Hydroelectric Water Right to an Instream Water Right, OAR Chapter 690, Division 054 – Supplemental Comments

Dear Mr. French:

The Confederated Tribes of the Warm Springs Reservation of Oregon (“Tribe”) appreciates the opportunity to have served on the Rules Advisory Committee for the adoption of rules intended to implement ORS 543A.305. The purpose of this letter is to provide written comments to the November 2020 Draft Rules and to the draft Fiscal and Economic Impact Statement. The comments are intended to supplement the Tribe’s prior written comments dated May 29, 2018, which are incorporated by reference.

The Tribe’s continuing goal is to provide the Oregon Water Resources Department (“Department”) with its unique perspective as a sovereign, federally-recognized Indian tribe, a holder of treaty-reserved rights pursuant to the Treaty with the Tribes of Middle Oregon, June 25, 1855 (“1855 Treaty”), and a party to the Settlement Agreement Concerning the Interim Operation and Decommissioning of the Powerdale Hydroelectric Project, FERC Project No. 2659, dated June 6, 2003 (“Powerdale Agreement”). The Tribe remains focused on assisting the Department to develop rules that are fair, workable, and consistent with the legislature’s statutory policy direction contained in ORS 543A.305.



I. November 2020 Draft Rules

OAR 690-054-0000 - Purpose and Applicability

The current draft provides that the rules do not apply to hydroelectric power projects “on boundary waters that operate with water rights issued by the State of Oregon and by any other state, except upon request of the water right holder.” The Tribe does not fully understand the purpose for this geographical limitation. Depending on the purpose of the limitation, it may make sense to include within the exception those hydroelectric power projects that operate on boundary waters between the State of Oregon and federally-recognized Indian tribes. The Pelton Round Butte Hydroelectric Project would be an example of such a project. The Tribe requests further consultation regarding this issue to assure that its sovereign interests are adequately considered and not impaired.

OAR 690-054-0010 – Definitions

OAR 360-054-0010(1)(a) – The proposed definition for the “actual use” of a hydroelectric project is too narrow and is not consistent with ORS 543A.305. The definition must include bypass flows required by licenses issued by the Federal Energy Regulatory Commission (“FERC”). Not doing so ignores the actual use of hydroelectric projects whose turbines are located adjacent to the river, which commonly include FERC mandated minimum instream flows in the “bypass” reach.¹ The failure to include bypass flows in the definition of “actual use” risks creating an arbitrary distinction between decommissioned hydroelectric projects whose turbines are located adjacent to the river and those whose turbines are located in the river itself. Finally, the proposed definition is also inconsistent with the Powerdale Agreement, which considers FERC bypass flows as part of PacifiCorp’s use of water under its hydroelectric water right. The Department is a party to the Powerdale Agreement, which was entered into after the enactment of ORS 543A.305. The Tribe cannot understand how the Department can both be a party to the Powerdale Agreement and propose a definition of actual use that excludes FERC bypass flows. The Tribe expressly incorporates by reference its comments from its May 28, 2018 letter addressing this issue.

OAR 360-054-0010(1)(b) – The proposed definition of “actual use” for other existing water rights as of October 23, 1999 should be clarified to unambiguously include the amount of water that was both legally *and in fact* diverted in accordance with those existing water rights.

¹ A bypass reach is commonly understood as the reach of a river between the dam that diverts water into a penstock for delivery to an off-channel powerhouse, and the point of return of the diverted water after it passes through the powerhouse.



OAR 360-054-0010(7) – ORS 543A.305(3) requires an inquiry into any “injury” that may be caused by converting a hydroelectric water right to an in-stream water right. The provision requires the Department to “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 proposed regulatory definition of “injury” should be revised to align with ORS 543A.305(3), which appears to be narrower than the general injury test that applies to water right transfers. *See* OAR 690-380-0100(3).

OAR 690-054-0020 – Notice of Consideration for Conversion: Eligibility Determinations and Preliminary Findings of Fact

OAR 360-054-0020(3) – The statutory injury inquiry provides that the Department “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.” ORS 543A.305(3). *OAR 360-054-0020(3)(a)* appears to align with the statutory language, especially with the requirement to consider “historical bypass practices or requirements.” The Tribe observes, however, that the consideration of bypass flows is not consistent with the definition of “Actual Use” in *OAR 690-054-0010(1)(a)* of the draft rules, which improperly omits bypass flows for the reasons explained above.

OAR 360-54-0020(3)(b) is more problematic. ORS 543.305(3) merely instructs the Department to consider the “resulting impacts on actual use by other existing water rights as of October 23, 1999.” The statute does not authorize the Department to consider whether “new regulation under Chapter 690, Division 250 would likely be required for the proposed conversion to an Instream Water Right * * *” as set forth in *OAR 360-54-0020(3)(b)(B)*. Further regulation of existing water rights is simply not relevant to the statutory injury inquiry provided in ORS 543.305(3). Further, *OAR 360-54-0020(3)(b)(D)* is overbroad; the statute does not authorize the Department to consider “[a]ny other evidence” that it deems helpful for making an injury determination.

OAR 690-054-0040 – Proposed Final Order: Final Determinations and Findings of Fact

OAR 360-054-0040(6) – The Tribe incorporates by reference its comments to proposed *OAR 360-054-0020(3)*, provided above.

OAR 360-054-0040(7) – ORS 543A.305(3) authorizes the Department to impose mitigation measures only to “avoid injury *and* to ensure the continuation of authorized water uses by other existing water rights.” (Emphasis added.) Stated differently, the statute does not authorize the Department to impose any mitigation measure unless it is necessary to *both* (a) avoid injury and (b) ensure the continuation of authorized water uses by other water users. *OAR 360-054-0040(7)* should be revised to clarify the Department’s limited authority to impose mitigation measures.



OAR 360-054-0040(8) – ORS 543A.305 does not authorize the Department to unilaterally subordinate the instream water right to any other water right, including other existing water rights as of October 23, 1999. In contrast, the statute requires that the “priority date of the in-stream water right shall be the same as that of the converted hydroelectric water right.” ORS 543A.305(2). *OAR 360-054-0040 (8)* is contrary the express legislative intent. The Department should delete this subsection in its entirety.

OAR 690-054-0060 – Filing of Protests

This proposed rule should be revised to acknowledge the sovereign interests of federally-recognized Indian tribes located in the State of Oregon, which hold treaty-reserved rights to fish, hunt, and gather culturally important foods. For example, pursuant to the 1855 Treaty, the Tribe has legally-enforceable reserved rights to take fish at its usual and accustomed areas throughout much of Oregon. The Tribe’s right to take fish includes the right to have a harvestable population of fish, which depend on instream flows. *See United States v. Washington*, 853 F.3d 946, 966 (9th Cir. 2017), *aff’d by equally div’d court* 138 S.Ct. 1832 (2018). The Tribe, thus, has a treaty-reserved right to minimum instream flows necessary to maintain a harvestable population of fish. *See generally Baley v. United States*, 942 F.3d 1312 (Fed. Cir. 2019). The priority date of that right is time immemorial. *Cf. United States v. Adair*, 723 F.2d 1394, 1412 – 14 (9th Cir. 1983). The rule should also be revised to provide automatic party status to any federally-recognized Oregon “treaty tribe” that chooses to commence a protest or to participate in any protest initiated by other parties with respect to the conversion of a hydroelectric water right in waters for which the tribe holds treaty-reserved rights.

II. Draft Fiscal and Economic Impact Statement

The Tribe focuses its comments to the Fiscal and Economic Impact section located on pp. 2-3 of the statement. The Tribe has several concerns. First, the summary of the statute is not accurate and not complete. For example, the statement provides that the statute requires the Department to “make a finding that the conversion will not result in injury to other existing water rights” but omits the statutory language “as of October 23, 1999.” In that way, the statement creates the misimpression that the conversion must not result in injury to any other water right regardless of priority date. Second, the statement’s description of “three scenarios” is confusing and appears unrelated to any analysis of the fiscal and economic impact of the rules. In addition, the third scenario misstates the statutory injury inquiry set forth in ORS 543A.305(3). Finally, the statement mistakenly provides that the Department will subordinate new instream water rights to other existing uses as of October 23, 1999, which is not authorized by (and is contrary to) ORS 543A.305. The Department should redraft the Fiscal and Economic Impact section of the statement to address these issues.



Division 54 Rulemaking

Department Response to Public Comments**(Written) Public Comment #1 – Stephen J. Odell, Marten Law, for Middle Fork Irrigation District**Comment Summary #1a:

First, the following sentence needs to be deleted from Proposed Rule 690-054-0000, entitled “Purpose and Applicability”: “A Hydroelectric Water Right subject to these rules shall be considered for conversion to an Instream Water Right prior to any forfeiture proceeding under ORS 540.610.” This attempted administrative prioritization and time frame reflects an end run around and is plainly inconsistent with the statutory language in both ORS 540.610, which requires forfeiture if a water right is not put to beneficial use for five years, and ORS 543A.305, which requires conversion no later than “five years after” the Hydroelectric Water Right has ceased to be used. As such, the time frames already established by these respective statutes are perfectly complementary to each other. In ordinary circumstances, there is no reason to expect that the Department should not be able to make the necessary finding to ensure that the conversion as ultimately effected will not result in injury to other existing water rights, in particular given the critically important condition that Proposed Rule 690-054-0040(8) requires to be included in any Proposed Final Order of Conversion, as follows: “Authorized water uses by Other Existing Water Rights as of October 23, 1999, shall not be subject to regulation under Chapter 690, Division 250 to satisfy this Instream Water Right.” That condition can therefore govern the conversion during the resolution of any protests and comments that are submitted to the Proposed Final Order pursuant to Proposed Rule 690-054-0060. The Oregon Court of Appeals also recently held that a temporary lease for instream use of a non-converted hydroelectric water right constitutes a beneficial use under Oregon Water Law that sufficed to avoid conversion under ORS 543A.305 based on use that avoided complete cessation for five years (and therefore, would similarly suffice to avoid forfeiture under the same rationale). See *WaterWatch of Oregon v. Water Res. Dept.*, 304 Or. App. 617 (2020).

Department Response #1a:

The Oregon Supreme Court in its recent ruling related to this conversion statute, *WaterWatch of Oregon v. Water Resources Department and Warm Springs Hydro LLC* stated “...we understand the statute to be triggered once five years have passed during which water was not used under a hydroelectric water right” 369 Or 71 (2021). Due to uncertainty surrounding ongoing litigation, the Department has removed the following language from OAR 690-054-0000: “A Hydroelectric Water Right subject to these rules shall be considered for conversion to an Instream Water Right prior to any forfeiture proceeding under ORS 540.610.”

Comment Summary #1b:

Second, the definition of “Injury” in Proposed Rule 690-054-0010(7) needs to be modified to track the language of the statute at ORS 543A.305(3). In particular, this definition as currently constituted in the proposed rule provides that the requisite finding of non-injury is to “based on

Division 54 Rulemaking

the Actual Use of both the Project and the Other Existing Water Right(s) as of October 23, 1999,” pursuant to considerations set forth in Proposed Rule OAR 690-054-0040(6). But the statute instead provides that the injury that must be avoided is to other existing water rights, not any regulatory definition of “Actual Use,” and that the Director is simply to consider “actual use” in making the statutory evaluation and finding. This a critical distinction that the proposed rules wholly confuse and elide, and thus, the definition needs to be amended accordingly.

Department Response #1b:

Under ORS 543A.305(3), in order to make a finding on injury, the Director is required to “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.” Proposed rule OAR 690-054-0040(6) mirrors the requirements of ORS 543A.305(3) and requires the Director to consider the “Actual Use of the Project” and “the resulting impacts on Actual Use by Other Existing Water Rights as of October 23, 1999.” No changes to the proposed rules were made in response to this comment.

Comment Summary #1c:

Third, the definition of “Mitigation Measures” in Proposed Rule 690-054-0010(9) needs to be truncated to be made consistent with the language in ORS 543A.305. More specifically, the definition needs to delete all of the verbs following, “avoid” (which include “abate, minimize, rectify, reduce, or compensate for”), and instead should read simply that “‘Mitigation Measures’ means conditions to the Instream Water Right that will ensure its conversion in accordance with ORS 543A.305 will not result in Injury to other existing water rights by avoiding such Injury and ensuring the continuation of authorized water uses by other existing water rights.”

Department Response #1c:

Proposed rule OAR 690-054-0040(7) sets out an optional process for vetting mitigation measures that is open to all interested persons. ORS 543A.305(3) authorizes the Director to “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.” The concept of mitigation measures as proposed is broad in order to provide an opportunity for the consideration of creative ideas to offset and to mitigate for the needs of instream and out-of-stream uses. Under the proposed rules, the proposed order must discuss the mitigation measures. No changes to the proposed rules were made as a result of this comment.

Comment Summary #1d:

Fourth, Proposed Rule 690-054-0020(1) needs to be revised to remove the discretion it would confer on the Director to “determine whether a Hydroelectric Water Right associated with a Project is eligible for conversion to an Instream Water Right.” This follows because the language of ORS 543A.305(3) is not discretionary, but instead states that the Department “shall convert” up the full amount of the water right associated with the hydroelectric project to an

instream water right upon finding “that the conversion will not result in injury to other existing water rights.” Thus, the only discretion the Director has in this regard is to find and ensure that the requisite conversion will not result in such injury; there is no discretion otherwise. That is, if any of the three criteria are satisfied, which are all straightforward and objective metrics that therefore do not require the exercise of agency discretion, then conversion is required subject to the statutory requirement that it not result in injury to other existing water rights.

Department Response #1d:

Proposed rule OAR 690-054-0020 outlines the procedure for determining when the conversion process begins and what preliminary information about the conversion is available to provide to the public. A comment period is incorporated into the process to allow the Department to gather additional information before findings are made about potential Injury and Mitigation Measures to ensure the Continuation of Authorized Uses of Other Existing Water Rights as of October 23, 1999. No final decisions are made during this part of the process, except what is essential to include in a public notice. No changes to the proposed rules were made as a result of this comment.

Comment Summary #1e:

Fifth, the District strongly supports maintaining the condition set forth in Proposed Rule 690-054-0040(8), but as slightly revised to actually reflect the controlling language in ORS 543A.305. By way of explanation, that statutory provision provides that the predicate finding the Director needs to make and to which the conversion from a hydroelectric water right to an instream water right must be expressly conditioned is that “the conversion will not result in injury to other existing water rights.” The final sentence of that subsection, in contrast, states that the Director “may include” mitigation measures that both (a) “avoid injury,” in an obvious shorthand reference to the controlling above-referenced condition; AND (b) “ensure the continuation of authorized water uses by other existing water rights.” The proposed rule in its present formulation only reflects the second of these two elements that are to comprise any potential mitigation measures, and thus, needs to be revised to provide as follows, consistent with the statute: “Other Existing Water Rights as of October 23, 1999, shall not be subject to regulation under Chapter 690 to satisfy this Instream Water Right.” In sum, it is imperative that the final rule retain a condition in this regard to comply with the requirement in the statute that conversions “will not result in injury to other existing water rights,” which can be accomplished by the minor revision set forth above.

Department Response #1e:

The conversion process does not exempt Other Existing Water Rights as of October 23, 1999, from all aspects of OAR Chapter 690. The proposed rule OAR 690-054-0040(8) is limited to a condition stating: “Authorized water uses by Other Existing Water Rights as of October 23, 1999, shall not be subject to regulation under Chapter 690, Division 250 to satisfy this Instream Water Right.” The Department believes the suggested language is too broad and impractical. No changes to the proposed rules were made as a result of this comment.

(Written) Public Comment #2 – Kimberly Priestley, WaterWatch of Oregon

Comment Summary #2a:

Purpose, 690-054-0000: The purpose section includes a number of provisions that are not found in statute. Of concern, the language limits the statutory application to projects in operation on or after October 23, 1999. There is nothing in statute that limits application to projects in operation after this date. This rule provision appears to be a direct attempt to exempt Warm Springs Hydro (Powder River), Stayton-Santiam Water Control District (Santiam) and likely others from conversion under this statute. Nothing in the statute allows the narrowing proposed in the rules. Additionally, the language suggests that a hydro right subject to conversion can be forfeited; this is something the OWRD is disputing in court. Remedy: Strike all but the first sentence of this section.

Department Response #2a:

Due to uncertainty surrounding ongoing litigation referenced in Department Response #1a, the Department removed the following two sentences from OAR 690-054-0000: “The conversion process is for Hydroelectric Water Rights beneficially used on or after October 23, 1999 and which ceased beneficial use thereafter” and “A Hydroelectric Water Right subject to these rules shall be considered for conversion to an Instream Water Right prior to any forfeiture proceeding under ORS 540.610.”

Comment Summary #2b:

OAR 690-054-0010 (1) “Actual Use”: As noted throughout the RAC, WaterWatch believes there needs to be parity between the definitions of actual use for the project and actual use of water rights as of October 23, 1999.

- (a) For a project: The proposed rules limit the definition of actual use of a hydro right to water that is legally diverted through the hydroelectric turbine. This definition ignores minimum flow requirements determined by FERC that are part and parcel of any hydroelectric use (minimum flows that must be met from water under the hydro right’s water right). The statutes do not speak to diversions, they speak to “use.” Moreover, OWRD has considered minimum flow requirements to be a “use” under a hydro right in the past. (Reference to Powerdale Agreement). To the extent water allowed under a hydro right is required to remain instream as part of FERC’s conditions, this is a use and should be considered such in these rules.
- (b) For Other Existing Water Rights as of October 23, 1999: if the OWRD is going to tie to diversions it should be limited to diversions before October 23, 1999. The statute does not provide support for the premise that all use, whether developed or not, under a water right issued by October 23, 1999, is protected. The statute is very purposeful in protecting “actual use” as of October 23, 1999, and not the full amount of the permit issued (regardless of development) as of 1999. Moreover, to the extent the rules require that project “actual use” is determined by month (see sub (a)), then the “actual use” of the consumptive rights should also be looked at through this monthly lens.

Remedy: We would suggest a definition that applies to both (a) the Project and (b) Other Existing Water Rights and is tied to water legally used under the permit/certificate prior to October 23, 1999 (including water used to satisfy minimum flow requirements by FERC).

Department Response #2b:

ORS 540.045 defines a watermaster’s duties to distribute water among various users in accordance with “existing water rights of record” which include: “all completed permits, certificates, licenses and ground water registration statements filed under ORS 537.605 and related court decrees.” FERC licenses are not considered a water right of record under Oregon statutes and are not subject to a call of the watermaster. Additionally, ORS 543A.305(6) limits the conversion to “that portion of the water right used exclusively for hydroelectric purposes.” Finally, the Oregon Supreme Court in its ruling on this conversion statute, (*WaterWatch of Oregon v Water Resources Department and Warm Springs Hydro LLC*) stated: “as WaterWatch argues, for purposes of the conversion statute, water use ‘under a hydroelectric water right’ can only be hydroelectric use” 369 Or 71 (2021).

Regarding the Powerdale Settlement Agreement: Section 4.3.3 stated that several parties were working on a side agreement about the conversion to an instream right. No side agreement was reached. The Powerdale hydroelectric water right will be subject to these rules when converted to an instream water right.

Regarding what are protected uses for Other Existing Water Rights: The statute does not state that Actual Use by Other Existing Water Rights must be measured by October 23, 1999. The Department recommends the rules consistently interpret the statute to provide the Director may include Mitigation Measures to “avoid Injury and to ensure the Continuation of Authorized Water Uses” (emphasis added) ORS 543A.305(3). No changes to the proposed rules were made as a result of this comment.

Comment Summary #2c:

OAR 690-054-0010 (2) “Continuation of Authorized Water Uses”:

We support the limitation to Other Existing Water Rights as of October 23, 1999. Any argument by stakeholders that this should be expanded to cover all authorized uses regardless of priority lacks statutory authority.

Similar to the statement above, the term “actual use” here should be amended to include only “actual use as of October 23, 1999” to be consistent with statute.

Department Response #2c:

The statute does not state that Actual Use by Other Existing Water Rights must be measured by October 23, 1999. The Department recommends the rules consistently interpret the statute to provide that the Director may include Mitigation Measures to

Division 54 Rulemaking

“avoid Injury and to ensure the Continuation of Authorized Water Uses” (emphasis added) ORS 543A.305(3). No changes to the proposed rules were made as a result of this comment.

Comment Summary #2d:

OAR 690-054-0010 (7) “Injury”: This definition instructs that injury will be evaluated “pursuant to the considerations of 690-054-0040(6)”. In turn, OAR 690-054-0040(6) brings in considerations that are inconsistent with both the Department’s current definition and application of OWRD’s injury standard for transfers generally, OAR 690-380-0010(3), as well as the narrowing of this standard as directed by ORS 543.150. The OWRD draft rules contemplate broadening the definition of injury in a way that is not contemplated under statute, most notably by directing analysis of future regulation for any reason (e.g., changed hydrological considerations due to climate change) in the injury analysis. Absent amendments to that section, the OWRD should delete the qualifier noted in this definition. This is a significant departure from decades of injury analysis by the OWRD and shows a clear bias to consumptive users.

Department Response #2d:

ORS 543A.305 requires a unique injury evaluation. Pursuant to ORS 543A.305(3), when determining whether a conversion will result in injury the Director is required to 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.” In addition, the statute authorizes the Director to: “ensure the continuation of authorized water uses by other existing water rights.” The Department’s definition of “Injury” in these draft rules therefore differs from the definition of “Injury” contained in OAR 690-380-0100(3) because the Department is implementing the unique evaluation described under ORS 543A.305(3). No changes to the proposed rules were made as a result of this comment.

Comment Summary #2e:

OAR 690-054-0010 (10) “Other existing water right as of October 23, 1999”: We support the OWRD’s definition that makes clear that these are water rights in existence (have been issued) as of 1999. Past assertions by stakeholders that this should be expanded to include water rights with priority dates of 1999 (e.g., permits later issued under Reservations for Future Economic Development) have no merit. However, this definition also should be qualified to make clear that such rights take priority over the instream right only as to actual use as of October 23, 1999.

Department Response #2e:

The statute does not state that Actual Use by Other Existing Water Rights must be measured by October 23, 1999. The Department recommends the rules consistently interpret the statute to provide that the Director may include Mitigation Measures to “avoid Injury and to ensure the Continuation of Authorized Water Uses” (emphasis added) ORS 543A.305(3). No changes to the proposed rules were made as a result of this comment.

Division 54 Rulemaking

Comment Summary #2f:

Notice of Consideration for Conversion: Eligibility Determinations and Preliminary Findings of Facts

690-054-0020(1)(c): The language here is not as clear as it could be. The statute allows conversion of a time limited hydro-electric water right that is transferred under ORS 540.520 and 540.530 at the time the time of expiration of the time limited right. We would suggest mimicking the statutory language.

690-054-0020(2): This subsection should state upfront that the full amount of the water right is subject to conversion, subject to (a)-(d). As written, it presents a false premise that the Director has wide discretion as to the amount.

690-054-0020 (2)(c): There is nothing in the statute that allows the OWRD to exempt stand-alone hydro rights that are “part of a larger distribution system for municipal, irrigation or other beneficial uses”. Rather, the statute is clear that if hydro production is not the sole beneficial use authorized by a water right, the statute only applies to conversion of that portion of the water right used exclusively for hydro power (ORS 543A.300(6)). In other words, it requires conversion of the hydro portion of the water right. The rule is correct in exempting water rights pursuant to ORS 543.765 (in conduit hydro), but is in error for attempting to exempt stand-alone hydro rights that might happen to flow through a distribution system (for instance, hydro rights that use irrigation canals that are not in-conduit hydro rights but stand-alone rights). As such, the rule should delete the language that follows “ORS 543.765”.

690-054-0020 (2)(d): This section is confusing as to the limitations on storage and appears to go beyond the statutory authority of the conversion statute. The first sentence should be amended to state that only the portion of the stored water right dedicated to hydro can be converted.

Department Response #2f:

ORS 543A.305(6) states: “If hydroelectric production is not the sole beneficial use authorized by a water right, this section shall apply only to conversion of that portion of the water right used exclusively for hydroelectric purposes.” The Department recognizes the complexity of hydroelectric projects which return water to a distribution system or watershed for additional uses. The Department will determine on a case by case basis which water uses are eligible for conversion pursuant with the process outlined in these proposed rules and the requirements of ORS 543A.305. No changes to the proposed rules were made as a result of this comment.

Comment Summary #2g:

690-054-0020 (3), Injury determination: As noted previously, WaterWatch has significant concerns with the OWRD’s wholly new approach to injury proposed in these rules. This is not consistent with past practice of the OWRD, or the definition of injury that existed in rule for transfers at the time of bill passage (and still exists today).

- (a) Determination of actual use of the project: Earlier drafts included “historical bypass practices or requirements” as something that would be considered in the determination of actual use (even though it was not in the governing definition of “actual use”), despite broad support by NGOs, Tribes and ODFW, this has been deleted. As we pointed out in the definition section, required bypass flows should be included in the definition of actual use. Minimum flow requirements are conditions of use and are part and parcel of part of the beneficial use of the hydro right.
- (b) The resulting impacts on actual use by Other Existing Water Rights as of October 23, 1999 (B): Regulation: The possibility of future regulation is not a factor that is included in any other rule or internal guidance documents relating to injury. This is a wholly new concept that is not supported by rule. This will allow protection of a water right against a host of unknowns not connected to the transfer, including climate change. We would urge the Commission to strike subsection 3(b)(B).

Department Response #2g:

ORS 540.045 defines a watermaster’s duties to distribute water among various users in accordance with “existing water rights of record” which include: “all completed permits, certificates, licenses and ground water registration statements filed under ORS 537.605 and related court decrees.” FERC licenses are not considered a water right of record under Oregon statutes and are not subject to a call of the watermaster. Additionally, ORS 543A.305(6) limits the conversion to “that portion of the water right used exclusively for hydroelectric purposes.” Finally, the Supreme Court opinion of December 23, 2021, stated: “...as WaterWatch argues, for purposes of the conversion statute, water use ‘under a hydroelectric water right’ can only be hydroelectric use” 369 Or 71 (2021). Regulation is directly relevant to the Department’s analysis of the resulting impacts on Actual Use by Other Existing Water Rights and to the Director’s consideration of Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses. No changes to the proposed rules were made as a result of this comment.

Comment Summary #2h:

Proposed Final Order: Final Determination and Findings of Fact OAR 690-054-0040(4): This subsection should be deleted. Per statute, the priority date of the instream right must be that of the underlying hydro right. The Director does not have discretion to “determine” the priority date of this right.

Department Response #2h:

The Department agrees that the Director does not have authority to alter the priority date. The provision serves as a reminder to staff to include the priority date in the proposed order even if the water right will be subordinated to avoid Injury to Other Existing Water Rights. All the Department’s orders which involve a change to a water right include the priority date of the right in order to fully identify which right is being modified. In some cases, there may be multiple priority dates with different authorized rates of use. This

Division 54 Rulemaking

practice provides an opportunity for the public to check the accuracy of the proposed order. No changes to the proposed rules were made as a result of this comment.

Comment Summary #2i:

690-054-0040(6): Same comments as made previously as to the determination of Actual Use of the Project and Other Existing Water Rights as of 1993 and the determination of injury.

Department Response #2i:

See responses above to #2b, 2c, 2d, 2e, and 2g. No changes to the proposed rules were made as a result of this comment.

Comment Summary #2j:

690-054-0040 (7)(a)(A), (B), (C), and (D): The rule proposal on mitigation is confusing on a number of levels, and, importantly, because the directive in (8) makes no sense. At its core, this rule section appears to let water right holders or other interested parties propose mitigation measures, and without any review by the OWRD as to the legality or efficacy of the mitigation measures, direct a process to have interested parties meet, extend the comment period, allow discussions to continue if interested parties show “reasonable progress” and obtain affidavits to consent to said mitigation measures. But then, even if everyone in section (7) comes to agreement, in (8) the OWRD will subordinate all authorized water uses by Other Existing Water Rights as of October 23, 1999”. We will comment on the subordination separately, but we will note that having both provisions appears to go well beyond what is contemplated by statute.

Department Response #2j:

Proposed rule OAR 690-054-0040(7) sets out an optional process for vetting mitigation measures that is open to all interested persons. ORS 543A.305(3) authorizes the Director to “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.” The concept of mitigation measures as proposed is broad in order to provide an opportunity for the consideration of creative ideas to offset and to mitigate for the needs of instream and out-of-stream uses. Under the proposed rules, the proposed order must discuss the mitigation measures and the measures must avoid injury and ensure the continuation of authorized water uses. Additionally, under OAR 690-054-0040(10), the Director determines whether the conversion, together with any recommended Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses, is consistent with ORS 543A.305.

Comment Summary #2k:

690-054-0020 (8): Section 8 is essentially a subordination directive. We do not believe the language as proposed is supported by statute. The statute protects against injury at the time of conversion, this is true. That said, this statutory protection is limited to protection against injury

Division 54 Rulemaking

of the “actual use” of “other existing water rights as of October 23, 1999”. So, in other words, for those water rights in existence as of October 23, 1999, the statute protects the actual use of those rights (so in other words, undeveloped water rights are not protected under the statute) against injury at the moment in time the right is converted. The statute purposefully used the term injury, one that has applied to transfers for years and was in existence at the time this statute was passed. The legislature then narrowed this term as noted previously. To assert wholesale subordination exceeds statutory intent because it protects the whole of the water right at full build out in perpetuity against a whole host of unknowns, including hydrology changes due to climate change. This grants the full amount (not the actual use) of pre- October 23, 1999, water rights protection that is not seen in any other forum.

This path also generally moots the need for any other provision of proposed rules. If the OWRD is going to take the position that the full amount of Other Existing Water Rights as of October 23, 1999, shall not be subject to regulation into the future, period, then all other provisions of the rules should be mooted. The inclusion of this provision, as well as all the other sections that serve only to undermine the full conversion of the power right, serve as double hit, so to speak, and shows a clear bias against protecting water instream.

Department Response #2k:

The Department gives weight to the ORS 543A.305(3) provision “may include mitigation measures as conditions of the instream right to avoid injury and to ensure the continuation of authorized water uses by other existing water rights” (as of October 23, 1999) (emphasis added). The new concept of ensuring Continuation of Authorized Water Uses by Other Existing Water Rights requires an expanded and distinct definition of Injury and new Mitigation Measures. Including subordination is a practical and effective way to ensure the Continuation of Authorized Water Uses. No changes to the proposed rules were made as a result of this comment.

Comment Summary #2m:

Exceptions, OAR 690-054-0070: The rules should allow exceptions to the OWRD Order to go to the Commission for final determination.

Department Response #2m:

The decision maker identified by ORS 543A.305 is the Director. The statute requires the Director to make a finding that the proposed conversion will not result in injury to other existing water rights and to authorizes the Director to include mitigation measures to avoid injury and to ensure the continuation of authorized uses by other existing water rights. Therefore, the Department believes it is appropriate for the Director to consider exceptions for final determination. No changes to the proposed rules were made as a result of this comment.

Comment Summary #2n:

Division 54 Rulemaking

Issuance of Instream Water Right Certificate, 690-054-0080: There is no authority found in any section of the Oregon Revised Statutes, including the Hydro Conversion Statutes or the Instream Water Rights Act, that allow the OWRD to limit instream water rights from being “additive”. In addition to the fact there is no legal authority for this, it makes no biological sense. The OWRD has no authority to limit the instream conversions as proposed. This should be struck from the rules.

Department Response #2n:

The Department has a long-established precedent for managing instream water rights. This includes standard language on more than 900 instream water right certificates (numbers 72490 to 73394 and 94583 through 94662) which states: “The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.” The proposed rule language reflects the Department’s experience in distribution of water according to priority dates and recognizes the largest target flow without adding all related flow targets together.

(Written) Public Comment #3 – Steve Kaser, Groundwater Protection Service LLC

Comment Summary #3:

If water is no longer in use, it should be returned to the body of water it was allocated from, making it available for a new water right. Transferring a hydroelectric permit to an instream permit circumvents the process currently in place to protect against overallocation of surface water. Similar to instream water rights, hydroelectric water rights should be terminated if not used for a period.

Department Response #3:

In 1999, the Oregon Legislature considered the issues surrounding conversions of hydroelectric water rights to instream water rights and passed House Bill (HB) 2162 which created new provisions in Oregon Revised Statutes (ORS) Chapter 543A. ORS 543A.305 reflects the policy decisions of the Oregon Legislature on this issue and these Division 54 rules implement the provisions of the statute. No changes to the proposed rules were made as a result of this comment.

(Written) Public Comment #4 – Kate Fitzpatrick, Deschutes River Conservancy

Comment Summary #4a:

We are concerned that the proposed rules expand the definition and determination of injury (OAR 690-054-0010(7)) in a way that is not consistent with statute.

Department Response #4a:

Division 54 Rulemaking

ORS 543A.305 requires a unique injury evaluation. Pursuant to ORS 543A.305(3), when determining whether a conversion will result in injury the Director is required to 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.” In addition, the statute authorizes the Director to: “ensure the continuation of authorized water uses by other existing water rights.” The Department’s definition of “Injury” in these draft rules therefore differs from the definition of “Injury” contained in OAR 690-380-0100(3) because the Department is implementing the unique evaluation described under ORS 543A.305(3). No changes to the proposed rules were made as a result of this comment.

Comment Summary #4b:

Director discretion to alter priority date (does not exist). See 690-054-0040(4) - priority date of the instream right should be that of the underlying hydro right, per statute.

Department Response #4b:

The Department agrees that the Director does not have authority to alter the priority date. The provision serves as a reminder to staff to include the priority date in the proposed order even if the water right will be subordinated. All the Department’s orders which involve a change to a water right include the priority date of the right in order to fully identify which right is being modified. In some cases, there may be multiple priority dates with different authorized rates of use. This practice provides an opportunity for the public to check the accuracy of the proposed order. No changes to the proposed rules were made as a result of this comment.

Comment Summary #4c:

The proposed rule on mitigation appears to allow the water right holder or other parties to propose mitigation measures without OWRD review of effectiveness or value of the mitigation measure (690-054-0040(7) and (8 - subordination) allows OWRD to subordinate all authorized water uses by other existing water rights as of October 23,1999. What is the impact to public investments in stream restoration?

Department Response #4d:

Proposed rule OAR 690-054-0040(7) sets out an optional process for vetting mitigation measures that is open to all interested persons. ORS 543A.305(3) authorizes the Director to “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.” The concept of mitigation measures as proposed is broad in order to provide an opportunity for the consideration of creative ideas to offset and to mitigate for the needs of instream and out-of-stream uses. Under the proposed rules, the proposed order must discuss the mitigation measures and the measures must avoid injury and ensure the continuation of authorized water uses. Additionally, under OAR 690-054-0040(10), the Director determines whether the conversion, together with any recommended Mitigation

Division 54 Rulemaking

Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses, is consistent with ORS 543A.305. The Department anticipates these proposed rules may result in a net benefit for instream water rights given the conversion process and opportunities for development of innovative solutions through the optional process for establishing Mitigation Measures.

Comment Summary #4d:

The proposed rule appears to limit the instream water right and not allow it to be additive (Issuance of Instream Water Right Certificate, 690-054-0080). “Each Instream Water Right is allocated individually and shall not be additive to other Instream Water Rights.” No authority to limit instream water rights from being additive and this is counter to current practice.

Department Response #4d:

The Department has a long-established precedent for managing instream water rights. This includes standard language on more than 900 instream water right certificates (numbers 72490 to 73394 and 94583 through 94662) which states: “The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.” The proposed rule language reflects the Department’s experience in distribution of water according to priority dates and recognizes the largest target flow without adding all related flow targets together.

Comment Summary #4e:

As drafted the proposed rules could minimize and even restrict instream gains meant to be granted by the conversion statute. We appeal to the Commission to direct OWRD to assure that the rules align with statute and that instream flows are not harmed.

Department Response #4e: Comment noted.

(Written) Public Comment #5 – Chandra Ferrari, Oregon Department of Fish and Wildlife

...help ensure advancement of the State’s IWRS (Integrated Water Resources Strategy) goals.

Comment Summary #5a:

OAR 690-054-0010 – Definitions

OAR 690-054-0010(1): ORS 543A.305(3) states that up to full amount of water right “associated with the hydroelectric project” shall be converted to an instream water right if it will not result in injury to other existing water rights. In making the determination, the director shall consider “the actual use of the hydroelectric project.” It is ODFW’s position that bypass flows that are required by a Federal Energy Regulatory Commission (FERC) license, §401 water quality certification, or state water right are part of the actual use of the hydroelectric project up to, but not exceeding, the full water right granted by OWRD. OWRD’s proposed definition for

the “actual use” of a hydroelectric project is too narrow and is not consistent with ORS 543A.305. For instance, language regarding bypass flows has been omitted from OWRD’s current draft rule definition. Bypass flows are a required condition of the project operations (that is, if bypass flows are not released, hydropower production is not authorized). If the project has a State water right of record, then bypass flows should be eligible for conversion to instream water rights pursuant to the statute. ODFW recommends that OWRD take bypass flows into consideration when determining the appropriate amount eligible for conversion to an instream water right. This recommendation applies to bypass flows that are expressly included in the hydroelectric licenses and bypass flows that are required and thus determined to be a “beneficial use” under FERC requirements. See ORS 543A.305(3)...

Department Response #5a:

ORS 540.045 defines a watermaster’s duties to distribute water among various users in accordance with “existing water rights of record” which include: “all completed permits, certificates, licenses and ground water registration statements filed under ORS 537.605 and related court decrees.” FERC licenses are not considered a water right of record under Oregon statutes and are not subject to a call of the watermaster. Additionally, ORS 543A.305(6) limits the conversion to “that portion of the water right used exclusively for hydroelectric purposes.” Finally, the Supreme Court opinion of December 23, 2021, stated: “as WaterWatch argues, for purposes of the conversion statute, water use ‘under a hydroelectric water right’ can only be hydroelectric use” 369 Or 71 (2021). No changes to the proposed rules were made as a result of this comment.

Comment Summary #5b:

OAR 690-054-0080: ...the draft rules allow OWRD to limit instream rights so that they are not “additive.” ...ODFW’s recommendation is to remove this language as currently drafted because it appears inconsistent with ORS 543A.305. All water rights (including the converted instream water right) should be regulated in accordance with priority date with no artificial constraints imposed on the quantity of instream water right.

Department Response #5b:

The Department has a long-established precedent for managing instream water rights. This includes standard language on more than 900 instream water right certificates (numbers 72490 to 73394 and 94583 through 94662) which states: “The instream flow allocated pursuant to this water right is not in addition to other instream flows created by a prior water right or designated minimum perennial stream flow.” The proposed rule language reflects the Department’s experience in distribution of water according to priority dates and recognizes the largest target flow without adding all flow targets together.

Comment Summary #5c:

OAR 690-054-0020(d): ...draft rule limits the amount of water that can be converted instream from a multi- purpose dam. ...If a water right authorizes multiple beneficial uses, the statute

allows the portion that is solely used for hydropower to be converted instream. Language in the rule around larger distribution systems is too broad. There could be sole hydropower rights that flow through distribution systems that are not in-conduit and thus those rights should still be able to be converted instream. ODFW suggests that the rule mirror the statutory language.

Department Response #5c:

ORS 543A.305(6) states: “If hydroelectric production is not the sole beneficial use authorized by a water right, this section shall apply only to conversion of that portion of the water right used exclusively for hydroelectric purposes.” The Department recognizes the complexity of hydroelectric projects which return water to a distribution system or watershed for additional uses. The Department will determine on a case-by-case basis whether those projects are eligible for conversion pursuant with the process outlined in these proposed rules and the requirements of ORS 543A.305. No changes to the proposed rules were made as a result of this comment.

Comment Summary #5d:

OAR 690-054-0040(4): The governing statute clearly requires that the priority date of the in-stream water right be the same as that of the converted hydroelectric water right. See OAR 543A.305(2). The rule language seems to imply there is discretion on this point. ODFW suggests clear language that a water right converted to an in-stream water right shall retain the priority date of the underlying hydroelectric water right.

Department Response #7d:

The Department agrees that the statute is clear. The provision serves as a reminder to staff to include the priority date in the proposed order even if the water right will be subordinated. All the Department’s orders which involve a change to a water right include the priority date of the right in order to fully identify which right is being modified. In some cases, there may be multiple priority dates with different authorized rates of use. This practice provides an opportunity for the public to check the accuracy of the proposed order. No changes to the proposed rules were made as a result of this comment.

Comment Summary #5e:

ORS 543A.305(3) is very purposeful in its use of the term “actual use.” See ORS 543A.305(3). For example, in OWRD’s evaluation, including its assessment of injury, the OWRD Director is required to consider the “actual use” of the hydroelectric project and the resultant impacts on the “actual use” by other existing water rights as of October 23, 1999. However, the proposed rule language defines actual use in a narrow manner in the context of a hydroelectric project (attempting to precisely determine the amount that goes through a turbine and excluding bypass flows) and in a broader manner in the context of an existing water right (not explicitly limiting it to the amount that was actually diverted pursuant to the water right as of October 23, 1999). ODFW recommends consistent definitions and applications of “actual use” for both hydroelectric water rights and existing water rights. Additionally, ODFW believes that the

Division 54 Rulemaking

statute supports an interpretation that existing water rights as of October 23, 1999, are only to be protected from injury up to the amount that was actually being “used” as of October 23, 1999.

Department Response #5e:

The statute does not state that Actual Use by Other Existing Water Rights must be measured by October 23, 1999. The Department recommends the rules consistently interpret the statute to provide that the Director may include Mitigation Measures to “avoid Injury and to ensure the Continuation of Authorized Water Uses” (emphasis added) ORS 543A.305(3). No changes to the proposed rules were made as a result of this comment.

Comment Summary #5f:

OAR 690-054-0040(6)(b): The draft rule language incorporates factors in the injury analysis that are not supported by statute and, in some cases, improperly avoids an injury analysis by subordinating ISWR to all existing water users. Specifically, ODFW is concerned that: (1) the proposed rule OAR 690-054-0040(6)(b) (e.g., subordination) is over broad, because absent a threshold finding of injury the Director has no authority to condition the ISWR; and (2) the rule improperly allows the likelihood of future regulation in its injury analysis (see OAR 690-054-0020(3)(b)(B)). ODFW recommends that proposed rules clarify that mitigation may not be imposed until an injury finding is made by the OWRD Director. And significantly, mitigation should be exclusively focused on avoiding identified injury to the “actual use” of an existing water right as of October 23, 1999, not protecting future water uses or insulating “existing” water users from the effects of future conditions (such as climate change) at the expense of the converted instream water right.

Department Response #5f:

Part of this comment appears to address a previous version of the proposed rules. OAR 690-054-0040(7) states “In order to avoid injury and to ensure the Continuation of Authorized Water Uses the Director may include Mitigation Measures...” (emphasis added). Regulation is directly relevant to the Department’s analysis of the resulting impacts on Actual Use by Other Existing Water Rights and to the Director’s consideration of Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses. The Department recommends that the rules consistently interpret the statute to provide that the Director may include Mitigation Measures to avoid Injury and to “ensure the Continuation of Authorized Water Uses by Other Existing Water Rights” (as of October 23, 1999) (emphasis added) ORS 543A.305(3). No changes to the proposed rules were made as a result of this comment.

Comment Summary #5g:

Pursuant to OAR 690-054-0030(4) “[a]t the discretion of the Director, if the Hydroelectric Water Right was Subordinated to Other Existing Water Rights as of October 23, 1999, then the first public notice may be given at the time of the proposed final order describing the conversion to an

Instream Water Right under OAR 690-054-0040 to 690-054-0050.” This proposed rule does not provide the public and ODFW sufficient notice to communicate concerns on behalf of public trust resources such as fish and wildlife. This rule will limit the ability of ODFW and the public to review the adequacy of the proposed final order in situations where a subordination clause is imposed. ODFW recommends that this rule be changed to allow not less than 30 days and no more than 60 days for a notice and comment period to allow for consultation and public comment.

Department Response #5g:

This rule is intended to streamline the review process for those hydroelectric projects that were subordinated when first authorized under OAR 690-051-0380, prior to the conversion process under the proposed Division 54 rules: “Each License shall be conditioned so the right to use water is expressly made inferior in right and subsequent in time to any future appropriation of water upstream for beneficial consumptive use.” More than 100 hydroelectric projects are currently subordinated in a manner according to or similar to this rule. There is no process for removing a subordination clause from a water right that was originally issued with that limitation. Removing the subordination would be expanding the water right and that would be considered injurious to other water rights. It is assumed that if the hydroelectric right is already subordinated that it could not be injurious to other water rights and the right could be converted instream “as is” without need of further mitigation. If for any reason the assumption is in question the Director could choose to allow more public comment under proposed rule 690-054-0030(3). No changes to the proposed rules were made as a result of this comment.

(Written) Public Comment #6 – April Snell, Oregon Water Resources Congress

Comment Summary #6a:

We are concerned the definition of “Actual Use” as proposed in OAR 690-054-0010(1), which currently reads “the amount of water, expressed in cfs, legally diverted and beneficially used, based on documents available to the Department,” leaves out language that could lead to unintended injury of senior water right holders. Because this definition is applied to Other Existing Water Rights under the proposed OAR 690-054-0010(1)(b), which presumably includes irrigation and other agricultural water rights that could be injured by a permanent conversion, the rules should be modified to better align with existing statutory language and practice. We suggest the following change, with added wording in bold italics:

“(b) For Other Existing Water Right(s) as of October 23, 1999, the *maximum* amount of water, expressed in cfs, *that could be* legally diverted and beneficially used, based on documents available to the Department.”

Changing the definition is necessary to ensure the water use covered under “Other Existing Water Rights” is properly protected from injury, which includes both the historic use of such rights, as well as the maximum amount that could be used. In other words, consistent with ORS 540.310(3), so long as the holder of an “Other Existing Water Right” has facilities capable of

handing the entire rate and duty authorized under the right, and is otherwise ready, willing, and able to make full use of the right, then the right should be protected from injury, even if such full use does not occur in a given year or period of years. To be clear, the conversion of a hydroelectric water right to permanent instream use should not impede or preclude an “Other Existing Water Right” holder from fully exercising the right in the future, even if the right had only been partially exercised in the past.

We would further note that the definition of “Injury” in proposed OAR 690-054-0010(7) incorporates the proposed definition of “Actual Use” set forth above, which makes the definition as currently proposed even more problematic. Injury review needs to include potentially impacted water right holders and the effects the proposed instream conversion would have on the maximum amount of water legally available to divert under the water right.

Along these same lines, and to ensure that the Department is considering the full potential for injury to Other Existing Water Rights, we would expect the Department to address the potential to use water up to the full rate and duty under an Other Existing Water Right as part of its preliminary finding on injury pursuant to proposed OAR 690-054-0020(3)(b)(D), and as part of its determination on injury pursuant to proposed OAR 690-054-0040(6)(b)(D). We would propose that these two proposed rule provisions be revised to explicitly account for the use of water protected by ORS 540.310(3). In the alternative, the Department could also respond to this comment by agreeing the term “[a]ny other available evidence” as used in these two proposed rule provisions would include the full rate and duty of an Other Existing Water Right, where such full rate and duty was protected under ORS 540.310(3).

Department Response #6a:

A water right certificate documents the maximum amount of water that may be legally diverted and beneficially used (full rate and duty). The Department is the official record keeper for these documents. The Department must also remain open to other evidence that water rights may have ceased beneficial use. The Department does not expect to make preliminary or final findings on forfeiture issues for Other Existing Water Rights, unless forfeiture has been established in separate proceedings. Water right holders who are “ready, willing, and able” to use their full rate and duty are not subject to forfeiture proceedings under ORS 540.610 and are expected to be fully included in Mitigation Measures to ensure the Continuation of Authorized Water Uses existing as of October 23, 1999. No changes to the proposed rules were made as a result of this comment.

Comment Summary #6b:

For districts who also operate hydroelectric projects, it is important to ensure the water rights associated with those projects are not injured or jeopardized. Irrigation districts and other operators of dams and reservoirs occasionally need to stop operations for repairs, upgrades, or other financial factors. The proposed rules should clarify a hydroelectric water right that has been temporarily leased instream is still considered a beneficial use and aligns with the 2020 Oregon Court of Appeals opinion in *WaterWatch of Oregon v. Water Resources Department*, (304 Or. App. 617).

Language should be added to proposed OAR 690-054-0020(1)(a) to make clear that when a hydroelectric water right has been leased to temporary instream purposes, use of water under the right (and pursuant to the temporary instream lease terms and conditions) has not “ceased” as that term is used in the corresponding statute and proposed rule. Furthermore, language should be added to the proposed OAR 690-054-0000 to make clear that the beneficial use of water under a hydroelectric water right includes temporary instream leasing of the right.

Department Response #4b:

Due to the uncertainty introduced by a recent Oregon Supreme Court decision, the Department is not recommending leasing of hydroelectric water rights instream at this time. No changes to the proposed rules were made as a result of this comment.

Comment Summary #6c:

OAR 690-054-0040(8) and (9): OWRC is supportive of other components of the proposed rule changes, including the default Mitigation Measure language set forth in OAR 690-054-0040(8) and (9).

Department Response #6c: Comment noted.

(Written) Public Comment #7 – David Filippi, Stoel Rives LLC, for East Fork Irrigation District

Comment Summary #7a:

690-054-0010(1)(b): EFID has concerns with the definitions of “Actual Use” in proposed OAR 690-054-0010(1). The definition of “Actual Use” as applied to Other Existing Water Rights, which we understand would include irrigation rights that could be injured by a permanent conversion, is “the amount of water, expressed in cfs, legally diverted and beneficially used, based on documents available to the Department.” OAR 690-054-0010(1)(b) (as proposed). This definition should be modified to read as follows:

“(b) For Other Existing Water Right(s) as of October 23, 1999, *the maximum* amount of water, expressed in cfs, *that could be legally* diverted and beneficially used, based on documents available to the Department.”

This modification is necessary to ensure that the water use pursuant to Other Existing Water Rights that is to be protected from injury includes both the historic use of such rights, as well as the maximum amount that could be used. In other words, consistent with ORS 540.310(3), so long as the holder of an Other Existing Water Right has a facility capable of handling the entire rate and duty authorized under the right, and is otherwise ready, willing, and able to make full use of the right, then the right should be protected from injury, even if such full use does not occur in a given year or period of years. To be clear, the conversion of a hydroelectric water right to permanent instream use should not impede or preclude an “Other Existing Water Right” holder from fully exercising the right in the future, even if the right had only been partially exercised in the past.

We would further note that the definition of “Injury” in proposed OAR 690-054-0010(7) incorporates the proposed definition of “Actual Use” set forth above, which makes the definition as currently proposed all the more problematic.

Along these same lines, and to ensure that the Department is considering the full potential for injury to Other Existing Water Rights, we would expect the Department to address the potential to use water up to the full rate and duty under an Other Existing Water Right as part of its preliminary finding on injury pursuant to proposed OAR 690-054-0020(3)(b)(D), and as part of its determination on injury pursuant to proposed OAR 690-054-0040(6)(b)(D). We would propose that these two proposed rule provisions be revised to explicitly account for the use of water protected by ORS 540.310(3). In the alternative, the Department could also respond to this comment by agreeing that the term “[a]ny other available evidence” as used in these two proposed rule provisions would include the full rate and duty of an Other Existing Water Right, where such full rate and duty was protected under ORS 540.310(3).

Department Response #7a:

A water right certificate documents the maximum amount of water that may be legally diverted and beneficially used (full rate and duty). The Department is the official record keeper for these documents. The Department must also remain open to other evidence that water rights may have ceased beneficial use. The Department does not expect to make preliminary or final findings on forfeiture issues for Other Existing Water Rights, unless forfeiture has been established in separate proceedings. Water right holders who are “ready, willing, and able” to use their full rate and duty are not subject to forfeiture proceedings under ORS 540.610 and are expected to be fully included in Mitigation Measures to ensure the Continuation of Authorized Water Uses existing as of October 23, 1999. No changes to the proposed rules were made as a result of this comment.

Comment Summary #7b:

OAR 690-054-0040(8) and (9): EFID would like to express support with respect to the default Mitigation Measure language set forth in OAR 690-054-0040(8) and (9).

Department Response #7b: Comment noted.

(Written) Public Comment #8 – Brenna Vaughn, Northwest Hydroelectric Association

Comment Summary #8:

In practice, it is not uncommon for a project to suspend operations for long periods for a variety of dam safety, operational, or economic factors. The proposed rules should clarify that a hydroelectric water right that has been leased to temporary instream use is currently considered a beneficial use, as set forth by the Oregon Court of Appeals in its recent opinion in *WaterWatch of Oregon v. Water Resources Department*, 304 Or. App. 617 (2020).

Under current practice and law, ORS 537.348 authorizes holders of water rights to lease their rights for instream use for a specified period without losing the original priority date of the water right. ORS 543A.305(3) was enacted in 1999 and provides that water rights associated with a

hydroelectric project shall be converted to a permanent instream water right for the public trust “[f]ive years after the use of water under a hydroelectric water right ceases.” Recently, the Oregon Court of Appeals properly read these two provisions together to recognize that a hydropower facility can lease its water rights as provided for in ORS 537.348 without risking the permanent conversion of those rights under ORS 543A.305, as cited above. This decision is currently pending review by the Oregon Supreme Court, and we understand a decision is anticipated next year. (*WaterWatch of Oregon v. Water Resources Department*, Or. Sup. Ct. No. S067938.) The principles in the ongoing court case are also important for consideration in this rulemaking:

- (i) hydropower generation is important to Oregon and reliable water rights are key to its preservation;
- (ii) hydroelectric water rights must be administered in accordance with both ORS 537.348 and ORS 543A.305(3); and
- (iii) a “hydroelectric water right” refers to a right owned or held by a hydroelectric project, not the actual use of the water right for hydropower generation.

NWHA believes that it is critical to ensure that the holders of hydroelectric water rights maintain the ability to lease their rights temporarily to instream use to preserve the ability to re-start or redevelop hydropower operations at a later date, in a manner similar to the temporary instream leasing opportunity afforded to all other water rights under Oregon law.

Consistent with the principles above, NWHA has reviewed the most current version of the proposed rules and has the following specific comments, which are offered to help ensure that the final rules continue to preserve operational and economic flexibility provided for by statute to holders of hydroelectric water rights:

- Language should be added to proposed OAR 690-054-0020(1)(a) to make clear that when a hydroelectric water right has been leased to temporary instream purposes, use of water under the right (and pursuant to the temporary instream lease terms and conditions) has not “ceased” as that term is used in the corresponding statute and proposed rule.
- Similarly, language should be added to the purpose and applicability paragraph in proposed OAR 690-054-0000 to make clear that the beneficial use of water under a hydroelectric water right includes temporary instream leasing of the right.

Department Response #8:

Due to the uncertainty introduced by a recent Oregon Supreme Court decision, the Department is not recommending leasing of hydroelectric water rights instream at this time. No changes to the proposed rules were made as a result of this comment.

(Written) Public Comment #9 – Robert A. Brunoe, Confederated Tribes of Warm Springs

[I]nstruct the Department to revise the Proposed Rules so that they are consistent with ORS 543A.305.

Comment Summary #6a:

OAR 690-054-0010 – Definitions

OAR 690-054-0010(1)(a) – The proposed definition for the “actual use” of a hydroelectric project is too narrow and is not consistent with ORS 543A.305. The statute requires that “*up to the full amount of the water right associated with the hydroelectric project*” be converted to an instream water right as long as the conversion will not result in injury to other existing water rights. ORS 543A.305(3) (emphasis added). There is nothing in the text of the statute that can be reasonably construed as limiting the conversion of a hydroelectric water right to that portion of the water “legally diverted through the hydroelectric turbine to produce electricity * * *” as the proposed rule provides. The definition must include bypass flows required by licenses issued by the Federal Energy Regulatory Commission (“FERC”). Not doing so ignores the actual use of hydroelectric projects whose turbines are located adjacent to the river, which commonly include FERC mandated minimum instream flows in the “bypass” reach. The failure to include bypass flows in the definition of “actual use” risks creating an arbitrary distinction between decommissioned hydroelectric projects whose turbines are located adjacent to the river and those whose turbines are located in the river itself. The proposed definition is also inconsistent with the Powerdale Agreement § 4.3.1, which considers FERC bypass flows as part of PacifiCorp’s use of water under its hydroelectric water right. The Department is a party to the Powerdale Agreement, which was entered into after the enactment of ORS 543A.305. As noted in my earlier comment letter, the Department should not propose a definition of actual use that excludes FERC bypass flows in a manner that is not consistent with the Powerdale Agreement.

Department Response #9a:

ORS 540.045 defines a watermaster’s duties to distribute water among various users in accordance with “existing water rights of record” which include: “all completed permits, certificates, licenses and ground water registration statements filed under ORS 537.605 and related court decrees.” FERC licenses are not considered a water right of record under Oregon statutes and are not subject to a call of the watermaster. Additionally, ORS 543A.305(6) limits the conversion to “that portion of the water right used exclusively for hydroelectric purposes.” Finally, the Supreme Court opinion of December 23, 2021, stated: “...as WaterWatch argues, for purposes of the conversion statute, water use ‘under a hydroelectric water right’ can only be hydroelectric use” 369 Or 71 (2021).

The Powerdale Agreement also included:

§ 4.3.3 Side Agreement “Several Parties are currently working toward a separate side agreement that would address how the conversion of the PacifiCorp Hydroelectric Water Right to an instream water right would occur. If no side agreement is reached, these issues shall be addressed in the normal course of events, as directed by ORS 543A.305.”

No Side Agreement was reached regarding the conversion of the hydroelectric water right. The Powerdale hydroelectric water right will be addressed according to the rules to

Division 54 Rulemaking

be adopted by the Commission. No changes to the proposed rules were made as a result of this comment.

Comment Summary #9b:

OAR 690-054-0010(1)(b) – The proposed definition of “actual use” for other existing water rights as of October 23, 1999, should be clarified to unambiguously include the amount of water that was both legally *and in fact* diverted in accordance with those existing water rights.

Department Response #9b:

Certificates issued are based on documentation of water use actually diverted and applied to a use. This comment appears to address a previous version of the proposed rules. Prior to filing the Notice of Proposed Rulemaking the Department added “and beneficially used” to OAR 690-054-0010(1)(b).

Comment Summary #9c:

OAR 690-054-0010(7) – ORS 543A.305(3) requires that the Water Resources Director find that a conversion of a hydroelectric water right “will not result in injury to other existing water rights.” In making that determination, the director must 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 proposed regulatory definition of “injury” focuses on whether those other existing water rights will receive “previously available water.” This inquiry is based on the “Actual Use” of both the hydroelectric project and the other water users. As noted, the proposed rules do not define “Actual Use” to include bypass flows mandated by FERC. As a result, the comparison of the actual use of a hydroelectric project with the actual use of other existing water rights as of October 23, 1999, is flawed. The proposed definition of “injury” should be revised to align with ORS 543A.305(3).

Department Response #9c:

ORS 540.045 defines a watermaster’s duties to distribute water among various users in accordance with “existing water rights of record” which include: “all completed permits, certificates, licenses and ground water registration statements filed under ORS 537.605 and related court decrees.” FERC licenses are not considered a water right of record under Oregon statutes and are not subject to a call of the watermaster. Additionally, ORS 543A.305(6) limits the conversion to “that portion of the water right used exclusively for hydroelectric purposes.” Finally, the Supreme Court opinion of December 23, 2021, stated: “...as WaterWatch argues, for purposes of the conversion statute, water use ‘under a hydroelectric water right’ can only be hydroelectric use” 369 Or 71 (2021). No changes to the proposed rules were made as a result of this comment.

Comment Summary #9d:

OAR 690-054-0020 – Notice of Consideration for Conversion: Eligibility Determinations and Preliminary Findings of Fact

Division 54 Rulemaking

OAR 690-054-0020(3) – By statute, the Department is required to evaluate whether the conversion will result in injury to other existing water rights, in part by considering “the actual use of the hydroelectric project and the resulting impacts on actual use by other existing water rights as of October 23, 1999.” ORS 543A.305(3). OAR 690-054-0020(3)(a) does not align with the statute because it relies on the flawed definition of “Actual Use” in OAR 690-054-0010(1)(a), which, as noted, omits any consideration of historical bypass flows associated with the hydroelectric project.

Department Response #9d:

ORS 540.045 defines a watermaster’s duties to distribute water among various users in accordance with “existing water rights of record” which include: “all completed permits, certificates, licenses and ground water registration statements filed under ORS 537.605 and related court decrees.” FERC licenses are not considered a water right of record under Oregon statutes and are not subject to a call of the watermaster. Additionally, ORS 543A.305(6) limits the conversion to “that portion of the water right used exclusively for hydroelectric purposes.” Finally, the Supreme Court opinion of December 23, 2021, stated: “...as WaterWatch argues, for purposes of the conversion statute, water use ‘under a hydroelectric water right’ can only be hydroelectric use” 369 Or 71 (2021). No changes to the proposed rules were made as a result of this comment.

Comment Summary #6e:

OAR 690-054-0020(3)(b) is also problematic. ORS 543.305(3) instructs the Department to consider the “resulting impacts on Actual Use by Other Existing Water Rights as of October 23, 1999.” The statute does not authorize the Department to consider whether “new regulation under Chapter 690, Division 250 would likely be required for the proposed conversion to an Instream Water Right * * *” as set forth in OAR 690-054-0020(3)(b)(B). Speculation about future regulation of existing water rights is not relevant to the statutory injury inquiry provided in ORS 543.305(3).

Department Response #9e:

Regulation is directly relevant to the Department’s analysis of the resulting impacts on Actual Use by Other Existing Water Rights and to the Director’s consideration of Mitigation Measures to avoid Injury and to ensure the Continuation of Authorized Water Uses.

Comment Summary #9f:

OAR 690-054-0040 – Proposed Final Order: Final Determinations and Findings of Fact

OAR 690-054-0040(6) – The Tribe incorporates by reference its comments to proposed OAR 690-054-0020(3), provided above.

Department Response #9f: See Department response to Comment #9e above.

Comment Summary #9g:

Division 54 Rulemaking

OAR 690-054-0040(7) – ORS 543A.305(3) authorizes the Department to impose mitigation measures only to “avoid injury and to ensure the continuation of authorized water uses by other existing water rights.” (Emphasis added.) OAR 690-054-0040(7) should be revised to clarify the Department’s limited authority to impose mitigation measures only when it is necessary to both (a) avoid injury and (b) ensure the continuation of authorized water uses by other water users.

Department Response #9g:

This comment appears to address a previous version of the proposed rules. OAR 690-054-0040(7) states “In order to avoid injury and to ensure the Continuation of Authorized Water Uses the Director may include Mitigation Measures...” (emphasis added). No changes to the proposed rules were made as a result of this comment.

Comment Summary #9h:

OAR 690-054-0040(8) - ORS 543A.305 does not authorize the Department to unilaterally subordinate the instream water right to any other water right, including “Other Existing Water Rights as of October 23, 1999.” Instead, the statute requires that the “priority date of the instream water right shall be the same as that of the converted hydroelectric water right.” ORS 543A.305(2). OAR 690-054-0040(8) is contrary to the express legislative intent. The Department should delete this subsection in its entirety.

Department Response #9h:

The statute provides for the “continuation of authorized uses by other existing water rights as of October 23, 1999.” The instream water right will retain the priority date of the converted hydroelectric water right; however, it may be subordinated to all the rights with priority dates existing prior to October 23, 1999. No changes to the proposed rules were made as a result of this comment.

Comment Summary #9i:

OAR 690-054-0060 - Filing of Protests

This proposed rule should be revised to acknowledge the sovereign interests of federally-recognized Indian tribes located in the State of Oregon, which hold treaty-reserved rights to fish, hunt, and gather culturally important foods. For example, pursuant to the 1855 Treaty, the Tribe has legally-enforceable reserved rights to take fish at its usual and accustomed areas throughout much of Oregon. The Tribe’s right to take fish includes the right to have a harvestable population of fish, which depend on instream flows. See *United States v. Washington*, 853 F.3d 946, 966 (9th Cir. 2017), *aff’d by equally div’d court* 138 S. Ct. 1832 (2018). The Tribe, thus, has a treaty- reserved right to minimum instream flows necessary to maintain a harvestable population of fish. See *generally Baley v. United States*, 942 F.3d 1312 (Fed. Cir. 2019). The priority date of that right is time immemorial. *Cf. United States v. Adair*, 723 F.2d 1394, 1412 - 14 (9th Cir. 1983).

The proposed rule should also be revised to provide automatic party status to any federally-recognized Oregon “treaty tribe” that chooses to commence a protest, or to participate in any

Division 54 Rulemaking

protest initiated by other parties, with respect to the conversion of a hydroelectric water right in waters for which the tribe holds an interest, including treaty-reserved rights.

Department Response #9i:

The Department regularly grants party status to all who pay the protest fees required under ORS 536.050 by the protest deadline. The proposed rule includes an opportunity for anyone to request standing for all proposed final orders. Tribes also may indicate their interest in participating through this established process. No changes to the proposed rules were made as a result of this comment.

Flowchart for Hydroelectric Conversions to Instream - DRAFT Div 54

