



## 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 - Revised #1**

#### **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 ~~on or after October 23, 1999~~ and which ceased beneficial use ~~thereafter 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 690-054-0050.

**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 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:** 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](http://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

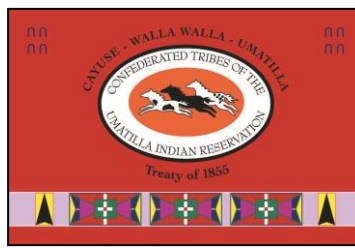
Statutory Authority: 543A.305, 536.027

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

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

November 2020

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



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](mailto: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.<sup>1</sup> 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.

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<sup>1</sup> 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.



Thank you for considering the Tribe's comments.

Very truly yours,



ROBERT A. BRUNOE  
RAB/jn

cc: Thomas Byler, Director, Oregon Water Resources Department  
Mary Grainey, Oregon Water Resource Department  
The Hon. Raymond C. Tsumpti, Chairman, Tribal Council  
The Hon. Brigitte McConville, Vice-Chairwoman, Tribal Council  
Josh Newton







**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, 1999<sup>1</sup>, 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".

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<sup>1</sup> 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 over a light blue 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/](http://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.

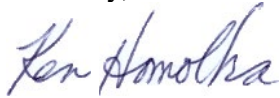
Bypassed flows that are required by a Federal Energy Regulatory Commission (FERC) license, §401 water quality certification, or water right should be added to the actual use of the hydroelectric project up to, but not to exceed, the full water right granted by OWRD. Bypassed flows are often integral 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](mailto: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](mailto: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

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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=aitSWFFXTG10dVVtdlVaaakNH0EJpZz09> 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.

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#### 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.

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#### 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/](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.

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**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.

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**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.

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WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

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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

ADOPT: 690-054-0060

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](mailto: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](mailto: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](mailto:sodell@martenlaw.com)

[martenlaw.com](http://martenlaw.com)

1050 SW Sixth Ave, Suite 2150

Portland, OR 97204



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**From:** [Stephen J. Odell](#)  
**Sent:** Tuesday, November 30, 2021 5:00 PM  
**To:** [POTTER Breeze K \\* WRD](#)  
**Cc:** [craig@mfidp.com](mailto: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](mailto:breeze.k.potter@oregon.gov)

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Submitted via e-mail

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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  
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Counsel, Middle Fork Irrigation District

**Steve Odell**

Partner

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**D** - 503 . 241 . 2648

**M** - 503 . 880 . 6949

**E** - [sodell@martenlaw.com](mailto:sodell@martenlaw.com)

[martenlaw.com](http://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



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**From:** Stephen J. Odell <[sodell@martenlaw.com](mailto:sodell@martenlaw.com)>  
**Sent:** Tuesday, November 30, 2021 4:53 PM  
**To:** POTTER Breeze K \* WRD <[Breeze.K.POTTER@water.oregon.gov](mailto:Breeze.K.POTTER@water.oregon.gov)>  
**Cc:** [craig@mfdp.com](mailto:craig@mfdp.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](mailto:breeze.k.potter@oregon.gov)

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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  
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Counsel, Middle Fork Irrigation District

**Steve Odell**

Partner

---

**D** - 503 . 241 . 2648

**M** - 503 . 880 . 6949

**E** - [sodell@martenlaw.com](mailto:sodell@martenlaw.com)

[martenlaw.com](http://martenlaw.com)

1050 SW Sixth Ave, Suite 2150

Portland, OR 97204



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**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 statute<sup>1</sup>.

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

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<sup>1</sup> 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)<sup>2</sup>, 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.<sup>3</sup> 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.

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<sup>2</sup> 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.

<sup>3</sup>E.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.

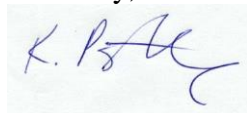
**Exceptions, OAR 690-054-0070:** The rules should allow exceptions to the OWRD Order to go to the Commission for final determination.

**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](mailto: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

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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](mailto: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 black ink that reads "Kate Fitzpatrick". The signature is written in a cursive, flowing style.

Kate Fitzpatrick  
Executive Director  
[kate@deschutesriver.org](mailto: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](http://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](mailto: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

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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](mailto: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](http://www.nwhydro.org)  
[brenna@nwhydro.org](mailto: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](mailto: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.<sup>1</sup>

### **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.<sup>2</sup> 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.

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<sup>1</sup> 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.

<sup>2</sup> 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](mailto: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”).<sup>1</sup> 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.

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<sup>1</sup> 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.

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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.<sup>2</sup> 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.

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<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> *Id.* The Tribe believes that the definition of “Actual Use of the Hydroelectric Project” in

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

<sup>4</sup> 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.<sup>5</sup> 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

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<sup>5</sup> 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.<sup>6</sup>

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

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<sup>6</sup> 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](mailto: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.<sup>1</sup> 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.

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<sup>1</sup> 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.



Thank you for considering the Tribe's comments.

Very truly yours,



ROBERT A. BRUNOE  
RAB/jn

cc: Thomas Byler, Director, Oregon Water Resources Department  
Mary Grainey, Oregon Water Resource Department  
The Hon. Raymond C. Tsumpti, Chairman, Tribal Council  
The Hon. Brigitte McConville, Vice-Chairwoman, Tribal Council  
Josh Newton





**SETTLEMENT AGREEMENT**

**CONCERNING THE INTERIM OPERATION  
AND DECOMMISSIONING OF THE POWERDALE  
HYDROELECTRIC PROJECT, FERC PROJECT NO. 2659**

**DATED**

**JUNE 6, 2003**

SETTLEMENT AGREEMENT

AMONG  
PACIFICORP

NATIONAL MARINE FISHERIES SERVICE  
UNITED STATES FISH AND WILDLIFE SERVICE  
OREGON DEPARTMENT OF FISH AND WILDLIFE  
OREGON WATER RESOURCES DEPARTMENT  
OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY  
CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON  
AMERICAN RIVERS  
HOOD RIVER WATERSHED GROUP

DATED  
JUNE 6, 2003

CONCERNING THE INTERIM OPERATION AND DECOMMISSIONING OF  
THE POWERDALE HYDROELECTRIC PROJECT, FERC PROJECT NO. 2659  
HOOD RIVER COUNTY, OREGON

Powerdale Hydroelectric Project Settlement Agreement

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## Powerdale Hydroelectric Project Settlement Agreement

### PARTIES TO THE AGREEMENT

This Settlement Agreement (the "Agreement") is made pursuant to Federal Energy Regulatory Commission ("FERC") Rule 602, 18 C.F.R. § 385.602, by and among PacifiCorp, an Oregon corporation; National Marine Fisheries Service ("NMFS"); United States Fish and Wildlife Service ("USFWS"); Oregon Department of Fish and Wildlife ("ODFW"); Oregon Water Resources Department ("OWRD"); Oregon Department of Environmental Quality ("ODEQ"); Confederated Tribes of the Warm Springs Reservation of Oregon ("CTWS"); American Rivers ("AR"); and Hood River Watershed Group ("HRWG"), each referred to individually as a "Party" and collectively as the "Parties." The NMFS, USFWS, CTWS, ODFW, OWRD and ODEQ are also each a "Governmental Party" and are referred to collectively as the "Governmental Parties." The "Effective Date" is the day that the last of the Parties executes the Agreement.

### RECITALS

A. PacifiCorp is the licensee for the Powerdale Hydroelectric Project (FERC No. 2659) (the "Project"). The Project is located on the Hood River in Hood River County, Oregon. The Project is operated as a run-of-river project, and consists of a concrete diversion dam 206 feet long and 10 feet high, a water conveyance system approximately 16,000 feet long, a powerhouse, a turbine generator with a nameplate rating of 6,000 kW, and appurtenant facilities.

B. The initial 38-year term of the FERC license for the Project expired on March 1, 2000. PacifiCorp submitted an application for a new license to continue operating the Project to FERC on February 23, 1998. On June 9, 2000, ODEQ issued a Clean Water Act ("CWA") Section 401 Certification for the Project based on a relicensing proposal that did not contemplate temporary suspension of generation from April 15 to June 30 each year or decommissioning of the Project ("June 2000 Certification"). In December 2001, ODEQ issued the Western Hood River Subbasin Total Maximum Daily Load ("TMDL") for temperature, which then was approved by the U.S. Environmental Protection Agency on January 30, 2002. On March 28, 2002, PacifiCorp submitted an Operational Plan to address Project-related warming of the Hood River ("TMDL Operational Plan"); this TMDL Operational Plan was approved by ODEQ on January 16, 2003.

C. In its December 26, 2001 Environmental Assessment, FERC determined that relicensing (protection, mitigation and enhancement) measures proposed by PacifiCorp and recommended by FERC staff and state and federal resource agencies would reduce the Project's net annual benefit to -\$207,576. On February 1, 2002, in consideration of this finding, PacifiCorp requested that FERC abey the license proceedings to allow PacifiCorp to develop a decommissioning plan for the Project. PacifiCorp and federal, state, tribal and non-governmental stakeholders entered into discussions to determine the feasibility of identifying a mutually-acceptable approach to decommissioning. On September 26, 2002, several Parties executed an Agreement in Principle on the interim operation and decommissioning of the Project. Subsequently, on September 30, 2002, several of the Parties to this Agreement submitted to

## Powerdale Hydroelectric Project Settlement Agreement

FERC a Joint Motion to Abey Licensing Proceedings to allow the Parties to continue negotiating toward settlement on such issues. FERC has yet to take final action on PacifiCorp's license application, and PacifiCorp continues to operate the Project under an annual license.

D. In addition to other aquatic and terrestrial species, the following fish species occur in the Project area during some portion of their life cycle: spring and fall chinook salmon, coho salmon, winter and summer steelhead, rainbow trout, bull trout, cutthroat trout, mountain whitefish, largescale sucker and Pacific lamprey. Of these, the Lower Columbia River chinook salmon, Lower Columbia River steelhead, and bull trout have been listed as threatened pursuant to the Endangered Species Act ("ESA").

E. ODFW and CTWS are currently undertaking fish studies in the Hood River basin as part of an effort to rebuild anadromous fish populations in the Hood River. These efforts, which began in 1988, rely on the ability to sort and collect fish at a collection facility located adjacent to the existing fish ladder at the Project dam. One of the objectives of the studies is to collect life history and production information for hatchery and wild fish to allow fish managers to determine the success of various techniques to rebuild native fish stocks. The federal and state fisheries agencies and CTWS anticipate that the results of these studies will not only affect fish management in the Hood River basin, but will also provide critical information for anadromous fish managers throughout the Northwest region. The continued use of the Project until approximately June 2010 is necessary to complete these studies. Thereafter, Project decommissioning and dam removal will allow the free migration of aquatic species referred to in Recital D.

F. In 1978, OWRD issued a certificate of water right (Certificate No. 46965) to PacifiCorp for the Powerdale Project, which authorizes a total diversion of 500 cubic feet per second (cfs), with a priority date of 1901 for 140 cfs and a priority date of 1911 for the remaining 360 cfs (hereinafter referred to as the "PacifiCorp Hydroelectric Water Right").

NOW, THEREFORE, in consideration of their mutual covenants in this Agreement, the Parties agree as follows:

### DEFINITIONS

"Alternative Dispute Resolution Procedures" or "ADR Procedures" refers to the dispute resolution process set forth in Section 6.14.

"American Rivers" or "AR" is a District of Columbia corporation and is listed as a Party in the first paragraph of this Agreement, entitled "Parties to the Agreement."

"Decommission," as used in this Agreement, refers to the commitments made by PacifiCorp in Section 4.1 and Appendices A and B of this Agreement to leave, modify or remove Project facilities and structures.

"FERC Order" is defined in Section 1.1 of this Agreement.

## Powerdale Hydroelectric Project Settlement Agreement

“Final FERC Order” means that FERC has issued the FERC Order and that all administrative and judicial appeals relating to the FERC Order have been finally adjudicated or dismissed.

“Hood River Watershed Group” or “HRWG” is a voluntary watershed council organization recognized under Hood River County Board of Commissioners’ Ordinance No. 204, and is listed as a Party in the first paragraph of this Agreement, entitled “Parties to the Agreement.”

“Inflow” means the flow in the Hood River immediately upstream of the Project, and does not include water diverted or otherwise used or lost upstream of the Project.

“Protection, Mitigation and Enhancement measures,” or “PM&E measures,” refers to the measures set forth in Sections 3.2 through 3.14 and 4.2.1 through 4.4 and 5.2.2.

“Ramping” means those Project-induced increases (“up-ramping”) and decreases (“down-ramping”) in river discharge and associated changes in water surface elevation over time resulting from generation of electricity by Project facilities, Project maintenance activities (i.e., planned outages) and unplanned (forced) outages. Ramping does not include changes in flows and change in river stage resulting from increases or decreases in stream flow unrelated to the Project. Ramping rates in this Agreement are stated in inches of change per hour. Ramping is measured as the distance between the maximum and minimum water level measured at a specified location over the applicable period of time; variation in water level within the maximum and minimum water level during that period are not considered for purposes of measuring ramping. For example, if the relevant ramping limitation is one inch per hour, and the river gage is at four feet at noon, then during the next hour the water elevation may vary no more than between three feet eleven inches and four feet, between four feet and four feet one inch, et cetera. In each example, the amount of change between the maximum and minimum gage readings in a one-hour time period is not more than one inch, but could vary within that range more than once during the hour.

### SECTION 1: PURPOSE AND EFFECT OF THIS AGREEMENT

1.1 Purpose of Agreement. The Parties have entered into this Agreement to resolve all issues regarding the interim operation and decommissioning of the Project, and for the purpose of obtaining a Final FERC Order that approves the interim operation and decommissioning of the Project in a manner that does not conflict with, add to or omit measures required by this Agreement. For this purpose, the Parties agree that the Agreement is fair and reasonable and in the public interest within the meaning of FERC Rule 602 governing offers of settlement. 18C.F.R. § 385.602(g)(3). For purposes of implementing this Agreement, the Parties agree to support PacifiCorp’s request that FERC:

- (i) retroactively extend the previous Project license, which expired on March 1, 2000, to February 29, 2012, giving the license an effective term of fifty years; and

## Powerdale Hydroelectric Project Settlement Agreement

- (ii) incorporate, without material modification, as license articles in the extended license, all of the measures set forth in Section 3; and
- (iii) approve and authorize, without material modification, the decommissioning measures and associated PM&E measures set forth in Sections 4.1, 4.2 and 5 and Appendix B to this Agreement; and
- (iv) allow PacifiCorp the opportunity, after all appeals of the FERC Order, to accept or reject the Final FERC Order as provided in Section 6.3 of this Agreement.

FERC's actions extending and amending the Project license and approving Project decommissioning as described above in (i) through (iii) are hereinafter referred to collectively as the "FERC Order."

The Parties shall request that FERC include in the FERC Order articles that are consistent with and that do not conflict with, add to or omit measures required by this Agreement, except as may be necessary to enable FERC to ascertain and monitor PacifiCorp's compliance with the FERC Order and its rules and regulations under the Federal Power Act ("FPA") and other federal and state laws. Each of the Parties agree, except as provided below, that PacifiCorp's performance of its obligations under this Agreement will be consistent with and will fulfill PacifiCorp's existing statutory and regulatory obligations as to each Party relating to the interim operation and decommissioning of the Project. The Parties further agree, except as provided below, that if any Party submits comments, recommendations, terms, conditions, or prescriptions that conflict with or add to the measures required by this Agreement, or takes other action in this proceeding inconsistent with this Agreement, such inconsistency shall be resolved in accordance with Section 6 of this Agreement. Without limiting the generality of the preceding sentence, the Parties agree that PacifiCorp's performance of its covenants in this Agreement will be consistent with and will fulfill all obligations under the following statutory provisions, except as specifically provided:

1.1.1 Federal Power Act Sections 10(a), 10(j) and 18. The provisions of this Agreement are intended to satisfy the Governmental Parties' exercise of authority under the FPA Sections 10(a), 10(j) and 18. 16 U.S.C. §§ 703(a), (j) and 811. The Parties intend, subject to Section 1.4 of this Agreement, that any future comments, recommendations, terms, conditions or prescriptions, to the extent applicable to this proceeding, will not add to or conflict with the measures required by this Agreement and that any inconsistency shall be resolved in accordance with Section 6 of this Agreement. Each Governmental Party reserves the right to exercise any authority it may otherwise have under the FPA in the event such Governmental Party withdraws in accordance with Section 6.16 of this Agreement.

1.1.2 Clean Water Act. Section 401 of the CWA, 33 U.S.C. § 1341, requires that any applicant for a federal license or permit to conduct any activity that may result in a discharge into navigable waters provide the licensing or permitting agency with a certification from the state that the discharge will comply with the applicable provisions of CWA sections 301, 302, 303,

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306, and 307, including applicable state water quality standards (“Section 401 Certification”). ODEQ anticipates that interim operation and decommissioning activities required by this Agreement, including Appendix B, will comply with the applicable provisions of CWA sections 301, 302, 303, 306, and 307, as well as with “any other appropriate requirement of State law” referenced in CWA subsection 401(d), 33 U.S.C. § 1341(d), including, as applicable, water quality standards, TMDLs, and requirements to protect designated beneficial uses. However, ODEQ does not intend to predetermine the outcome of its evaluation of the interim operation and decommissioning activities under the CWA and state law, and, consistent with Section 1.4 of this Agreement, reserves its right to take all actions necessary to comply with the CWA and state law. The Parties’ agreement with regard to the process for obtaining a Section 401 Certification is described in Section 2.5, below. If ODEQ issues a Section 401 Certification that requires measures that conflict with, add to or are otherwise inconsistent with those water-quality-related measures required by this Agreement, as set forth in Exhibit 1, the Parties shall address any such inconsistency in accordance with Section 6 of this Agreement.

1.1.3 Endangered Species Act Section 7(a)(2) and Magnuson-Stevens Fishery Conservation and Management Act Section 305(b). Section 7(a)(2) of the ESA requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally-listed threatened and endangered species or to result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). The Parties acknowledge that FERC may not issue the FERC Order until it has completed consultation with NMFS and USFWS with respect to threatened and endangered species affected by the Project. The Parties reserve the right to request rehearing in the event that the FERC Order is issued prior to completion of Section 7(a)(2) consultation. If FERC approves interim operation and decommissioning of the Project in a manner that does not conflict with, add to, or omit measures required by this Agreement, the proposed action for purposes of ESA section 7(a)(2) consultation would be the operation of the Project for an interim period with the PM&E measures set forth in Section 3, and the subsequent decommissioning of the Project and implementation of associated PM&E measures in accordance with Section 4. NMFS and USFWS anticipate that the measures contained in this Agreement will be adequate to minimize any incidental take occurring as a result of interim Project operations, decommissioning, and related PM&E measures; however, NMFS and USFWS do not intend to predetermine the outcome of any consultation under the ESA and reserve their right to take all actions required to comply with the ESA. Additionally, Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act requires federal agencies to consult with NMFS regarding actions that may adversely affect essential fish habitat (“EFH”). NMFS will combine its EFH consultation with its ESA consultation. If, as an outcome of ESA or EFH consultation, NMFS or USFWS require measures that conflict with, add to or are otherwise inconsistent with the measures required by this Agreement and specifically Sections 3, 4 or 5 or Exhibit 1 of this Agreement, the Parties shall address any such inconsistency in accordance with Section 6 of this Agreement.

1.1.4 Treaty and Other Authorities. CTWS holds and exercises off-reservation treaty rights, including fishing, hunting and gathering rights, in the Hood River basin pursuant to the Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963 (the “Treaty”). In addition, the Project is located within lands ceded to the United States in the Treaty. CTWS agrees that

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the measures contained in this Agreement will fulfill any obligations that PacifiCorp may have in regard to the interim operation and decommissioning of the Project pursuant to the Treaty and other federal and tribal laws and regulations. The Project is not located within tribal reservations for purposes of Section 4(e) of the FPA.

1.1.5 Oregon Fish Passage and Screening Statute. Interim operation PM&E measures and decommissioning measures to be performed under this Agreement serve as fish passage under Oregon Revised Statutes (“ORS”) 509.585. In addition, this Agreement is intended to satisfy the requirements of ORS 498.311 regarding game fish, to the extent applicable.

1.2 NEPA Analysis. In connection with a FERC Order, the Parties anticipate that FERC will complete an environmental analysis pursuant to the National Environmental Policy Act (“NEPA”). The Parties shall request that FERC incorporate interim operation and decommissioning measures described in this Agreement into the proposed action described and evaluated in its NEPA environmental analysis.

1.3 Limitations. This Agreement establishes no principle or precedent with regard to any issue addressed in this Agreement or with regard to any Party’s participation in any other pending or future licensing or decommissioning proceeding. Further, no Party to this Agreement shall be deemed to have approved, accepted, agreed to, or otherwise consented to any operation, management, valuation or other principle underlying any of the matters covered by this Agreement, except as expressly provided in this Agreement. By entering into this Agreement, no Party shall be deemed to have made any admission or waived any contention of fact or law that it did make or could have made in FERC proceedings related to this Project. This Agreement shall not be offered in evidence or cited as precedent by any Party to this Agreement in any administrative or judicial litigation, arbitration, or other adjudicative proceeding, except in a proceeding to establish the existence of or to enforce or implement this Agreement. This Section 1.3 shall survive any termination of this Agreement.

1.4 Representations Regarding Consistency and Compliance with Statutory Obligations. Except as provided herein, the Governmental Parties believe their statutory and other legal obligations are, or can be, met through implementation of this Agreement; provided, nothing in this Agreement may be construed to limit any Governmental Party from complying with its obligations under applicable laws and regulations or from considering public comments received in any environmental review or regulatory process related to the Project in accordance with this Agreement. This Agreement may not be interpreted to predetermine the outcome of any environmental or administrative review or appeal process.

1.5 Conditions Precedent and Conditions Subsequent. The Parties’ respective obligations under this Agreement are subject to conditions precedent and conditions subsequent, as more fully set forth in Section 6 below.

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### SECTION 2: ACTIONS UPON EXECUTION OF THIS AGREEMENT

2.1 FERC Filings. Following the Effective Date, but no later than May 15, 2003, PacifiCorp shall file with FERC a fully executed copy of this Agreement and its appendices and exhibits in accordance with FERC regulations at 18 C.F.R. § 385.602. Concurrent with that filing, PacifiCorp shall file a request to extend and amend the Project license and decommission the Project in accordance with this Agreement.

2.2 Permits. In accordance with this Agreement, PacifiCorp shall apply for and use reasonable efforts to obtain in a timely manner and in final form all applicable federal, state, regional, and local permits, licenses, authorizations, certifications (including a Section 401 Certification), determinations, and other governmental approvals for purposes of implementing this Agreement ("Permits"). PacifiCorp shall likewise use reasonable best efforts to obtain a FERC Order in a timely manner. The Parties shall cooperate during the permitting, environmental review, and implementation of this Agreement. Each Party, upon PacifiCorp's request, shall use its best reasonable efforts to support PacifiCorp's applications for Permits, provided that this sentence shall not apply to a Party that is the agency issuing the requested Permit. Except as expressly provided in this Agreement, PacifiCorp may not be required by this Agreement to implement any action under this Agreement until all applicable Permits required for that action are obtained in a form that does not conflict with or add to measures required by this Agreement and any and all applicable, prescribed periods for a petition for administrative or judicial review or appeal or any similar proceeding relating to any Permit ("Proceeding") have expired without any such Proceeding having been commenced or, in the event any such Proceeding is commenced, until any such Proceeding is terminated on terms and conditions that do not conflict with or add to measures required by this Agreement. Each Party shall bear its own costs of participating in any Proceeding. In the event any Proceeding is commenced, the Parties shall confer to evaluate the effect of such Proceeding on implementation of this Agreement. Nothing in this Section 2.2 shall be construed to limit PacifiCorp's ability to apply for a Permit before issuance of the FERC Order.

2.3 Communications with FERC and Other Government Agencies. Except as required to comply with applicable law, the Parties shall (i) make comments and respond to comments or responses to comments filed by them in the context of a FERC Order, Permit or TMDL proceeding only in a manner that is consistent with and that does not recommend conflicting or additional measures from those required by this Agreement; and (ii) to the extent they participate in relevant regulatory proceedings, actively support this Agreement and the incorporation of terms that are consistent with and that do not conflict with or add to measures required by this Agreement into Permits and TMDLs. If any Party advocates, after the Effective Date, to FERC or in any other forum, conditions that conflict with, add to or are otherwise inconsistent with this Agreement, the matter shall be addressed in accordance with Section 6 of this Agreement.

2.4 Timing of Obligations. The implementation schedule attached to and incorporated by reference into this Agreement as Appendix A specifies the schedule for implementation of Protection, Mitigation and Enhancement ("PM&E") measures during the interim operating period (Table A), and implementation of decommissioning and related PM&E measures

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(Table B). If there is a specific provision of this Agreement relating to the schedule for implementation of a particular measure and that provision conflicts with Appendix A, the specific provision in this Agreement controls. If there is no specific provision in this Agreement relating to the schedule for implementation of a particular measure, the schedule for implementation set forth in Appendix A controls. The schedule may be modified only with the written consent of all Parties, which modification shall constitute an amendment of this Agreement.

### 2.5 Section 401 Certification Procedures.

2.5.1 Section 401 Certification Upon Application to FERC. Concurrent with PacifiCorp's request for a FERC Order, PacifiCorp shall file with ODEQ an application for Section 401 Certification of interim operation and decommissioning of the Project that is consistent with this Agreement. The Section 401 Certification application shall consist of applicable information required under Oregon Administrative Rule 340-048-0020(2), this Agreement (with Appendices and Exhibits), and any other appropriate information. PacifiCorp shall pay ODEQ an application fee in accordance with ORS 468.065(3) upon invoice from ODEQ or other mutual arrangement. In evaluating PacifiCorp's Section 401 Certification application, ODEQ shall incorporate and rely on the ODEQ "Evaluation and Findings Report" dated May 26, 2000, to the extent applicable to interim operation and decommissioning activities, as well as consider any other relevant information, including but not limited to data generated in connection with the TMDL Operational Plan. ODEQ shall provide public notice and an opportunity to comment on a proposed Section 401 Certification decision that is consistent with the proposed Section 401 Certification conditions set forth in Exhibit 1 to this Agreement. If, as a result of consideration of public comment and any new information, ODEQ issues a Section 401 Certification that requires measures that conflict with, add to, or are otherwise inconsistent with those water-quality-related measures required by this Agreement, as set forth in Exhibit 1, the Parties shall address any such inconsistency in accordance with Section 6 of this Agreement. ODEQ shall endeavor to issue this Section 401 Certification within four months of receiving the application.

2.5.2 Effect on June 2000 Certification. For purposes of the interim operation and decommissioning for which PacifiCorp shall request FERC approval pursuant to this Agreement, the Section 401 Certification issued by ODEQ under Section 2.5.1 above shall supersede the June 2000 Certification. The June 2000 Certification shall be effective only in the event (i) FERC issues a new license for the Project as requested by PacifiCorp in June 1999, and (ii) PacifiCorp accepts the new license. ODEQ and PacifiCorp agree that the agreement between ODEQ and PacifiCorp dated June 9, 2000 for implementation of the June 2000 Certification shall terminate upon PacifiCorp's acceptance of a Final FERC Order.

2.5.3 Section 401 Certification for Federal Permits for Decommissioning Activities. Upon applying for a federal permit or permits for decommissioning activities required by this Agreement, including a dredge and fill permit from the U.S. Army Corps of Engineers ("Corps") pursuant to CWA Section 404 ("Section 404 Permit"), PacifiCorp shall provide written notice of such application and of any proposed changes in decommissioning activities since the date of



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issuance of ODEQ's Section 401 Certification under Section 2.5.1 above. Within 60 days of ODEQ's receipt of notice from the Corps or other federal permitting agency that it is processing PacifiCorp's application, ODEQ, consistently with 33 U.S.C. § 1341(a)(3), shall notify the federal agency and PacifiCorp either (i) that the Section 401 Certification issued by ODEQ under Section 2.5.1 above is sufficient for purposes of the federal permit and permit conditions, or (ii) that, in light of new information related to the water quality impacts of decommissioning activities since issuance of the Section 401 Certification under Section 2.5.1, there is no longer reasonable assurance of compliance with state water quality standards. In the latter event, ODEQ shall consider the new information, solicit and consider public and agency comment as required by law, and issue a Section 401 Certification determination for purposes of the federal permit and decommissioning activities. If, as a result of consideration of public comment and any new information, ODEQ issues a Section 401 Certification that requires measures that conflict with, add to, or are otherwise inconsistent with those water-quality-related measures required by this Agreement, as set forth in Exhibit 1, the Parties shall address any such inconsistency in accordance with Section 6 of this Agreement.

2.5.4 Application for Delegated State Section 404 Permit for Decommissioning Activities. In the event the Oregon Division of State Lands ("ODSL") assumes authority to administer a dredge and fill permit program under CWA Section 404 by the time a Section 404 Permit is required for Project decommissioning activities, PacifiCorp shall apply for such a Section 404 Permit from ODSL. ODEQ, ODFW and OWRD shall provide comments to ODSL in accordance with ORS 196.825 or successor statutes in effect at that time. Subject to consideration of any new information at the time of the application for the Section 404 Permit and consideration of any public comment as may be required by law, ODEQ, ODFW and OWRD shall provide ODSL with comments or proposed conditions that are consistent with and that do not conflict with or add to measures required by this Agreement. If ODEQ, ODFW or OWRD provide comments or proposed conditions that would require PacifiCorp to undertake measures that conflict with, add to, or are otherwise inconsistent with those measures required by this Agreement or Exhibit 1, the Parties shall address any such inconsistency in accordance with Section 6 of this Agreement.

### SECTION 3: INTERIM OPERATING PERIOD

3.1 Interim Operating PM&E Measures. PacifiCorp shall implement the PM&E measures set forth in Sections 3.2 through 3.14, beginning at the time designated for each measure in this Section and Appendix A, Table A, and continuing until decommissioning begins in accordance with the schedule in Appendix A, Table B, or until notification pursuant to Section 5.1, whichever happens first.

3.2 Ramping Rate. The following ramping rates apply to all ramping at the Project but do not apply to forced outages, except that they shall apply to Project start-up after such an outage.

3.2.1 Requirements After Effective Date. Upon the Effective Date, PacifiCorp shall commence development, in consultation with NMFS, USFWS, ODFW, ODEQ and CTWS, of standard operating procedures for meeting the ramping requirements described in this Section

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3.2.1 and Section 3.2.2. In addition, upon the Effective Date, PacifiCorp shall commence development of a monitoring plan in consultation with NMFS, USFWS, ODEQ, ODFW and CTWS to document the rate of change in water level or stage in the river. Beginning 30 days after the Effective Date and continuing through commencement of ramping requirements under Section 3.2.2, PacifiCorp shall make reasonable efforts, using existing equipment, to limit the ramping rates in the bypass reach to three inches per hour, with a preferred target of two inches per hour. PacifiCorp shall make a reasonable effort to complete the standard operating procedures and monitoring plan prior to the FERC Order.

3.2.2 Requirements After FERC Order and Final FERC Order. Upon the FERC Order, if not already completed, PacifiCorp shall complete the standard operating procedures and monitoring plan referred to in Section 3.2.1. Beginning 30 days after the Final FERC Order, PacifiCorp shall make reasonable efforts to limit the ramping rates in the bypass reach to no more than two inches per hour, and in any event such rates shall not exceed three inches per hour, in accordance with the standard operating procedures and monitoring plan.

3.2.3 Response to Monitoring. Should development or implementation of the monitoring plan referred to in Sections 3.2.1 and 3.2.2, or the resulting data, show that a different ramping rate will result in the same protections for aquatic species (for example, when Inflows are already high), PacifiCorp may propose such a different ramping requirement. Upon the written approval of NMFS, USFWS, ODFW, ODEQ and CTWS, the approved variation shall be substituted for the above ramping requirements, without requiring amendment of this Agreement.

3.2.4 Unplanned Outages. Following an unplanned outage, PacifiCorp shall observe conditions directly downstream of the Project dam and powerhouse. Should PacifiCorp or another Party identify a fish stranding problem, PacifiCorp shall use its best reasonable efforts to minimize the impacts of such stranding by relocating such fish to the river in consultation with ODFW, CTWS, NMFS and USFWS.

3.3 Instream Flows and Temperature. The minimum instream flow requirements set forth in this Section 3.3 shall be met using a combination of flows from the fish ladder, fish screen bypass flow, trash sluice, and spillway gates.

3.3.1 Requirements After Effective Date. Upon the Effective Date and continuing through commencement of minimum instream flow requirements under Section 3.3.2, PacifiCorp shall make reasonable efforts, using existing equipment, to implement in the bypass reach either the following minimum instream flows, or Inflow (less the amount required to compensate for flowline leakage up to a maximum of 25 cfs), whichever is less:

- (i) February 1 to April 14: 220 cubic feet per second (“cfs”);
- (ii) April 15 to June 30: manage flows as set forth in Section 3.4 below;
- (iii) July 1 to October 31: 250 cfs;
- (iv) November 1 to November 30: 220 cfs;
- (v) December 1 to January 31: 140 cfs.

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Upon the Effective Date, PacifiCorp shall commence development of standard operating procedures in consultation with ODFW, ODEQ, NMFS, USFWS and CTWS, to determine the accuracy of the existing Programmable Logic Control or alternative method for monitoring compliance with minimum instream flows. PacifiCorp shall make a reasonable effort to complete the standard operating procedures prior to the FERC Order.

3.3.2 Requirements After FERC Order and Final FERC Order. Upon the FERC Order, if it is not already completed, PacifiCorp shall complete the standard operating procedures referred to in Section 3.3.1. Beginning 30 days after the Final FERC Order, PacifiCorp shall implement in the bypass reach either the minimum instream flows set forth in Section 3.3.1(i)-(v), or Inflow (less the amount required to compensate for flowline leakage up to a maximum of 25 cfs), whichever is less. Instream flows shall be measured by a Programmable Logic Control or alternative method for monitoring compliance with minimum instream flows, consistent with the standard operating procedures developed pursuant to Section 3.3.1. Instream flows shall be maintained on an average hourly basis. Once the standard operating procedures are implemented, PacifiCorp shall publicly post hourly flow data on the Internet. The Internet posting shall clearly display the total average hourly river flow being released into the bypass reach directly downstream of the diversion dam. The Internet posting shall also display the average hourly flow being diverted to the flow conveyance system. Flows shall be reported in cfs. PacifiCorp shall post hourly flow measurements as timely as possible but no more than 24 hours after such measurements are taken.

3.3.3 Temperature Monitoring. After the Effective Date, PacifiCorp shall monitor stream temperatures hourly from July 1 through October 15 each year at sites PDBUP (upstream end of the bypass reach, approximately 50 meters downstream of the dam) and PDBDN (downstream end of the bypass reach, approximately 250 meters upstream of the powerhouse). The accuracy of temperature recorders shall be tested before and after field deployment to ensure that they are operating within their designated range of accuracy. In addition to pre- and post-deployment checks, the temperature recorders shall be audited monthly during the field measurement period. The pre- and post-deployment and monthly field audit checks shall be made using a National Institute of Standards and Technology ("NIST") traceable (calibrated and maintained) thermometer accurate to  $\pm 0.2^{\circ}\text{C}$  or better, which has been checked against an NIST traceable thermometer. In addition, for the period July 1 through October 15, PacifiCorp, upon the Effective Date, shall record existing data on flows released into the bypass reach, and upon the Final FERC Order, shall record average hourly flows released into the bypass reach. These flows shall be measured in accordance with Section 3.3.1 or Section 3.3.2, whichever is applicable. ODEQ may make reasonable and feasible modifications to the temperature and monitoring requirements of this Section 3.3.3, and, in consultation with ODFW, OWRD, NMFS, USFWS and CTWS, may make reasonable and feasible modifications to the flow monitoring requirements of this Section 3.3.3 if (i) the monitoring requirements prove to be insufficient to provide the necessary data or (ii) modifications to minimum instream flow requirements require modifications to monitoring requirements.

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3.3.4 Response to TMDL Temperature Monitoring. In order to meet its TMDL load allocation from September 15 to October 15, PacifiCorp shall undertake the following measures:

3.3.4.1 Annual Temperature and Flow Monitoring Report. After the Effective Date, PacifiCorp shall provide ODEQ with an annual temperature and flow monitoring report by December 31 of each year. The annual monitoring report shall include flow data and hourly temperature data, pre- and post-deployment data, and monthly field audit data required by Section 3.3.3 for that calendar year. The annual report shall identify any instances in which the seven-day moving average of daily maximum temperatures measured at the downstream end of the bypass reach exceeded 55°F during the period from September 15 through October 15. If any such instances are identified in the first three years of monitoring, PacifiCorp shall submit in the third annual temperature and flow monitoring report to ODEQ an evaluation of whether the temperature increase in the bypass reach was 0.25°F (as a seven-day moving average) more than the increase that would have occurred had the Project not diverted water from the bypass reach. In lieu of conducting this evaluation, PacifiCorp may assume that any temperature increase between the upstream and downstream ends of the bypass reach is due to Project diversions.

3.3.4.2 Measures to Reduce Stream Warming from September 15 through October 15. If, based on the evaluation or assumed Project impact described in Section 3.3.4.1, ODEQ determines that the stream warming that occurred in the bypass reach was 0.25°F more than would have occurred had there been no Project diversions, PacifiCorp shall, within 90 days after written notification from ODEQ, submit to ODEQ a written proposal for measures that PacifiCorp will take to ensure that the Project-related warming in the bypass reach is not more than 0.25°F (as a seven-day moving average) when the seven-day moving average of daily maximum temperatures exceeds 55°F at the downstream end of the bypass reach between September 15 and October 15. The proposal shall include a proposed schedule for implementing the measures. The measures may include, but are not limited to, the following:

(i) Temperature modeling for the period September 15 through October 15 to determine what minimum instream flows would be necessary to reduce Project-related warming to 0.25°F or less (as a seven-day moving average) when the seven-day moving average of daily maximum temperatures at the downstream end of the bypass reach exceeds 55°F. If increased minimum flows are necessary and feasible, PacifiCorp shall provide the increased flows for the necessary period, subject to the limits set forth in Section 3.3.4.3.

(ii) In the alternative, PacifiCorp may elect not to divert water (except for amounts required to compensate for flowline leakage up to 25 cfs) whenever and so long as the river temperature exceeds 55°F at the downstream end of the bypass reach between September 15 and October 15.

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3.3.4.3 Limits on Minimum Instream Flow Modifications. The following limitations apply to modifications of minimum instream flows under this Section 3.3:

- (i) ODEQ shall not require modification of flows beyond those reasonably necessary to prevent a Project-related instream temperature increase of 0.25°F or more. This limitation shall only apply upon ODEQ's determination that PacifiCorp has satisfactorily demonstrated under prevailing conditions that any such modification would result in a Project-related temperature increase of less than 0.25°F.
- (ii) Modification of minimum instream flows shall be limited to no more than a 50 cfs increase in any two-year period.
- (iii) PacifiCorp's responsibility to fulfill minimum instream flow requirements shall be limited to reducing Project diversions from the bypass reach.
- (iv) No increase in minimum instream flows shall be required before September 15, 2006.

3.3.5 Powerhouse Cooling Water Discharge. Heat discharged to the Hood River through powerhouse cooling water shall not exceed 19.31 million kilocalories per day.

3.3.6 TMDL Reservation. In the event that the Project continues to divert water for power generation or Project maintenance during and after 2012, ODEQ reserves the right to modify the Section 401 Certification for the Project, in accordance with OAR Chapter 340, Division 48, as needed to ensure implementation of TMDLs for any applicable period.

### 3.4 Temporary Reduction in Diversion Flow.

3.4.1 General. From April 15 to June 30 each year, PacifiCorp shall reduce diversion flow to a maximum of 25 cfs. All flows in excess of the amount required to compensate for flowline leakage up to 25 cfs shall be passed by the dam.

3.4.2 Resuming Power Generation. PacifiCorp may resume power generation on July 1 of each year. For the 96 hours prior to the start-up of the turbine unit, PacifiCorp shall use multiparameter continuous monitoring devices approved by ODEQ to sample water quality at two sites in the river agreed upon by ODEQ. One site shall be approximately 250 meters upstream of the powerhouse tailrace in the river along the east bank; the other shall be approximately 30 meters downstream of the powerhouse tailrace's confluence with the river along the east bank. The continuous sampling devices shall sample and record hourly stream temperature, dissolved oxygen, pH, and turbidity. At least 72 hours prior to the start-up of the turbine unit, but not less than 24 hours after commencing the continuous monitoring, PacifiCorp shall open a 10-inch drain valve in the powerhouse near the tailrace to provide a slow exchange of flowline water. Upon beginning generation on July 1, PacifiCorp shall set the turbine generator unit on the minimum wicket gate setting required to synchronize the turbine generator.

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PacifiCorp shall then ramp the turbine generator load in sufficiently small increments to the extent feasible to maintain the ramping requirements set forth in Section 3.2. Monitoring under this Section 3.4.2 at the two sampling sites may cease 24 hours after beginning generation. The multiparameter devices shall be calibrated for each parameter according to the manufacturer's specifications prior to deployment. At the time the instruments are placed in the water and when they are retrieved at each site, PacifiCorp shall measure stream temperature with a certified NIST thermometer and collect a sample for a Winkler titration for dissolved oxygen at each site. Within 30 days after the instruments are retrieved, PacifiCorp shall forward ODEQ the electronic files of the continuous sampling and calibration data.

3.4.3 Alternative Measures. The procedure outlined in Section 3.4.2 may provide dilution of flowline water in excess of that necessary to comply with water quality standards. PacifiCorp may reduce or cease its monitoring effort under Section 3.4.2 following three consecutive years of monitoring data, of quality considered accurate and reliable to ODEQ, demonstrating that the flowline water does not contribute to an exceedance of a water quality standard at the downstream monitoring site described in that Section. In the absence of three years of such data, PacifiCorp may reduce or cease its monitoring effort under Section 3.4.2 if ODEQ provides written approval based upon an ODEQ determination that there is no reasonable potential for the flowline water to contribute to exceedance of one or more water quality standards at the downstream monitoring site. If, notwithstanding use of the procedure described in Section 3.4.2, the flowline water causes an exceedance of water quality standards at the downstream monitoring site, ODEQ may direct PacifiCorp to develop and propose, within a reasonable time specified by ODEQ, alternative measures for ensuring that the flowline water does not cause an exceedance of water quality standards at the downstream monitoring site upon beginning generation. Upon approval by ODEQ, PacifiCorp shall implement the alternative measures, which may include increased diversion flow during the period April 15 through June 30.

3.5 Planned Outages. Beginning 30 days after the Effective Date, PacifiCorp shall, to the extent feasible, limit planned outages to coincide with the temporary reduction of diversion flow provided in Section 3.4 or with the summer, and shall limit planned non-summer outages to 24 hours to the extent reasonably feasible. PacifiCorp shall notify ODFW, NMFS, USFWS, and CTWS of planned outages and subsequent start-up periods to allow for monitoring of those areas with the greatest possibility for fish stranding.

3.6 Flushing. Beginning 30 days after the Effective Date, PacifiCorp shall restrict flushing of the sand settling basin to periods when bypass reach instream flows are at least 500 cfs, and preferably greater than 1,000 cfs.

3.7 Intake Screens. Upon the Effective Date, PacifiCorp shall continue to operate and maintain existing intake screens in working order. This work shall include regular inspections and the repair, rehabilitation or replacement, as needed, of seals and moving components such as chain drives, sprockets, screen baskets, motors and screen wash equipment. If a screen is damaged beyond repair, PacifiCorp shall replace it with a screen of similar design; however,

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PacifiCorp shall not be required to design or install an upgraded fish screen or otherwise make technological or other major improvements.

3.8 Fishway Auxiliary Water Intake. On or before the FERC Order, PacifiCorp shall identify and obtain NMFS, USFWS, ODFW and CTWS written approval of a method for maintaining the fish ladder auxiliary attraction water bar rack within the ladder sufficiently free of debris to allow adequate attraction flows. Alternatives to be considered shall be limited to the following unless the Parties agree otherwise: frequent manual cleaning, modification of the bar spacing on the existing intake trash rack, installation of an intake device incorporating v-bar screen technology, or changing the spacing of the bars on the rack within the ladder. Recommendations and supporting documentation shall be shared with NMFS, USFWS, ODFW and CTWS. No later than the first in-water work opportunity following the Final FERC Order, PacifiCorp shall implement the approved method for maintaining the fish ladder auxiliary attraction water bar rack sufficiently free of debris.

3.9 Ground-Disturbing Activities. Unless emergency conditions exist that require immediate actions, beginning 30 days after the Effective Date PacifiCorp shall limit impacts to terrestrial and wetland habitat from any ground-disturbing activities by (i) minimizing the area of disturbance; (ii) adhering to conditions in any applicable U.S. Army Corps of Engineers or Oregon Division of State Lands wetlands permit(s); (iii) consulting with state and federal wildlife agencies, CTWS, and, when necessary, the Columbia River Gorge Commission prior to carrying out the work to determine appropriate protection measures; (iv) limiting construction to the summer and fall; (v) revegetating disturbed areas with native vegetation to the extent feasible; and (vi) controlling sedimentation of aquatic habitat through the erosion control measures contained in the applicable permit(s). PacifiCorp shall conduct a survey before the initial ground-breaking activity for rare, threatened and endangered species in areas planned for significant construction activities, and shall coordinate with the USFWS, ODFW, Oregon Department of Agriculture and Oregon Natural Heritage Program to ensure that the target species list is current.

3.10 Rare, Threatened and Endangered Terrestrial Species. Beginning 30 days after the Effective Date, PacifiCorp, if requested by USFWS or ODFW, shall cooperate with such agencies in their continuing efforts to monitor bald eagles, harlequin ducks and other federal- or state-listed rare, threatened or endangered terrestrial species documented within the Project boundary by (i) providing access to the Project, and (ii) providing data collected by PacifiCorp personnel regarding such species.

3.11 Cultural Resources Management Plan. Beginning 30 days after the Effective Date, PacifiCorp shall consult with the Oregon State Historic Preservation Office (“SHPO”) and FERC staff to begin revising its draft Cultural Resources Management Plan (“CRMP”) to reflect the actions proposed in this Agreement. It is anticipated that FERC will issue a new Programmatic Agreement between itself and the SHPO to reflect the terms of this Agreement and the revised CRMP. PacifiCorp shall make a reasonable effort to complete the revised CRMP prior to the FERC Order; however, the Parties recognize that the timing of the FERC Order may result in later completion. Upon the FERC Order, if it is not already completed, PacifiCorp shall complete and begin implementing the revised CRMP as soon as practicable.

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3.12 Recreation Facilities. Upon the Effective Date, PacifiCorp shall continue to maintain existing recreation facilities on an as-needed basis through PacifiCorp's existing operations and maintenance program. In addition, PacifiCorp shall perform the following at Powerdale Park: (i) when the existing toilet needs replacing, provide and maintain a portable, ADA-accessible toilet; (ii) within one year after the Effective Date, provide one additional picnic table; (iii) within two years after the Effective Date, provide a second additional picnic table; and (iv) within 30 days after the Final FERC Order, install trail directional signs and a Project interpretive sign. PacifiCorp shall also perform the following at the Powerhouse day-use site: (a) within 30 days after the Final FERC Order, install and maintain a portable, ADA-accessible toilet at the Powerhouse day-use site and construct a pathway to that toilet; and (b) within 30 days after the Final FERC Order, install warning signs regarding fluctuating water levels, trail directional signs, and a salmon interpretive sign.

3.13 Information Sharing. In addition to any water quality information sharing required pursuant to the Section 401 Certification, the following information shall be shared with the Parties to assist in compliance monitoring and general decisionmaking.

3.13.1 Requirements After Effective Date. Beginning 30 days after the Effective Date and continuing through commencement of records maintenance and sharing requirements under Section 3.13.2, PacifiCorp shall provide the Parties with reasonable access to data related to PacifiCorp's implementation of this Agreement and created with existing equipment, such as records at the powerhouse and data regarding planned and unplanned outages, but not including PacifiCorp financial data. In addition, PacifiCorp shall convene an annual meeting with NMFS, USFWS, ODFW and CTWS to discuss any fish and wildlife mitigation and monitoring activities. Except as required by applicable law, the Parties shall keep confidential all records marked "confidential" or "proprietary" and not disseminate all or part of, or otherwise share the contents of, such records.

3.13.2 Requirements After Final FERC Order. Beginning 30 days after the Final FERC Order, PacifiCorp shall maintain records of Project operations, including instream flow releases, ramping conditions, and temperature monitoring reports, and shall make such records available to the Parties upon request. In addition, PacifiCorp shall convene an annual meeting with NMFS, USFWS, ODFW and CTWS and shall provide an annual report to such agencies summarizing fish and wildlife mitigation and monitoring activities. On reasonable notice, PacifiCorp shall provide the Governmental Parties with access to Project facilities and records related to implementation of the Agreement, but not including PacifiCorp financial information. Except as required by applicable law, the Parties shall keep confidential all records marked "confidential" or "proprietary" and not disseminate all or part of, or otherwise share the contents of, such records.

3.14 Maintenance of Lands During Interim Period. Beginning upon the Effective Date and continuing through March 29, 2012, PacifiCorp shall continue to own the lands identified in Appendix D (the "Subject Lands") and shall not dispose of, encumber, or initiate changes in the character of such lands, except (i) as provided in Section 4.4; (ii) for those actions specified in



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Appendix E; and (iii) after providing the Lands Stakeholders reasonable advance notice and an opportunity to comment, as reasonably necessary or desirable for the prudent ownership and management of the Subject Lands (e.g., granting easements or quitclaims for utilities, road widening, repairs and maintenance, stormwater facilities, and distribution lines).

### SECTION 4: DECOMMISSIONING

4.1 Decommissioning Actions. PacifiCorp shall perform the decommissioning actions set forth in this Section 4.1 and the decommissioning plan attached to and incorporated by reference into this Agreement as Appendix B. If any provision in Section 4.1 and Appendix B conflict, the provision in this Section 4.1 shall control. Subject to Sections 2.2 and 7.3, PacifiCorp shall complete the decommissioning actions within the time specified for each action in Appendix A, Table B, but in no event shall PacifiCorp be required to begin such actions prior to the Final FERC Order. Such times may only be modified with the written consent of all Parties, or by amending this Agreement in accordance with Section 6.13.

4.1.1 Diversion Dam. PacifiCorp shall remove the diversion dam including the roller gates, hoists and bridge, piers, walls, spillway, un-gated overflow section, fishway, embankment sections, and intake to the level of the original riverbed.

4.1.2 Intake. PacifiCorp shall perform the following actions regarding the intake: (i) remove all concrete portions of the structure above original river bed; (ii) remove the 6-foot-wide gated trash sluice, trashracks, traveling basket fish screens, and all related structural, mechanical and electrical equipment associated with the intake; (iii) remove the intake headgate that regulates flow from the intake into the power canal; (iv) remove the trash gate located between the intake structure and the trash sluice; and (v) remove several miscellaneous structures, including the control gatehouse, operator's house, and non-essential fencing. The operator's house may be left in place with the consent of a Grantee identified pursuant to Section 4.4.

4.1.3 Power Canal, Steel Flume and Sand-Settling Basin. PacifiCorp shall perform the following actions regarding the power canal, steel flume, and sand-settling basin: (i) break up and fill the 604-foot-long, trapezoidal concrete power canal with materials from the cofferdams and earth embankments, and blend it with the adjoining river bank; and (ii) remove the 550-foot-long steel flume, 142-foot-long concrete sand-settling basin, 254-foot-long steel flume, and 33-foot-long concrete structure.

4.1.4 Flowline Pipe. PacifiCorp shall perform the following actions regarding the approximately 14,500-foot-long flowline: (i) remove three sections of 10-foot-diameter wood stave pipe (a 480-foot-long section, a 1,564-foot-long section, and a 488-foot-long section) located in the first 4,692 feet of flowline and totaling 2,532 feet of wood stave, and identified in Appendix B, Figure 5.2, attached to and incorporated by reference into this Agreement; (ii) remove the concrete saddles associated with these three sections of wood stave; (iii) leave in place all remaining components of the flowline, including steel pipe located between and adjacent to the removed wood stave pipe; and (iv) create a wildlife access path beneath each of

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the two remaining upstream sections of steel flowline (commonly referred to as the “Flat Top” and “Hog Ranch” sections) at approximately the center of each section by excavating below the flowline to create an approximately six-foot-high passage.

4.1.5 Flowline Bridge. PacifiCorp shall leave the flowline bridge and associated access to the steel catwalk in place.

4.1.6 Surge Tank. PacifiCorp shall use a shaped charge to topple the surge tank. PacifiCorp shall then cut the surge tank into pieces to be salvaged as scrap material.

4.1.7 Powerhouse. PacifiCorp shall perform the following actions regarding the powerhouse: (i) leave the concrete powerhouse structure in place; (ii) remove all internal non-structural features; (iii) replace window glass with security-oriented architectural treatments; (iv) remove the metal-sided maintenance garage located immediately adjacent to the south side of the powerhouse; (v) use the outdoor traveling gantry crane which spans the powerhouse to remove equipment from the interior of the powerhouse, then dismantle and remove the operable components of the crane, leaving the structural members of the crane in place; (vi) drain all oil and hydraulic fluids from equipment located inside the powerhouse; (vii) remove any loose equipment, parts and materials; (viii) remove the internal rotating generator and turbine components; (ix) seal the turbine pit with concrete; (x) maintain power to the switch room for as long as is necessary to support remaining facilities; (xi) re-grade the areas surrounding the surge tank and maintenance garage to match surrounding contours; and (xii) secure the powerhouse building, all remaining equipment, and adjacent remaining facilities.

4.1.8 Switchyard. PacifiCorp shall perform the following actions regarding the switchyard: (i) remove all components related to the transmission of power generated by the Project; (ii) leave in service all equipment required to supply or control power to the distribution switch/control panels in the powerhouse and equipment associated with the operation of PacifiCorp’s transmission/distribution system; and (iii) modify the existing fencing around the switchyard and powerhouse as necessary to provide additional security.

4.1.9 Fish Sorting and Trapping Facility. PacifiCorp will ensure that the Powerdale Dam Fish Trapping Facility (“Fish Trapping Facility”) is removed by February 29, 2012, unless otherwise agreed in writing by the Parties, pursuant to the First Amended Permit (Hydro Lands) executed by BPA and PacifiCorp on May 15, 2003 and attached hereto as Exhibit 3.

4.2 Decommissioning PM&E Measures. In association with the decommissioning actions set forth in Section 4.1, PacifiCorp shall perform the following PM&E measures. If any provision in Section 4.2 and Appendices A (decommissioning schedule) or B (decommissioning plan) conflict, the provision in this Section 4.2 shall control.

4.2.1 Erosion and Sediment Control Plan. Prior to taking any in-water decommissioning actions pursuant to Section 4.1, PacifiCorp shall develop and implement an Erosion and Sediment Control Plan (“ESCP”), in consultation with and with the approval of NMFS, USFWS, ODEQ, ODFW and CTWS, that identifies specific methods that shall be

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implemented at each work area to protect water quality. The ESCP shall address: (i) protection of the Hood River from unplanned releases of sediment and debris during decommissioning activities; (ii) disposition of sediment and decommissioning debris in accordance with applicable law, PacifiCorp's Spill Prevention Control and Countermeasure Plan, and public health and safety; (iii) implementation of permanent revegetation measures consistent with best management practices; and (iv) dam removal, which shall be conducted in dry conditions using a coffer dam and artificial channel to divert flows from work areas. In addition, the ESCP shall specify measures such as berms, ditches, sediment retention basins, silt fencing, and site restoration to be undertaken by PacifiCorp.

### 4.2.2 Aquatic Resources.

4.2.2.1 Timing and Notification of In-Water Work. For all in-water work required by Section 4.1 of this Agreement, PacifiCorp shall conduct such work between July 15 and August 31, or outside of that time period with the approval of ODFW, NMFS and USFWS. Actions that are likely to occur outside of the July 15 to August 31 period include the following decommissioning actions:

- (i) Construction and removal of upstream and downstream cofferdams, cofferdam materials and culverts;
- (ii) Removal of the artificial upstream fish passage channel and bypass flume;
- (iii) Placement of materials (relocated cofferdam materials and available streambed materials) along the river to create access for removal of remaining portions of dam and fish ladder;
- (iv) Placement of materials to regrade and armor the east and west banks of the river to harden the disturbed areas; and
- (v) Regrading of the streambed above and below the dam as necessary to assist with removal of any barriers to fish passage created as a result of decommissioning activities.

PacifiCorp shall provide NMFS, USFWS, ODFW and CTWS reasonable notice before initiating any in-water work, regardless of when it occurs, to enable such Parties to view the work and recommend fish salvage or other immediate measures to avoid fish stranding or delay. PacifiCorp shall undertake such measures with the assistance of ODFW and CTWS. For purposes of this Section, "in-water work" does not include dam removal or other decommissioning actions performed in areas that have been dewatered for purposes of decommissioning actions.

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### 4.2.2.2 Fish Passage During Dam Removal.

4.2.2.2.1 Manner of Fish Passage. During construction of the cofferdams associated with dam removal activities, PacifiCorp shall extend the existing fish ladder return channel upstream of the dam to above the upstream cofferdam work, and shall install culverts through the downstream cofferdam to provide continued access to the existing fish ladder entrance; provided that PacifiCorp shall not provide such fish passage through the cofferdam culvert if NMFS, USFWS, ODFW and CTWS agree that such passage is not necessary. Coincidental to the construction of the cofferdams, PacifiCorp shall construct an artificial channel extending from a mid-point on the existing fish ladder to a location immediately downstream of the downstream cofferdam. Upon completion of this channel and the bypass channel (described below), PacifiCorp shall close the fish access through the downstream cofferdam, allowing upstream migrants to enter the existing fish ladder structure through a newly constructed access. PacifiCorp shall place rock between the upstream return channel and water bypass intake to minimize upstream migrant entrainment into the downstream bypass flume. During dam removal, PacifiCorp shall divert river flow past the work zone using portions of the existing water conveyance system's steel flume by installing removed sections of the steel flume from above the upstream cofferdam to below the downstream cofferdam, passing over the overflow section and existing fish ladder. This will provide downstream fish passage. PacifiCorp shall position the bypass flume to discharge directly into a pool constructed at the entrance of the upstream passage channel to attract upstream migrants to the channel. The discharge area shall be designed with adequate pool area and depth to minimize impingement of downstream migrants on the bottom or sides of the pool. The requirements of this Section 4.2.2.2.1 may be modified with the written agreement of PacifiCorp, NMFS, USFWS, ODFW and CTWS.

4.2.2.2.2 Final Fish Passage Design and Construction Plans. Prior to changing any of the existing fish passage facilities or constructing any new fish passage facilities associated with dam removal, PacifiCorp shall prepare final fish passage design and construction plans in consultation with NMFS, USFWS, ODFW and CTWS. The final design and construction plans shall be consistent with Section 4.2.2.2.1 and the following criteria, which may be modified with the written agreement of PacifiCorp, NMFS, USFWS, ODFW and CTWS.

- (i) The outfall from the flume shall be designed in accordance with, as appropriate, sections 7.4.1, 7.4.2, 7.4.3, 13.10.4, 13.10.5 and 13.10.6 of NMFS' Draft Anadromous Salmonid Passage Facility Guidelines and Criteria as of the Effective Date (attached as Exhibit 5). In addition, the pool volume and depth will be designed to minimize pool bottom surface velocities and injury to fish. For purposes of section 13.10.5, the design will minimize, but may not completely avoid, creation of false attraction

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flows. The outfall shall have a 10-foot minimum drop to the pool below (to prevent adults from entering the pipe), and shall be designed to provide smooth, rounded edges and surfaces, using materials similar to the flume, to minimize injury to fish exiting the pipe and to jumping adults;

(ii) The pipe/flume shall be designed in accordance with, as appropriate, sections 13.9.3.1, 13.9.3.4, 13.9.3.5, 13.9.3.6, 13.9.3.9, 13.9.3.11, 13.9.3.13 and 13.9.3.14 of NMFS' Draft Anadromous Salmonid Passage Facility Guidelines and Criteria as of the Effective Date (attached as Exhibit 5). Weathered steel surfaces presently existing on the steel flume sections, or alternatively the galvanized surfaces of standard culvert material, shall be considered acceptable for this application, provided that, if the interior surfaces of the existing steel flume are considered to be too rough to meet NMFS' Passage Facility Guidelines and Criteria, PacifiCorp shall install a liner or conduct sand blasting of the interior surfaces;

(iii) The temporary approach to the fishway channel entrance shall be constructed with "field placed" structure materials to optimize local hydraulic conditions. PacifiCorp shall provide NMFS, USFWS, ODFW and CTWS a minimum of seven days notice prior to the placement of these materials to allow their on-site participation in field direction of this placement work on-site;

(iv) The control structures within the temporary approach channel to the fishway entrance shall be placed at least one channel width apart. These structures shall have less than one foot of head differential (measured from upstream of the boulder control structures to the downstream water surface elevation), and shall not span the entire width of the approach channel (unless the depth provided over the channel-spanning structure is at least one foot);

(v) If fish will be passing through the temporary culvert(s) installed in the downstream coffer dam, such culverts shall meet, as appropriate, sections 9.7.5, 9.7.8 and 9.7.9 of NMFS' Draft Anadromous Salmonid Passage Facility Guidelines and Criteria as of the Effective Date (attached as Exhibit 5). In addition, the bypass shall be designed in accordance with, as appropriate, sections 9.3.2 and 9.3.3 of NMFS' Draft Anadromous Salmonid Passage Facility Guidelines and Criteria as of the Effective Date;

(vi) The design shall provide supplemental flow to the fishway discharge to allow optimal operation of the fish ladder and temporary approach channel; and

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(vii) The design shall be developed such that flow conveyed in the bypass flume is delivered below the temporary approach channel in a manner that will maximize both upstream and downstream passage. The design shall be developed such that the bypass flume and the upstream temporary approach channel work together to both attract adult fish to the temporary approach channel, minimize delay of both upstream and downstream migrants, and minimize injury to fish passing downstream.

4.2.2.2.3 ESA Agency Approval. For ESA purposes, PacifiCorp shall submit fish passage design and construction plans for the bypass flume, plunge pool, culvert, temporary approach channel, and fish ladder for NMFS and USFWS approval. If required to minimize the effect of any incidental take of listed species, NMFS and USFWS may require as a condition of their approval additions or changes to such design plans; provided, however, that if NMFS or USFWS requires as a condition of approval more than a minor change to such design or construction plans, or alters the basic design, location, scope, duration or timing of such plans, the condition shall be considered inconsistent under Sections 6.2 and 6.5 of this Agreement.

4.2.2.2.4 Fish Passage Monitoring and Contingency Plan. PacifiCorp shall conduct a geomorphology survey consistent with the scope of work attached as Exhibit 2. Within 18 months of the Effective Date, PacifiCorp shall provide a final geomorphology report to the Parties. The report shall describe: (i) current geomorphic conditions beginning 2,200 feet below the dam (near the stream gage) to 1,000 feet upstream of the dam, or above the vegetated island (whichever is farther); and (ii) the anticipated impact of sediment released from dam removal on fish passage and aquatic habitat downstream of the dam removal site. PacifiCorp shall develop and implement a fish passage monitoring and mitigation plan, in consultation with NMFS, USFWS, ODFW, ODEQ and CTWS, and approved by NMFS, USFWS and ODFW. In the event a fish passage obstruction, as defined by the plan, is caused or exacerbated by dam removal, PacifiCorp shall restore adequate fish passage by implementing mitigation measures set forth in the plan. PacifiCorp shall have no obligation to monitor or mitigate under this Section 4.2.2.2.4 for more than one cycle of seasons beyond the return of the river to natural conditions, as determined by a team composed of representatives of NMFS, USFWS, ODFW, CTWS and PacifiCorp, in accordance with the geomorphology report.

### 4.2.3 Terrestrial Resources.

4.2.3.1 Minimizing Impacts. PacifiCorp shall complete surveys for federal- or state-listed rare, threatened and endangered species in areas planned for construction and shall plan and design removal activities to minimize direct impacts on wildlife species and minimize habitat impacts.

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4.2.3.2 Revegetation and Mitigation. PacifiCorp, in consultation with the Parties, shall prepare and implement a Revegetation and Mitigation Plan (“RMP”). The RMP shall address the manner in which PacifiCorp, in conducting decommissioning activities, shall (i) minimize the area of disturbance to the extent feasible; (ii) adhere to conditions of any applicable U.S. Army Corps of Engineers or Oregon Division of State Lands wetlands permit; (iii) consult with state and federal wildlife agencies, CTWS, and, when necessary, the Columbia River Gorge Commission prior to carrying out the work to determine appropriate protection measures; (iv) limit construction to summer through fall months; (v) revegetate disturbed areas with native vegetation to the extent feasible, based on existing vegetation cover type mapping and potential wetland delineations; and (vi) control sedimentation of aquatic habitat as set forth in the ESCP. The Parties recognize that decommissioning may result in some unavoidable wetland alteration due to elimination of leaks from the existing wood stave flowline, and agree that PacifiCorp is not obligated to compensate for the removal of this artificial water source.

4.2.4 Cultural Resources. PacifiCorp shall reach a draft Memorandum of Agreement with the SHPO for submission to FERC prior to decommissioning. PacifiCorp shall photographically document eligible properties for pictorial preservation by the National Register. In addition, PacifiCorp shall consider mitigation measures for eligible properties such as recordation to the Historic American Buildings Survey/Historic American Engineering Record standards, and architectural salvage. Prior to modifying any structures, PacifiCorp shall consult with the SHPO, the National Park Service, the U.S. Army Corps of Engineers, CTWS, the Oregon Historical Society, the Hood River County Historical Society, and the County of Hood River, as appropriate. If ownership of the property and remaining eligible facilities are transferred to another entity, PacifiCorp shall provide documentation acknowledging that the facilities are eligible for listing in the National Register of Historic Properties and require treatment in a manner consistent with that National Historic Preservation Act.

4.2.5 Recreation Resources. PacifiCorp may restrict or prohibit public access to the two existing day-use sites and the bypass reach while portions of decommissioning activities take place. Where full or restricted access is provided, PacifiCorp shall: (i) provide appropriate signing and public notification prior to demolition and restoration activities to inform the public of planned activities and temporarily restricted public access to the bypass and day-use sites; (ii) minimize impacts to the fishing experience by implementing a demolition program that minimizes the length of time that the river is affected; and (iii) where feasible, restore river trails, access roads and parking areas to pre-construction conditions following decommissioning activities.

4.2.6 Land Use and Management and Aesthetics/Visual Resources. Except as otherwise provided in this Agreement, the Parties agree that PacifiCorp shall not be obligated to perform additional measures addressing impacts to land use, land management, aesthetics or visual resources during or after decommissioning.

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### 4.3 Disposition of Water Rights.

4.3.1 Assignment. Within 90 days of permanent cessation of power at the Project, PacifiCorp shall assign its PacifiCorp Hydroelectric Water Right for the Powerdale Project (Certificate No. 46965) to OWRD for conversion to an instream water right pursuant to ORS 543A.305. OWRD shall accept the PacifiCorp Hydroelectric Water Right "AS IS"; PacifiCorp expressly disclaims any representation or warranty concerning the PacifiCorp Hydroelectric Water Right or its convertibility to an instream water right. Prior to the initiation of the conversion process, PacifiCorp shall use reasonable efforts to avoid allowing the PacifiCorp Hydroelectric Water Right to be forfeited for non-use, and shall not otherwise intentionally jeopardize the validity of the PacifiCorp Hydroelectric Water Right, except to the extent that the licensing authority requires flow regimes inconsistent with the PacifiCorp Hydroelectric Water Right, and in times of water shortage PacifiCorp and OWRD may agree with other existing water users to prorate water shortages notwithstanding relative priority dates. Instream flows required under this Agreement (Section 3.3) or by a FERC Order or license shall be considered part of PacifiCorp's use of water under its PacifiCorp Hydroelectric Water Right, but only to the extent that water available to PacifiCorp under its PacifiCorp Hydroelectric Water Right is needed to satisfy the instream flows. Nevertheless, if PacifiCorp's use of water under the PacifiCorp Hydroelectric Water Right becomes an issue, PacifiCorp shall cooperate with OWRD in defending the validity of the PacifiCorp Hydroelectric Water Right by providing documentation regarding the history of the use of water pursuant to the PacifiCorp Hydroelectric Water Right at the Powerdale facility as OWRD deems necessary.

4.3.2 Protest Withdrawal. Within 60 days following the Final FERC Order, PacifiCorp shall withdraw its protest currently pending before OWRD of ODFW's instream water right application IS 83969.

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.

### 4.4 Disposition of Lands.

4.4.1 Designation of Grantee; Conveyance of Lands. PacifiCorp shall convey its interest in the Subject Lands, specifically described in Appendix D to this Agreement, to a creditworthy entity or entities (the "Grantee") mutually agreeable to NMFS, USFWS, ODFW, CTWS, AR, and HRWG (collectively, the "Lands Stakeholders"), in consultation with Hood River Valley Parks and Recreation District and Hood River County Parks and Buildings Department, and identified in a written notice to PacifiCorp signed by an authorized representative of each of the Lands Stakeholders; provided, however, that the notice identifying the Grantee must be received by PacifiCorp, if at all, on or before February 29, 2012; and provided further that PacifiCorp shall have the right to reserve from the Subject Lands an exclusive, perpetual easement, in form satisfactory to PacifiCorp, to enable PacifiCorp and its successors and assigns to access, operate, maintain, upgrade, enclose with fencing or other



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materials, and/or remove, as PacifiCorp deems appropriate: the switch room, powerhouse, associated electrical assets and other transmission and distribution facilities. If the identification is timely made, PacifiCorp shall convey the Subject Lands at a closing (the "Closing") that will occur on or before the later to occur of March 1, 2012 (the day after the Project license expires) or 30 days after the identification is made. If PacifiCorp does not receive the notice designating the Grantee on or before February 29, 2012, then beginning March 1, 2012, PacifiCorp shall be free, at its sole discretion, to retain or dispose of the Subject Lands as it sees fit. The boundaries of the Subject lands may be modified before Closing, upon unanimous written agreement among PacifiCorp and the Lands Stakeholders in consultation with Hood River Valley Parks and Recreation District and Hood River County Parks and Buildings Department, to reflect and incorporate any transfer to Jenny Copper of a portion of parcel PPNo. ORHR-0019 and any acquisition by PacifiCorp of Jenny Copper's property at Tax Lot # 300, as further described in Appendix E.

4.4.2 Responsibilities and Liabilities. Any conveyance of lands pursuant to Section 4.4.1 shall be "AS IS"; and the Grantee shall be responsible and liable for the Subject Lands and any structures remaining on the Subject Lands. The Grantee shall countersign and acknowledge the deed or deeds by which the Subject Lands are conveyed, and shall in such deed or deeds expressly agree to defend, indemnify and hold PacifiCorp harmless for any liability arising from the Subject Lands or any structures remaining on the Subject Lands, whether such liability arises before or after the conveyance date. In addition, the deed or deeds shall be a bargain and sale deed or deeds without any representation or warranty concerning the condition of title to the Subject Lands (it being understood that the Grantee shall look exclusively to title insurance, which shall be obtained at Grantee's expense, for satisfaction concerning title to the Subject Lands). Although PacifiCorp shall not otherwise be required to cure any title condition affecting the Subject Lands, it shall cause the Subject Lands to be released from PacifiCorp's blanket mortgage before the Subject Lands are conveyed to the Grantee. The Closing will take place in escrow at the offices of a title company selected by Grantee and identified to PacifiCorp at least 20 days before the Closing is to occur.

4.4.3 Purpose of Conveyance. The Parties intend that one or more Lands Stakeholders shall be responsible for causing the Grantee to execute, acknowledge and deliver a perpetual conservation easement in the form attached as Exhibit 4 (the "Conservation Easement") into escrow at the Closing. The form and terms of the Conservation Easement may be modified before Closing, upon unanimous written agreement by the parties to the Conservation Easement, in consultation with the Lands Stakeholders; provided, that the purpose of the Conservation Easement shall be to achieve the following: (i) Protection of existing fish and wildlife habitat while allowing for habitat restoration and enhancement; (ii) Retention of existing recreational uses while allowing improvements commensurate with those uses, provided such uses and improvements are consistent with protection, restoration and enhancement of fish and wildlife habitat; (iii) Expanded recreational and educational opportunities, provided such uses are consistent with protection, restoration and enhancement of fish and wildlife habitat; and (iv) Acknowledgement and preservation of the right of CTWS tribal members to exercise their Treaty-secured off-reservation fishing rights on the Subject Lands by utilizing the Subject Lands to access usual and accustomed fishing sites; and provided further, that the terms of the

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Conservation Easement shall allow the continuation and renewal of those existing uses and encumbrances listed in Appendix E. To facilitate this process, PacifiCorp shall submit escrow instructions at Closing that will instruct the title company to deliver the deed conveying the Subject Lands to the Grantee only when the Grantee has executed, acknowledged and unconditionally delivered the Conservation Easement into escrow. In no event shall PacifiCorp be responsible for addressing the Grantee's failure or refusal to execute, acknowledge and deliver the Conservation Easement. If the conveyance of the Subject Lands cannot be closed on or before March 31, 2012 because of the Grantee's failure or refusal to execute, acknowledge and deliver the Conservation Easement or to otherwise close the transaction, then beginning April 1, 2012, PacifiCorp shall be free, at its sole discretion, to retain or dispose of the Subject Lands as it sees fit.

### 4.4.4 Establishment of Maintenance Fund.

4.4.4.1 Establishment of Trust Fund. Upon PacifiCorp's conveyance of the Subject Lands in accordance with Section 4.4.1, PacifiCorp shall place \$154,500 (escalated as provided below) in trust, the interest of which shall be used by the Grantee for maintenance of the Subject Lands (the "Maintenance Fund"). The contribution to the Maintenance Fund shall be escalated by a percentage equal to any increase in the Consumer Price Index published by the United States Bureau of Labor Statistics of the United States Department of Labor. Comparisons shall be made using the index entitled US City Average – All Items and Major Group Figures for all Urban Consumers, (1982 – 1984 = 100), or the nearest comparable data on changes in the cost of living if such index is no longer published. The change shall be determined by comparison of the figure for March of 2003, with that announced most recently before the date of the contribution. In no event, however, shall the amount of the maintenance fund be reduced below \$154,500. PacifiCorp and the Grantee shall use commercially reasonable efforts to create and fund the trust and distribute interest from the trust in a manner that will maximize any deductions and other tax benefits available to PacifiCorp under applicable law. At the Closing of the conveyance, PacifiCorp and the Grantee shall execute and deliver such instruments as may be reasonably required to enable Grantee to use only the interest and not the principal of the sum placed in trust, and to make sure that funds in the trust are invested in an appropriate manner to facilitate the ongoing maintenance of the Subject Lands.

4.4.4.2 Alternative Funding. The Parties recognize that the Grantee identified may be a 26 U.S.C. § 501(c)(3) non-profit entity whose stated purpose is land conservation. In that event, PacifiCorp shall transfer the principal amount of the Maintenance Fund, calculated in accordance with Section 4.4.4.1, to Grantee to be placed in a dedicated account for maintenance of the Subject Lands in lieu of establishing a trust fund for that purpose. PacifiCorp and the Grantee shall use commercially reasonable efforts to transfer the funds in a manner that will maximize any deductions and other tax benefits available to PacifiCorp under applicable law.

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SECTION 5: EARLY CESSATION OF GENERATION; EARLY DECOMMISSIONING

5.1 Early Cessation of Generation. If PacifiCorp determines at its sole discretion at any time prior to decommissioning that, due to a catastrophic event that affects the Project, continued operation of the Project would be uneconomic, PacifiCorp may cease generating power at the Project. Upon cessation of generation, if PacifiCorp decides to pass all water less the amount required to compensate for leakage, PacifiCorp shall not be required to implement the PM&E measures set forth in Sections 3.2 through 3.9, except for 3.6. In addition, PacifiCorp shall continue to share information generated prior to and after ceasing power generation pursuant to Section 3.13, but Section 3.13 shall not be interpreted as requiring the continued creation of data or other information pursuant to measures no longer being implemented. PacifiCorp shall notify the Parties within 30 days after a decision to cease power generation pursuant to this Section 5.1. PacifiCorp's decision to cease power generation and associated PM&E measures is subject only to any necessary FERC approval. The Parties shall not object to PacifiCorp's decision to cease power generation.

5.2 Actions After Ceasing Generation.

5.2.1 Remaining Operation and Maintenance Issues. After ceasing generation pursuant to this Section, PacifiCorp shall maintain remaining Project facilities as necessary to avoid the creation of environmental and human health and safety hazards until such facilities are removed. In addition, within 15 days of providing notice to the Parties of a decision to cease power generation, PacifiCorp shall consult with NMFS, USFWS, ODFW, ODEQ and CTWS regarding its continued operation of the Project consistently with Sections 5.1, 5.2.2 and 5.3.

5.2.2 Provision of Flows to Support Fish Sorting and Trapping Facility. During the first year after providing notice pursuant to Section 5.1, PacifiCorp shall continue to operate the dam in a manner that maintains sufficient water surface elevation upstream of the dam to allow operation of the Fish Trapping Facility. After the first year, PacifiCorp shall continue to operate the dam in such a manner provided that PacifiCorp is reimbursed for the costs of such operations. If at any time after the first year PacifiCorp is not reimbursed for such operations, PacifiCorp shall, at its sole discretion but after consultation with the Parties, either: (a) continue to operate the dam as described in the first sentence of this Section 5.2.2 until decommissioning begins in accordance with Section 4.1 and Appendix A, Table B; or (b) continue to operate the dam as described in the first sentence of this Section 5.2.2 until the beginning of the next season during which PacifiCorp can commence early decommissioning of the Project in accordance with Section 5.3 below. A decision to continue to operate the dam pursuant to subsection (a) of this Section shall not restrict PacifiCorp from choosing to decommission early in accordance with subsection (b) of this Section at some later time.

5.3 Early Decommissioning. Upon ceasing generation in accordance with Section 5.1, PacifiCorp may, at its discretion, perform the decommissioning actions and their associated PM&E measures set forth in Section 4.1 and Appendix B prior to the time designated for such actions in Appendix A, Table B. Notwithstanding the previous sentence, PacifiCorp shall not remove the dam or other structures necessary to facilitate operation of the Fish Trapping Facility

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until such operation is no longer required pursuant to Section 5.2.2. In addition, should PacifiCorp cease generation pursuant to Section 5.1 and should operation of the Fish Trapping Facility permanently discontinue for any reason, PacifiCorp shall use its reasonable best efforts to pursue early decommissioning of the Project. PacifiCorp shall notify the Parties at least 60 days prior to any early decommissioning action. PacifiCorp shall consult with the Parties regarding implementation of the early decommissioning action and any associated PM&E measures, prior to their implementation.

### SECTION 6: IMPLEMENTATION OF AGREEMENT

6.1 Parties Bound. Except as provided in Section 6.16, the Parties shall be bound by this Agreement until the Agreement is terminated in accordance with Section 6.15, unless this Agreement is sooner terminated as provided in Section 6.17. Sections 1.3, 6.18 and 7.4 of this Agreement shall survive any such termination.

6.2 Inconsistent Actions Before FERC Order. If, following the Effective Date and prior to the FERC Order: (i) any Section 401 Certification, TMDL, final ESA biological opinion, final order pursuant to ORS 509.585, or other necessary authorization is denied or issued with conditions that conflict with, add to, omit or are otherwise inconsistent with the measures required by this Agreement and specifically Sections 3, 4 or 5 or Exhibit 1 of this Agreement; or (ii) any Party advocates to FERC or in any other forum the imposition of measures that conflict with, add to, omit or are otherwise inconsistent with the measures required by Sections 3, 4 or 5 or Exhibit 1 of this Agreement; then this Agreement shall be deemed modified to include such conditions or recommended measures, as finally imposed by FERC or other agency, unless any Party (a) provides notice to the other Parties that it objects to the imposition of such measures within 30 days after the Party has actual knowledge of the occurrence of the imposition of such measures; and (b) initiates the Alternative Dispute Resolution Procedures set forth in Section 6.14 of this Agreement (“ADR Procedures”). Any Party may also seek rehearing or appeal as provided in Section 6.6 of this Agreement, and such request for rehearing or appeal shall constitute notice to the other Parties of the dispute. If, after completion of ADR Procedures one or more of the imposed measures continues to conflict with, add to, omit or otherwise remain inconsistent with the measures required by this Agreement and specifically Sections 3, 4 or 5 or Exhibit 1 of this Agreement, the Party or Parties that objected to an event listed above may, within 60 days after completion of ADR Procedures, withdraw from this Agreement.

6.3 FERC Order.

6.3.1 FERC Order Inconsistent with This Agreement. If any interim operation or decommissioning activity or PM&E measure, either as initially approved by FERC or following conclusion of any rehearing or appeals, contains any measure that conflicts with, adds to, or omits the measures set forth in Sections 3, 4.1, 4.2 or 5 or Exhibit 1 of this Agreement, or is otherwise inconsistent with this Agreement, this Agreement shall be deemed modified to conform to the inconsistency, unless a Party provides notice to the other Parties that it objects to the inconsistency and initiates ADR Procedures within 30 days after the date of the FERC Order or the conclusion of any rehearing or appeals, as appropriate. If the disputing Party or Parties

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seek rehearing or appeal as provided in Section 6.6, such Party's request for rehearing or appeal shall constitute notice to the other Parties of the dispute. If, after completion of ADR Procedures, any interim operation or decommissioning activity or PM&E measure continues to conflict with, add to, or omit measures required by Sections 3, 4.1, 4.2 or 5 or Exhibit 1 of this Agreement, or is otherwise inconsistent with this Agreement, the Party or Parties that objected to the inconsistency may, within 60 days after completion of ADR Procedures, withdraw from this Agreement. The Parties reserve any remedies under applicable law to enforce measures required under this Agreement but omitted or altered by FERC (or after appeals), if disputed under this Section.

6.3.2 Rejection of Inconsistent FERC Order or Inconsistent Final FERC Order. If PacifiCorp withdraws from this Agreement in accordance with Section 6.3.1 as the result of an inconsistent FERC Order or inconsistent Final FERC Order and this Agreement is therefore terminated pursuant to Section 6.17, the Parties intend that PacifiCorp shall be allowed to reject the inconsistent FERC Order or inconsistent Final FERC Order and that PacifiCorp shall not be required to withdraw its pending license application.

6.3.3 Acceptance of Consistent Final FERC Order. If the Final FERC Order is consistent with this Agreement, PacifiCorp shall accept the Final FERC Order. Upon receipt and acceptance by PacifiCorp of the Final FERC Order, PacifiCorp shall file a withdrawal of its pending license application.

6.4 Reopeners and Modification. After the FERC Order, the Parties may not seek measures that conflict with, add to, omit or are otherwise inconsistent with the measures required by this Agreement and specifically Sections 3, 4 or 5 or Exhibit 1 of this Agreement pursuant to standard FERC reopener provisions or other authorities except: (i) as provided pursuant to Sections 1.1.2, 1.1.3, 2.5.3 and 6.8; (ii) as required by statutes or regulations enacted or amended after the date of the FERC Order; or (iii) in the event of materially-changed factual circumstances or material facts not known or understood at the time of the FERC Order. If a Party seeks inconsistent measures in accordance with (i), (ii), or (iii) above, the acting Party shall provide the other Parties at least 60 days' notice to consider the acting Party's position. A Party shall not be required to comply with this 60-day-notice provision if it believes an emergency situation exists, or if required to meet its responsibilities under a statute or regulation enacted or amended after the date of the FERC Order. If a Party imposes or otherwise succeeds in requiring measures that conflict with, add to, omit or are otherwise inconsistent with the measures required by this Agreement and specifically Sections 3, 4 or 5 or Exhibit 1 of this Agreement pursuant to subsections (i), (ii) or (iii) above or by any other means, any Party or Parties may object and respond in accordance with Section 6.5 below.

6.5 Response to Modifications. If, after the FERC Order, any Party or non-Party action, including FERC action, ODEQ 401 Certification action, or other agency action, results in a change to interim operation or decommissioning of the Project that conflicts with, adds to, omits or is otherwise inconsistent with the measures required by this Agreement and specifically Sections 3, 4 or 5 or Exhibit 1 of this Agreement, this Agreement shall be deemed modified to conform to the inconsistency, unless a Party gives notice that it objects to the inconsistency and

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initiates ADR Procedures. A Party may also seek rehearing or appeal of such action as provided in Section 6.6 below, and any such request for rehearing or appeal shall constitute notice to the other Parties of the dispute. If, after conclusion of ADR Procedures, any interim operation or decommissioning activity or PM&E measure continues to conflict with, add to, omit or otherwise remain inconsistent with the measures required by this Agreement and specifically Sections 3, 4 or 5 or Exhibit 1 of this Agreement, the Party or Parties that objected to the inconsistency may, within 60 days after completion of ADR Procedures, withdraw from this Agreement. The Parties reserve any remedies under applicable law to enforce measures required under this Agreement but modified, if disputed under this Section.

6.6 Review of Governmental Actions. To the extent provided by applicable law, any Party may request rehearing of or appeal any act or omission by FERC, a Governmental Party, or a governmental agency which is not a Party, and which act or omission conflicts with, adds to, or omits measures required by this Agreement, or is otherwise inconsistent with this Agreement. The ADR Procedures and the timelines established by Section 6 shall neither preclude PacifiCorp from timely rejecting a FERC Order or Final FERC Order that is inconsistent with this Agreement nor preclude any Party from timely filing for and pursuing rehearing under 18 C.F.R. § 385.713 or other agency's applicable rules, or judicial review, of the inconsistent action. However, the Parties shall follow ADR Procedures to the extent reasonably practicable prior to rejection of the FERC Order or Final FERC Order by PacifiCorp or while any rehearing or appeal of an inconsistent FERC Order is being pursued. If a Party has filed for administrative rehearing or judicial review of any action that conflicts with, adds to, omits or is otherwise inconsistent with the measures required by this Agreement, and the Parties subsequently agree to modify this Agreement to conform to the inconsistent action, the filing Party or Parties shall withdraw the request for rehearing or appeal, or recommend such withdrawal, as appropriate.

6.7 PacifiCorp Fails to Perform. If PacifiCorp fails to perform any provision of this Agreement, whether or not the provision is included in the FERC Order, and such failure is not excused by force majeure, a Party may give PacifiCorp notice and an opportunity to cure within 30 days of such notice. If PacifiCorp fails to cure the problem within that period, or if such failure is not curable within 30 days and PacifiCorp has not commenced a cure within that period and diligently completed such cure, any Party who objects to such failure to perform may give notice to the other Parties and commence ADR Procedures. In addition, the aggrieved Party or Parties may petition FERC to enforce such provision, if appropriate, or may pursue the remedies of mandamus or specific performance, if applicable. If, after any applicable remedies at FERC are exhausted, FERC (i) does not enforce the provision; (ii) does not construe the disputed portion of the Agreement against the complaining Party; and (iii) PacifiCorp fails to perform the provision, then any Party other than PacifiCorp may withdraw from this Agreement. In addition, the Parties reserve any remedies under applicable law to enforce the measures contained in this Agreement but not performed by PacifiCorp. If a Party has exhausted remedies at FERC and then seeks judicial review of the same dispute, then that Party may still withdraw from the Agreement at any time in accordance with subsections (i) through (iii) above, except that the complaining Party may not withdraw if the reviewing court determines that PacifiCorp is in compliance with the disputed portion of the Agreement.

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6.8 Reinitiation of ESA Consultation. Should any species that may be affected by the Project become listed as threatened or endangered or other event requiring reinitiation of ESA Section 7(a)(2) consultation pursuant to 50 C.F.R. § 402.16 occur after the FERC Order and before termination of this Agreement pursuant to Section 6.17, USFWS or NMFS may, if necessary to comply with their mandates under the ESA, seek reinitiation of consultation with FERC. Should consultation under ESA section 7(a)(2) result in the imposition of measures that conflict with, add to, omit or are otherwise inconsistent with the measures required by this Agreement and specifically Sections 3, 4 or 5 or Exhibit 1 of this Agreement, this Agreement shall be deemed modified to conform to the inconsistency unless a Party gives notice that it objects to the inconsistency and initiates ADR Procedures. If, after conclusion of ADR Procedures, any interim operation or decommissioning activity or PM&E measure continues to conflict with, add to, omit or otherwise remain inconsistent with the measures required by this Agreement and specifically Sections 3, 4 or 5 or Exhibit 1 of this Agreement, the Party or Parties that objected to the inconsistency may, within 60 days after completion of ADR Procedures, withdraw from this Agreement.

6.9 Responsibility for Costs. PacifiCorp shall pay for the cost of actions required of PacifiCorp by this Agreement and the Final FERC Order. PacifiCorp shall have no obligation to reimburse or otherwise pay any other Party for its assistance, participation, or cooperation in any activities pursuant to this Agreement, except as required by law.

6.10 State Ratemaking Proceedings. The Parties agree that the Agreement is fair and reasonable and in the public interest, and will support this Agreement for purposes of PacifiCorp's planned decommissioning cost recovery application before each state regulatory commission that has ratemaking authority. Upon request of PacifiCorp at least 30 days prior to the deadline for such comments, each Party shall use its reasonable best efforts to submit appropriate general letters of support of this Agreement within their areas of expertise.

6.11 PacifiCorp Solely Responsible for Operations of Project. By entering into this Agreement, none of the Parties, except for PacifiCorp, have accepted any legal liability or responsibility for the operation and decommissioning of the Project.

6.12 Availability of Funds. Implementation of this Agreement by a Party that is a federal agency is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. §§ 1341-1519, and the availability of appropriated funds. Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that the Governmental Parties that are federal agencies shall not be required under this Agreement to expend any federal agency's appropriated funds unless and until an authorized official of each such agency affirmatively acts to commit such expenditures, as evidenced in writing. Implementation of this Agreement by Governmental Parties that are state agencies is subject to the availability of appropriated funds. Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, or expenditure of any money from the Treasury of the State of Oregon. The Parties acknowledge that the Governmental Parties that are state agencies shall not be required under this Agreement to expend any appropriated funds unless and until an authorized official of each such agency

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affirmatively acts to commit such expenditures, as evidenced in writing. Implementation of this Agreement by CTWS is subject to the availability of appropriated funds. Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, or expenditure of any money from CTWS.

### 6.13 Amendment of Agreement.

6.13.1 General. This Agreement may be amended at any time during the extended license term or implementation of the decommissioning measures set forth in Section 4 and Appendix B of this Agreement, with the unanimous agreement of all Parties. This Agreement may also be amended before the FERC Order, upon the Parties' unanimous written agreement, provided the Parties first consult regarding the effect of any such amendment on the pending FERC Order. Any amendment of this Agreement shall be in writing and executed by all Parties still in existence, or their successors and assigns, if applicable. As appropriate, the Parties shall submit a statement to FERC in support of the amendment.

6.13.2 Alternate Measures. The Parties agree that, should a change in circumstances so warrant, the Parties will consult to determine whether alternate measures would meet the intent of this Agreement and could be substituted for measures in this Agreement. At the Parties' discretion, and subject to necessary approvals, such alternate measures may be adopted pursuant to Section 6.13.1.

### 6.14 Alternative Dispute Resolution.

6.14.1 General. Except to the extent that FERC or another agency with jurisdiction over the Project has a procedure that precludes implementation of Section 6.14.1 through 6.14.3, all disputes among the Parties regarding the obligations of the Parties under this Agreement shall, at the request of any Party, be the subject of nonbinding ADR Procedures among the disputing Parties. Each Party shall cooperate in good faith to promptly schedule, attend, and participate in ADR Procedures. The Parties agree to devote such time, resources, and attention to ADR Procedures as are needed to attempt to resolve the dispute at the earliest time possible. Each Party shall implement promptly all final agreements reached, consistent with its applicable statutory and regulatory responsibilities. Nothing in Sections 6.14.1 through 6.14.3 is intended or shall be construed to affect or limit the authority of FERC, the Governmental Parties, or other agency with jurisdiction over the Project to resolve a dispute brought before it in accordance with its own procedure and applicable law, or is intended or shall be construed to alter the statute of limitations or other requirements for administration or judicial review of any action. ADR Procedures shall not preclude PacifiCorp from timely rejecting a FERC Order or Final FERC Order that is inconsistent with the Agreement nor prevent any Party from timely filing for and pursuing rehearing under 18 C.F.R. § 385.713 or other agency's applicable rules, or judicial review, of an action that is inconsistent with the Agreement. However, the Parties shall follow ADR Procedures to the extent reasonably practicable prior to rejection of the FERC Order or FERC Final Order by PacifiCorp or while any rehearing or appeal of an inconsistent FERC Order is pursued.



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### 6.14.2 ADR Procedures.

6.14.2.1 General. Unless otherwise agreed among the Parties, each Party shall bear its costs for its own participation in ADR Procedures. Pending resolution of any dispute under these ADR Procedures, and subject to the authority of FERC or other agency with jurisdiction to order otherwise, PacifiCorp shall continue operating or decommissioning the Project in accordance with this Agreement and any FERC Order, except to the extent that such operations or decommissioning actions may be directly affected by the results of such ADR Procedures and ceasing such actions will not violate the FERC Order, a Permit, or any other law or regulation.

6.14.2.2 Notice of Dispute. A Party claiming a dispute shall give notice of the dispute within 30 days of the Party's actual knowledge of the act, event, or omission that gives rise to the dispute, unless this Agreement provides otherwise. Notification under Section 7.9 of this Agreement, when effective, shall constitute actual knowledge. Service of process on a Party's registered agent shall also constitute actual knowledge.

6.14.2.3 Meeting of the Parties. In any dispute subject to these ADR Procedures, the Parties shall hold two informal meetings within 30 days after notice, or as soon as practicable thereafter, to attempt to resolve the disputed issue or issues. Within 15 days after the second meeting or any scheduled meeting thereafter, any Party still disputing the issue or issues shall notify the other Parties that the informal meetings failed to resolve the dispute and may request mediation (a "mediation request"). If a mediation request is not so provided, ADR Procedures will be considered complete.

6.14.2.4 Mediation. Upon receiving a mediation request, the Parties may attempt to resolve the dispute using a neutral mediator agreeable to the Parties. If, within 15 days after receiving a mediation request, all disputing Parties have not agreed to mediate the dispute, ADR Procedures shall be considered complete.

6.14.3 Enforcement of Agreement After ADR Procedures. Any Party may seek specific performance of this Agreement by any other Party, before FERC or in a court of competent jurisdiction, after compliance with ADR Procedures. No Party shall be liable in damages for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement, or any other cause of action arising from this Agreement, except that a Party may seek monetary penalties under applicable law. Nothing in Sections 6.14.1 through 6.14.3 is intended or shall be construed to affect or limit the jurisdiction of any agency or court as established under applicable law.

6.15 Completion of Decommissioning Measures. Upon completion of the decommissioning and associated PM&E measures set forth in Sections 4.1 and 4.2 and Appendix B, PacifiCorp shall notify the Parties that it has completed decommissioning. Upon request, PacifiCorp shall provide reasonable supporting documentation and/or site access as may be necessary for the Parties to verify completion of such actions. Should any Party dispute PacifiCorp's completion of actions required by Sections 4.1 and 4.2 and Appendix B, the Party shall consult with

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PacifiCorp and attempt to resolve the dispute, and may initiate ADR Procedures set forth at Section 6.14. After completion of any ADR Procedures, any Party who reasonably believes that decommissioning and/or associated PM&E measures have not been completed in accordance with this Agreement may petition FERC to enforce the Final FERC Order and/or the Agreement, if appropriate, or may pursue remedies under applicable law or the remedies of mandamus or specific performance, if applicable. If no Party initiates ADR Procedures within 30 days of PacifiCorp's notification of completion pursuant to this Section, this Agreement shall be considered unanimously terminated by the Parties. Nothing in this Section is intended or shall be construed to prevent PacifiCorp from notifying and requesting any necessary approval from FERC that all measures required by the Final FERC Order have been completed. PacifiCorp shall notify the Parties at least 30 days prior to seeking any such FERC approval if the Agreement has not yet been terminated.

### 6.16 Withdrawal from Agreement.

6.16.1 Withdrawal of a Party from Agreement. A Party may withdraw from this Agreement only as expressly provided in this Agreement. In addition, if a Party ceases to exist and has no successors or assigns, it shall be treated as having withdrawn.

6.16.2 Method of Withdrawal. A Party may exercise its right to withdraw from this Agreement by providing 60 days' advance notice to the other Parties.

6.16.3 Continuity After Withdrawal. The withdrawal of a Party does not terminate this Agreement for the remaining Parties. However, if any Party withdraws, any other Party may elect to withdraw without further ADR Procedures, after providing notice within 60 days of the withdrawal of the other Party. If a Party withdraws from this Agreement, the withdrawing Party shall not be bound by any term contained in this Agreement, except as provided in Sections 1.3, 6.18 and 7.4 or except as might be established through action for specific performance or mandamus.

6.17 Termination of Agreement. This Agreement may be terminated by unanimous written agreement of the Parties, by withdrawal of all Parties, or by unanimous termination as set forth in Section 6.15 of this Agreement. In addition, without affecting actions for specific performance or mandamus, if applicable, the withdrawal of PacifiCorp pursuant to Section 6.16.1 shall terminate this Agreement.

6.18 Survival of Interim PM&E Measures. If this Agreement terminates pursuant to Section 6.17 because of the withdrawal of PacifiCorp pursuant to Section 6.3, then PacifiCorp's obligation to perform the following PM&E measures, and provisions regarding implementation of PM&E measures, shall survive termination, up to and through the time of resolution of the pending FERC relicensing of the Project in FERC Docket No. P-2659-011, including the rehearing and appeal, if any, of a FERC order on relicensing: Sections 3.2.1, 3.2.3, 3.2.4, 3.3.1, 3.3.3, 3.3.4, 3.3.5, 3.3.6, 3.4, 3.5, 3.6, 3.7, 3.9, 3.10, 3.11, 3.12 (except 3.12(iv), (a), and (b)),

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3.13.1, 6.11, 6.12, 7.3, and 7.4. In addition, PacifiCorp shall not be required to make capital improvements but shall continue to maintain the fish ladder auxiliary attraction water bar rack within the ladder sufficiently free of debris to allow adequate attraction flows.

### SECTION 7: GENERAL PROVISIONS

7.1 No Third-Party Beneficiaries. Without limiting the applicability of rights granted to the public pursuant to applicable law, this Agreement shall not create any right or interest in the public, or any member of the public, as a third-party beneficiary of this Agreement and shall not authorize any non-Party to maintain a suit at law or equity pursuant to this Agreement. The duties, obligations, and responsibilities of the Parties with respect to third parties shall remain as imposed under applicable law.

7.2 Successors and Assigns. This Agreement shall apply to and be binding on the Parties and their successors and approved assigns. Upon completion of a succession or assignment, the initial Party shall no longer be a Party to this Agreement, but shall remain secondarily liable for the performance of the assignee. No change in ownership of the Project or transfer of the Project license by PacifiCorp shall in any way modify or otherwise affect any other Party's interests, rights, responsibilities, or obligations under this Agreement. Unless prohibited by applicable law, PacifiCorp shall provide in any transaction for a change in ownership of the Project or transfer of the Project license that such new owner or owners shall be bound by and shall assume the rights and obligations of this Agreement and the FERC Order upon completion of the change of ownership and any requisite FERC approval. A transferring or assigning Party shall provide notice to the other Parties at least 60 days prior to completing such transfer or assignment.

7.3 Failure to Perform Due to Force Majeure.

7.3.1 Declaration of Force Majeure. No Party shall be liable to any other Party for breach of this Agreement as a result of a failure to perform or for delay in performance of any provision of this Agreement if such performance is delayed or prevented by force majeure. The term "force majeure" means any cause reasonably beyond the affected Party's control, whether unforeseen, foreseen, foreseeable, or unforeseeable, and without the fault or negligence of the affected Party. Force majeure may include, but is not limited to, natural events, labor or civil disruption, breakdown or failure of Project works, orders of any court or agency having jurisdiction of the Party's actions, delay in the FERC Order, or delay in issuance of any required permit. Increased cost for the performance of any interim operation or decommissioning measure, or change in market conditions for the sale of electricity, shall not be deemed to constitute force majeure, provided that PacifiCorp shall not be obligated to perform measures other than those commitments specified in this Agreement. The Party whose performance is affected by force majeure shall notify the other Parties in writing within 24 hours after becoming aware of the Party's inability to perform due to a force majeure. Such notice shall identify the event causing the delay or anticipated delay, estimate the anticipated length of delay, state the measures taken or to be taken to minimize the delay, and estimate the timetable for implementation of delayed measures. The affected Party shall make all reasonable efforts to promptly resume performance of this Agreement and, when able, to resume performance of its

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obligations and give the other Parties written notice to that effect. NMFS and USFWS do not intend to analyze or authorize the “take” of any ESA-listed species under its jurisdiction caused by the Project due to a force majeure event.

7.3.2 Emergency Consultation with NMFS and USFWS. If PacifiCorp is unable to perform any obligation pursuant to any provision of this Agreement as a result of force majeure, and NMFS or USFWS requests reinitiation of consultation consistently with 50 C.F.R. § 402.16, PacifiCorp shall cooperate in such reinitiation of consultation in order to minimize the effect of any incidental take associated with the inability to perform due to the force majeure event. USFWS or NMFS may, if necessary to comply with their mandates under the ESA with respect to a newly-listed species, petition FERC to reopen the Project license. Should reinitiation of consultation under ESA section 7 be required and result in the imposition of measures that conflict with, add to, omit or are otherwise inconsistent with the measures required by this Agreement and specifically Sections 3, 4 or 5 or Exhibit 1 of this Agreement, the effect of such inconsistency on this Agreement shall be addressed in accordance with Section 6.14.

7.3.3 Duration of Force Majeure. If PacifiCorp’s inability to perform any obligation pursuant to any provision of this Agreement continues or is reasonably anticipated to continue for more than 180 days due to force majeure, any Party other than PacifiCorp may withdraw from this Agreement, and any Party that withdraws from this Agreement may pursue any other remedy available under applicable law. If any Party withdraws from this Agreement pursuant to this Section 7.3.3, PacifiCorp may oppose the assertion of such other remedy or authority that Party seeks to assert under any applicable law or notify FERC that PacifiCorp has withdrawn from this Agreement and may seek such further FERC action as PacifiCorp in its sole discretion deems appropriate.

7.4 Indemnification and Hold Harmless. PacifiCorp shall indemnify and hold harmless each of the Parties to this Agreement and their respective boards, commissions, officers, employees, and agents regarding any claims or liabilities for property damage or personal injury arising from interim operation or decommissioning activities undertaken prior to the completion of decommissioning by PacifiCorp or its employees, officers, agents or contractors.

7.5 Elected Officials Not to Benefit. No member of or delegate to Congress shall be entitled to any share or part of this Agreement or to any benefit that may arise from it.

7.6 No Partnership. Except as otherwise expressly set forth herein, this Agreement does not, and shall not be deemed to, make any Party the agent for or partner of any other Party.

7.7 Preservation of Treaty Rights. Nothing in this Agreement shall be construed to impair, limit or in any way modify the off-reservation treaty rights, including fishing, hunting and gathering rights, reserved to the CTWS pursuant to the Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963.

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7.8 Reference to Statutes or Regulations. Any reference in this Agreement to any federal or state statute or regulation shall be deemed to be a reference to such statute or regulation or successor statute or regulation in existence as of the date of the action.

7.9 Notice. Any notice required by this Agreement shall be written. Notice shall be sent by first-class mail or comparable method of distribution to the authorized representative of each Party, or a Party's successor or assign if applicable. For the purpose of this Agreement, a notice shall be effective three days after the date on which it is mailed or otherwise distributed. The authorized representative of each Party as of the Effective Date is designated in Appendix C, attached to and incorporated by reference into this Agreement. Each Party is responsible for providing notice to the other Parties of any change in its authorized representative designated in Appendix C. When sending notice pursuant to this Section, each Party shall also send a copy of the notice to the person or persons designated under "with copy to" in Appendix C.

7.10 Section Titles for Convenience Only. The titles of the sections in this Agreement are used only for convenience of reference and organization, and shall not be used to modify, explain, or interpret any of the provisions of this Agreement or the intentions of the Parties. Reference to a given section of this Agreement shall be deemed to include all subsections of that section.

7.11 Entire Agreement. This Agreement sets forth the entire agreement and processes to be followed by Parties with regard to the environmental, historical, cultural, public recreation, fishery, wildlife, water quality, land management, operational, and related measures, including all PM&E measures, relating to the interim operation and decommissioning of the Project.

### SECTION 8: EXECUTION OF AGREEMENT

8.1 Signatory Authority. Each signatory to this Agreement certifies that he or she is authorized to execute this Agreement and to legally bind the Party he or she represents, and that such Party shall be fully bound by the terms hereof upon such signature without any further act, approval, or authorization by such Party.

8.2 Signing in Counterparts. This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the signatory Parties to all of the counterparts had signed the same instrument. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signatures, and may be attached to another counterpart of this Agreement identical in form having attached it to one or more signature pages.

Powerdale Hydroelectric Project Settlement Agreement

**PacifiCorp:**

Judi Johansen 6/6/03  
Judi Johansen date  
Chief Executive Officer

**National Marine Fisheries Service:**

D. Robert Lohn 6/6/03  
D. Robert Lohn date  
Regional Administrator

**United States Fish and Wildlife Service:**

For: David B. Allen 6/6/03  
David B. Allen date  
Regional Director

**Oregon Department of Fish and Wildlife:**

Lindsay A. Ball 06-06-03  
Lindsay A. Ball date  
Director

**Oregon Department of Environmental Quality:**

Michael T. Llewelyn 6/6/03  
Michael T. Llewelyn date  
Administrator, Water Quality Division

**Oregon Water Resources Department:**

Paul R. Cleary 6/6-03  
Paul R. Cleary date  
Director

**Confederated Tribes of the Warm Springs Reservation of Oregon:**

Garland Brunoe 6/6/03  
Garland Brunoe date  
Tribal Council Chairman

**American Rivers:**

for Ann C. Mills 6/6/03  
Ann C. Mills date  
Executive Vice President

**Hood River Watershed Group:**

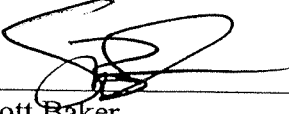
Chuck Gehling 6/6/03  
Chuck Gehling date  
Chairman

Powerdale Hydroelectric Project Settlement Agreement

**SUPPORTING NON-PARTY**

The following entity supports the purpose and effect of the Settlement Agreement Concerning the Interim Operation and Decommissioning of the Powerdale Hydroelectric Project (FERC No. 2659). This entity is not a Party to or third-party beneficiary under the Settlement Agreement.

**Hood River Valley Parks and Recreation District:**

  
\_\_\_\_\_  
Scott Baker  
Program Coordinator

6/5/03  
date

## **APPENDIX A**

### **IMPLEMENTATION SCHEDULE**



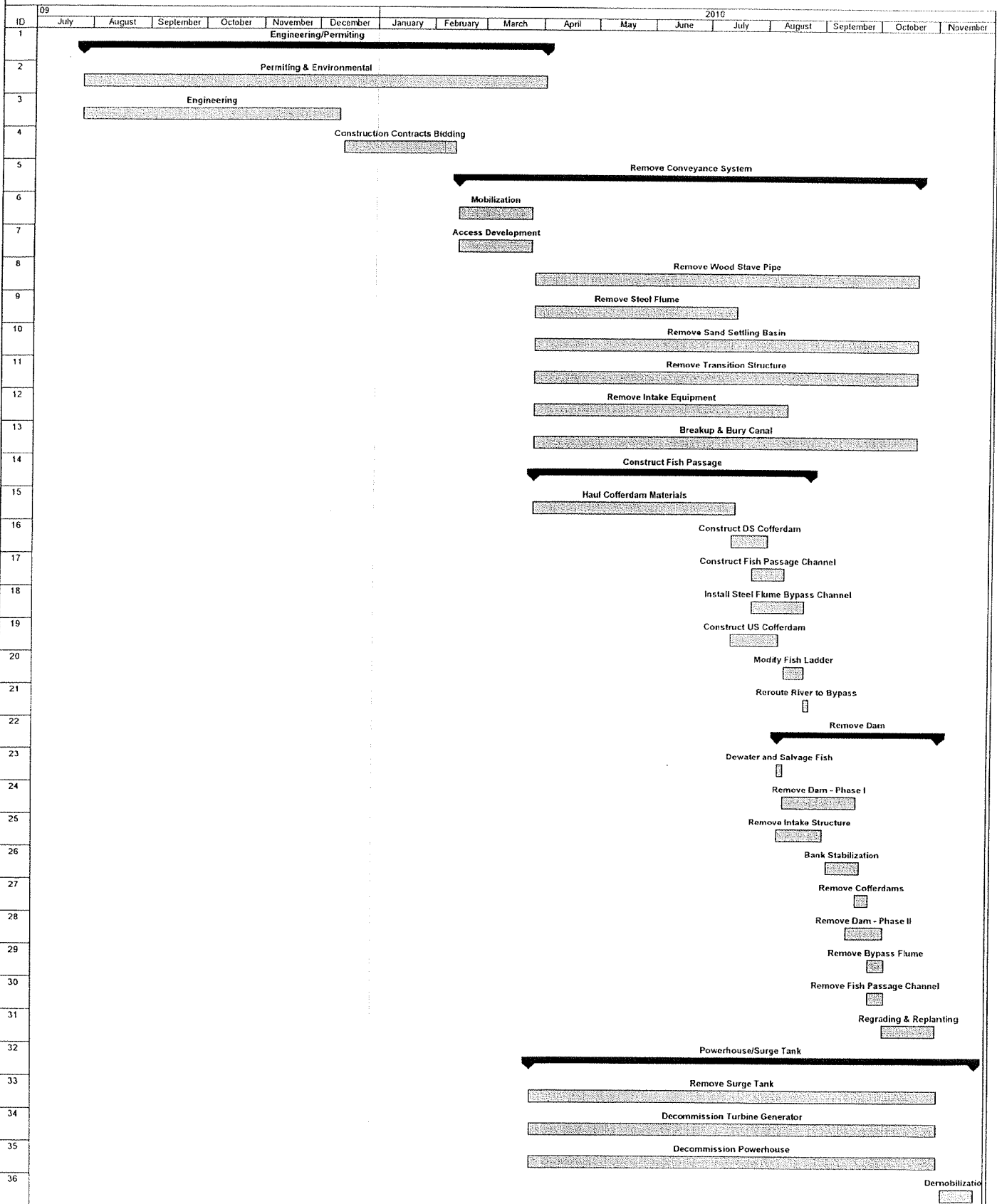
APPENDIX A  
IMPLEMENTATION SCHEDULE

**Table A: Implementation of Interim Operation PM&E Measures**

Sec.	PM&E Measure  (see appropriate section number in Agreement for specific wording of measures)	Upon Effective Date	15 Days After Effective Date	30 Days After Effective Date	Upon FERC Order	Upon Final FERC Order	30 Days After Final FERC Order	Other Timing
3.2.1	Ramping: make reasonable efforts to limit ramping to 3 inches/hour, with preferred target of 2 inches/hour, using existing equipment			X				
3.2.2	Ramping: make reasonable efforts to limit ramping to 2 inches/hour; ramping not to exceed 3 inches/hour						X	
3.3.1	Instream Flows: make reasonable efforts to implement minimum instream flows in the bypass reach using existing equipment	X						
3.3.2	Instream Flows: meet instream flow limits						X	
3.4	Temporary Reduction in Canal Flow: reduce diversion flow to maximum of 25 cfs from April 15 to June 30 each year	X						
3.5	Planned Outages: to extent feasible, limit planned outages to coincide with temporary reduction in canal flow or summer, and non-summer outages to 24 hours			X				
3.6	Flushing: restrict flushing of sand settling basin to periods when bypass flows are > 500 cfs, and preferably > than 1,000 cfs			X				
3.7	Intake Screens: operate and maintain in working order	X						

Sec.	PM&E Measure (see appropriate section number in Agreement for specific wording of measures)	Upon Effective Date	15 Days After Effective Date	30 Days After Effective Date	Upon FERC Order	Upon Final FERC Order	30 Days After Final FERC Order	Other Timing
3.8	Fishway Auxiliary Water Intake: implement method to keep fish ladder auxiliary attraction water bar rack sufficiently free of debris							no later than first in-water work opportunity after the Final FERC Order
3.9	Ground-Disturbing Activities: implement requirements to limit impacts to terrestrial and wetland habitat from ground-disturbing activities			X				
3.10	Rare, Threatened and Endangered Terrestrial Species: provide access and data			X				
3.11	Cultural Resources Management Plan: consult with SHPO			X				
3.11	Cultural Resources Management Plan: implement revised CRMP as soon as practicable					X		
3.12	Recreation Facilities: maintain existing recreation facilities	X						
3.12	Recreation Facilities: replace existing toilet with portable, ADA-accessible toilet, when necessary							when existing toilet needs replacing
3.12	Recreation Facilities: provide one additional picnic table at Powerdale Park							within 1 year of Effective Date
3.12	Recreation Facilities: provide second additional picnic table at Powerdale Park w/in two years of Effective Date							within 2 years of Effective Date

<b>Sec.</b>	<b>PM&amp;E Measure</b> <small>(see appropriate section number in Agreement for specific wording of measures)</small>	<b>Upon Effective Date</b>	<b>15 Days After Effective Date</b>	<b>30 Days After Effective Date</b>	<b>Upon FERC Order</b>	<b>Upon Final FERC Order</b>	<b>30 Days After Final FERC Order</b>	<b>Other Timing</b>
3.12	Recreation Facilities: install trail directional signs and a Project interpretive sign						X	
3.12	Recreation Facilities: at powerhouse day-use site, install portable, ADA-accessible toilet and construct pathway; install warning signs						X	
3.13	Information Sharing: provide reasonable access to data created with existing equipment			X				
3.13	Information Sharing: maintain records and make records available to Parties; convene annual meeting						X	
3.14	Maintenance of Lands During Interim Period: continue to own Subject Lands; do not dispose, encumber or initiate changes in character of lands	X						



<sup>1</sup> Times designated in this schedule are subject to early decommissioning pursuant to Section 5 of the Settlement Agreement.

## **APPENDIX B**

### **DECOMMISSIONING PLAN**

Powerdale Hydroelectric Project  
FERC Project No. 2659  
Hood River, Oregon

## **APPENDIX B TO SETTLEMENT AGREEMENT**

### **POWERDALE HYDROELECTRIC PROJECT DECOMMISSIONING PLAN**

**May 2003**

PacifiCorp  
Portland, OR

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## **DECOMMISSIONING PLAN FOR PACIFICORP'S POWERDALE HYDROELECTRIC PROJECT, HOOD RIVER, OREGON**

This Decommissioning Plan is part of and governed by the Settlement Agreement among PacifiCorp, National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), Oregon Department of Fish and Wildlife (ODFW), Oregon Water Resources Department (OWRD), Oregon Department of Environmental Quality (ODEQ), Confederated Tribes of the Warm Springs Reservation of Oregon (CTWS), American Rivers (AR), and the Hood River Watershed Group (HRWG).

Permitting for the proposed project decommissioning is scheduled to begin mid-year in 2009, with initiation of on-the-ground decommissioning activities in the first quarter of 2010, as reflected in Appendix A, Table B of the Settlement Agreement. Prior to applying for the permits necessary to decommission the Powerdale Project, PacifiCorp will develop detailed engineering plans. These plans will be of a detail required to obtain the necessary permits and include the best management practices (BMPs) and environmental protection guidelines in effect at that time. Where feasible, decommissioning activities are scheduled to occur during periods that will minimize the impact on fish and terrestrial resources (Section 2). A tabular summary of elements to be removed or retained is presented in Table 1.0-1. Project drawings depicting the decommissioning scenario presented below can be found in Section 5.0.

### **1.0 DECOMMISSIONING SCENARIO**

#### **1.1 DIVERSION DAM**

PacifiCorp will completely remove the existing diversion dam including the roller gates, hoists and bridge, piers, walls, spillway, un-gated overflow section, fishway, embankment sections, and intake to the level of the original riverbed. The method of accomplishing this portion of the decommissioning activities while maintaining upstream and downstream fish passage and protecting the resource is described below. Operation of the Farmer's Irrigation District (FID) powerhouse, directly upstream from the Powerdale dam, will not be impacted by this action.

##### **1.1.1 Cofferdams**

In order to perform the demolition and removal of the concrete portions of the dam and intake in the dry, upstream and downstream cofferdams will be placed across the river. It is expected that natural sediments obtained from the river and surrounding areas (sands, gravels and cobbles) will be used to construct as much of the cofferdams as possible, with the remaining materials imported from another source.

**Table 1.0-1. Disposition of project components at decommissioning.**

<b>Project Element</b>	<b>Sub-Element</b>	<b>Removed</b>	<b>Left in Place</b>	
Dam	Roller Gates & Hoists	X		
	Bridge	X		
	Piers	X		
	Walls & Misc.	X		
	Spillway	X		
	Fish Ladder	X		
Intake	Trashracks	X		
	Traveling Screens	X		
	Supporting Equipment	X		
	Control Gate & Trash Gate	X		
	Control Gate House	X		
	Concrete Intake Structure	X		
Power Canal		X (rock-filled and cover/blend)		
Steel Flume		X		
Sand Settling Basin		X		
Transition Structure		X		
Flowline	Wood Stave – 480 feet	X		
	Steel – 1,090 feet		X	
	Wood Stave – 1,564 feet	X		
	Steel – 1,070 feet		X	
	Wood Stave – 488 feet	X		
	Steel – 2,368 feet		X	
	Wood Stave – 493 feet		X	
	Steel – 1,849 feet		X	
	Wood Stave – 480 feet		X	
	Steel – 4,536 feet		X	
	Bridge			X
	Surge Tank		X	
Powerhouse	Superstructure		X	
	Substructure		X	
	Generator Rotating Parts	X		
	Turbine Rotating Parts	X		
	Mechanical & Electrical Equipment	X		
	Maintenance Garage	X		
	Gantry Crane	X		
Tailrace			X	
Switchyard			X	

The western end of the upstream cofferdam will be located on the natural riverbank that lies between the Powerdale intake structure and the FID powerhouse. The eastern end will be

positioned at the right abutment of Powerdale dam near the transition between the overflow and right embankment sections (Figure 1.1-1).

The downstream cofferdam will be constructed approximately 200 feet downstream of the dam's spillway crest. This location will allow an access road to be aligned and constructed across both the intake canal and the cofferdam; the road is necessary to access the construction area and connect the east and west sides of the site (Figure 1.1-1). Both the upstream and downstream cofferdams will remain in place until the concrete portions of the intake and spillway sections of the dam are removed.

### 1.1.2 Fish Passage

Prior to changing any of the existing fish passage facilities, or constructing any new fish passage facilities associated with dam removal, PacifiCorp will prepare final fish passage design and construction plans in consultation with NMFS, USFWS, ODFW and CTWS. The final design and construction plans will be consistent with Section 1.1.2.2 below and the following criteria, which may be modified with the written agreement of PacifiCorp, NMFS, USFWS, ODFW and CTWS.

(i) The outfall from the flume shall be designed in accordance with, as appropriate, sections 7.4.1, 7.4.2, 7.4.3, 13.10.4, 13.10.5 and 13.10.6 of NMFS' Draft Anadromous Salmonid Passage Facility Guidelines and Criteria as of the Effective Date of the Settlement Agreement. In addition, the pool volume and depth will be designed to minimize pool bottom surface velocities and injury to fish. For purposes of section 13.10.5, the design will minimize, but may not completely avoid, creation of false attraction flows. The outfall shall have a 10-foot minimum drop to the pool below (to prevent adults from entering the pipe), and shall be designed to provide smooth, rounded edges and surfaces, using materials similar to the flume, to minimize injury to fish exiting the pipe and to jumping adults;

(ii) The pipe/flume shall be designed in accordance with, as appropriate, sections 13.9.3.1, 13.9.3.4, 13.9.3.5, 13.9.3.6, 13.9.3.9, 13.9.3.11, 13.9.3.13 and 13.9.3.14 of NMFS' Draft Anadromous Salmonid Passage Facility Guidelines and Criteria as of the Effective Date of the Settlement Agreement. Weathered steel surfaces presently existing on the steel flume sections, or alternatively the galvanized surfaces of standard culvert material, shall be considered acceptable for this application, provided that, if the interior surfaces of the existing steel flume are considered to be too rough to meet NMFS' Passage Facility Guidelines and Criteria, PacifiCorp shall install a liner or conduct sand blasting of the interior surfaces;

(iii) The temporary approach to the fishway channel entrance will be constructed with "field-placed" structure materials to optimize local hydraulic conditions. PacifiCorp will provide NMFS, USFWS, ODFW and CTWS a minimum of seven days notice prior to the placement of these materials to allow their on site participation in field direction of this placement work;

(iv) The control structures within the temporary approach channel to the fishway entrance will be placed at least one channel width apart. These structures will have less than one foot of head differential (measured from upstream of the boulder control structures to the downstream water surface elevation), and will not span the entire width of the approach channel (unless the depth provided over the channel-spanning structure is at least one foot);

(v) If fish will be passing through the temporary culvert(s) installed in the downstream coffer dam, such culverts shall meet, as appropriate, sections 9.7.5, 9.7.8 and 9.7.9 of NMFS' Draft Anadromous Salmonid Passage Facility Guidelines and Criteria as of the Effective Date of the Settlement Agreement. In addition, the bypass shall be designed in accordance with, as appropriate, sections 9.3.2 and 9.3.3 of NMFS' Draft Anadromous Salmonid Passage Facility Guidelines and Criteria as of the Effective Date;

(vi) The design will provide supplemental flow to the fishway discharge to allow optimal operation of the fish ladder and temporary approach channel; and

(vii) The design will be developed such that flow conveyed in the bypass flume is delivered below the temporary approach channel in a manner that will maximize both upstream and downstream passage. The design will be developed such that the bypass flume and the upstream temporary approach channel work together to both attract adult fish to the temporary approach channel, minimize delay of both upstream and downstream migrants, and minimize injury to fish passing downstream.

#### 1.1.2.1 ESA Agency Approval

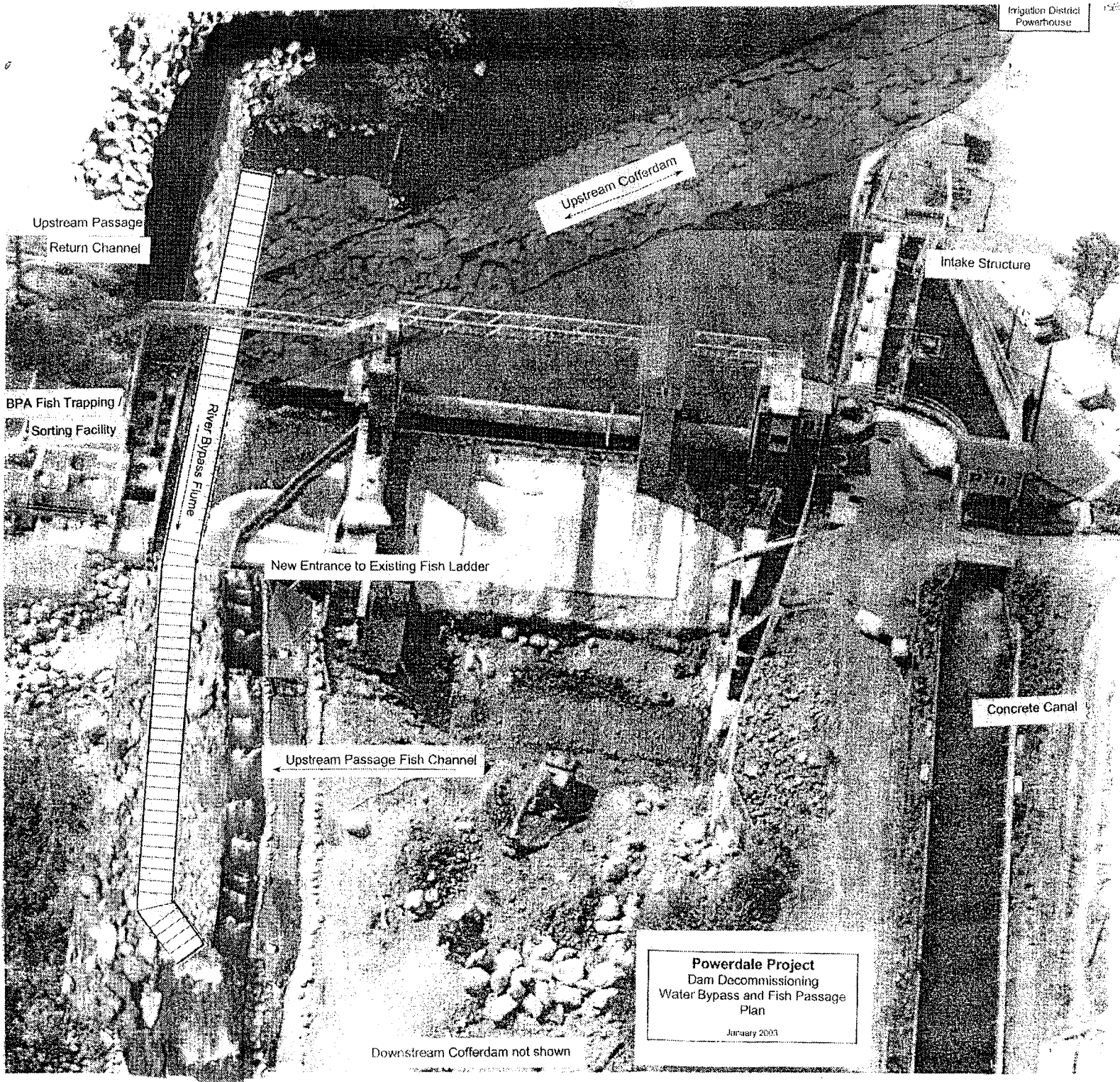
For ESA purposes, PacifiCorp will submit fish passage design and construction plans for the bypass flume, plunge pool, culvert, temporary approach channel, and fish ladder for NMFS and USFWS approval. If required to minimize the effect of any incidental take of listed species, NMFS and USFWS may require, as a condition of their approval, additions or changes to such design plans, provided that if NMFS or USFWS requires as a condition of approval more than a minor change to such design or construction plans, or alters the basic design, location, scope, duration or timing of such plans, the condition will be considered inconsistent with the Settlement Agreement.

#### 1.1.2.2 Upstream Passage during Dam Removal

Unless NMFS, USFWS, ODFW and CTWS agree that upstream fish passage is not necessary, such passage will be maintained initially by placing culverts in the downstream cofferdam as it is constructed, thereby allowing continued access through the existing stream channel to the fish ladder until the construction of the bypass flume (Section 1.1.2.2) and an artificial upstream fish passage channel are completed and operating.

An artificial upstream fish passage channel will be constructed coincidental to the construction of the cofferdams and will be located between the existing fish ladder structure and the right riverbank. This channel will extend from a mid-point on the existing fish ladder to a location immediately downstream of the downstream cofferdam (Figure 1.1-1). Upon completion of the channel, culvert access through the downstream cofferdam will be closed and upstream migrants will be directed to the fish ladder structure through this newly constructed fish passage channel.

Figure 1.1-1. Water bypass and fish passage plan.



PacifiCorp will continue to maintain the existing fish ladder during dam removal to ensure continued upstream fish passage into the ODFW and CTWS trapping and sorting facility. The return channel exiting the sorting facility will be extended upstream, beyond the upstream cofferdam, to allow the return of fish to the river channel (Figure 1.1-1).

#### 1.1.2.2 Downstream Passage/Bypass Flume

River flow will be diverted past the work zone during removal of the dam using recycled portions of the existing water conveyance system's steel flume materials, which will be removed as described in Section 1.3. This bypass flume will provide downstream fish passage and will extend from above the upstream cofferdam to just below the downstream cofferdam, passing over the overflow section and existing fish ladder. The inside surface of the bypass flume will be smooth, with steady gradient and gradual bends. NMFS, USFWS, and ODFW will be given the opportunity to inspect the bypass flume prior to installation.

The upstream fish return channel from the ODFW and CTWS sorting facility and the intake for the water bypass flume will be separated by the placement of rock between them to avoid the entrainment of upstream migrants into the downstream flume.

To provide attraction of upstream migrants to the new artificial upstream passage channel, discharge from the bypass flume will be positioned to fall directly into the entrance of the newly constructed upstream passage channel. This discharge will be designed to act as both a barrier to upstream migrants attempting to enter the bypass flume, while at the same time attracting them to the upstream passage channel and fish ladder.

This water bypass flume will also serve as the passage route for downstream migrating fish including adult bull trout and steelhead kelts. The discharge pool will be excavated to ensure adequate area and depth prior to diverting flow to prevent injury to the downstream migrants.

#### 1.1.3 Diversion Dam

Upon closure of the upstream and downstream cofferdams, the area between them will be dewatered by pumping and access will be constructed to allow removal of the concrete portions of the dam and intake structure.

It is expected the concrete will be broken up with mechanical equipment and controlled blasting. Reinforcing steel will be separated and the concrete materials from the dam will be reduced to a manageable size and hauled to a location on site for burial. Steel materials will be hauled off site for proper disposal or salvage.

After removal of the concrete structures, the riverbed between the upstream and downstream cofferdams will be contoured to match upstream and downstream invert elevations using on site materials.

After completion of the removal work and riverbed grading within the confines of the cofferdams, the river will be returned to the natural channel by breaching the upstream and downstream cofferdams. As flows are not expected to be of sufficient quantity to effectively wash the cofferdam materials downstream, a majority of these materials will be removed using

mechanical excavation equipment and reclaimed for use in riverbank grading and armoring. The remaining, unrecoverable portions of the cofferdams are expected to fill in and adjust the streambed to natural contours. With the river returned to a natural course the remaining concrete structures, including the fishway and un-gated overflow section, will be removed. Access for this work will be gained directly from the riverbank utilizing remaining portions of the cofferdams, or by developing access points using removed cofferdam materials, as needed. Dam removal work will be concluded with the placement of materials along the riverbank to harden the disturbed bank areas and prevent erosion during the upcoming winter period.

Earthen materials from the two dam embankments will be spread on site or relocated for use in covering buried concrete materials from the dam and flowline removal. These earth materials will be contoured and revegetated to blend with the surrounding area and to prevent erosion into waterways. Likewise, areas disturbed by dam removal will be revegetated and invasive or exotic plants will be controlled pursuant to a Revegetation and Mitigation Plan described in Section 3.4. Erosion and sediment control measures will be implemented as determined in the Erosion and Sediment Control Plan (ESCP), described in Section 3.1, to protect the environment and will remain in place until new vegetation is established.

The volume of sediment stored in the 5-acre-foot reservoir behind Powerdale dam is minimal. It is expected that high flows experienced in the Hood River during the first winter after dam removal will remove any sediments that remain in the reservoir area. No specific treatment is planned for removing the sediments as part of the dam removal work. Any remaining accumulations of sediments are expected to be flushed downstream with the natural flows in the river.

## **1.2 INTAKE**

The concrete intake structure, located on the left bank adjacent to and just upstream from the dam, will be removed to original riverbed. The 6-foot-wide gated trash sluice, trashracks, traveling basket fish screens, and all related structural, mechanical and electrical equipment associated with the intake will be removed. The intake headgate that regulates flow from the intake into the power canal and the trash gate located between the intake structure and the trash sluice will be removed. Several miscellaneous structures including the operator's house and the control gatehouse will be removed, as well as some non-essential fencing. The operator's house may be left in place, at the discretion of a designated grantee as defined in Section 4.4 of the Settlement Agreement.

## **1.3 POWER CANAL, STEEL FLUME AND SAND-SETTLING BASIN**

The 604-foot-long trapezoidal concrete power canal will be broken up and filled with available materials from the cofferdams and earth embankments, and the area will be graded to blend with the adjoining river bank. The 550-foot-long steel flume, 142-foot-long concrete sand-settling basin, 254-foot-long steel flume, and 33-foot-long concrete structure transitioning into the flowline will be removed. Concrete debris from the removal of these facilities will be broken into a manageable size and buried on site. Miscellaneous metals and wood materials will be hauled to an off site disposal location.

## 1.4 FLOWLINE (PIPE)

The flowline is approximately 14,500 feet in length and extends from the concrete transition structure (steel flume to flowline) to the surge tank. With the exception of several short segments of riveted steel pipe, it was originally constructed of wood stave pipe for its entire length. The flowline is supported on concrete saddles along most of its length. Each saddle is 9 feet wide at its base, 12 feet, 8 inches wide at the top, and approximately 1-foot thick.

In 1965 approximately 3,600 feet of the original wood stave pipe was replaced in kind. Since 1978, remaining portions of the original wood stave pipe flowline have been replaced with steel pipe on an as-needed basis. The flowline presently consists of the remaining approximately 3,600 feet of vintage 1965 wood stave pipe, 2,000 feet of the original riveted steel plate pipe, and 9,000 feet of newer spiral-welded steel pipe.

Beginning at the transition structure, the first 4,692 feet of flowline includes 2,532 feet of 10-foot-diameter wood stave pipe. This wood stave pipe is positioned along this portion of the flowline in 3 distinct sections. The first is a 480-foot-long section that starts at the transition structure to the first section of spiral weld steel pipe. The steel pipe runs for a length of 1,090 feet before transitioning back into a 1,564-foot-long section of wood stave pipe. The flowline changes back into a 1,070-foot-long section of steel at this location, leading to a 488-foot-long section of wood stave pipe. All 3 of these sections of wood stave pipe and the associated concrete saddles will be removed. The steel pipe sections in this area will remain in place. Wildlife access will be created beneath each of the two upstream sections of steel flowline (commonly referred to as the "Flat Top" and "Hog Ranch" sections) along this 4,692 stretch by excavating an approximately 5 to 6 foot-high passage below the pipe at approximately the center of each section.

The flowline sections to be removed will be accessed from the diversion dam area along a maintenance road. The steel reinforcing hoops around the wood stave pipe will be cut and the pipe will be crushed with a hydraulic excavator. The metal bands will be separated from the wood stave debris, and both will be loaded into dump trucks and hauled away via the existing access road. The concrete saddles will be broken into small pieces, each no larger than 1 cubic yard. A trench will be dug near the vicinity of the flowline alignment and the concrete pieces buried on location. The trench will be back-filled and the area will be graded to match the natural contours and will be revegetated. Remaining openings into the transition structure and at the ends of the remaining sections of the steel pipe will be secured to prevent ingress.

The portion of the flowline downstream of the lower 488-foot length of wood stave pipe to be removed will remain in place. This includes two relatively short sections of wood stave pipe (493 feet long and 480 feet long respectively) located approximately 7,000 feet and 9,400 feet downstream of the transition structure, along with the remaining portions of the steel flowline.

The steel walkway providing recreation access to the river along the top of the flowline, for a distance of approximately 4,000 feet upstream from the flowline bridge, will be left in place.



## **1.5 FLOWLINE BRIDGE**

A 130-foot-long riveted steel truss bridge supports the flowline pipe across the Hood River approximately 4,000 feet upstream of the powerhouse. Two large concrete pedestals support this bridge on each bank of the river. The bridge will remain in place to provide a river crossing point for fishermen and recreationists. Access will remain available to the steel catwalk that extends along the flowline for another 4,000 feet upstream from the bridge.

## **1.6 SURGE TANK**

A 28-foot-diameter riveted steel plate surge tank stands 207 feet high on 4 support legs. It has a 7-foot 9-inch-diameter riser pipe and a 3-foot-diameter overflow pipe that extends from the tank to the tailrace. A shaped charge will be used to topple the surge tank. Once it is down, it will be cut into pieces and salvaged as steel scrap.

## **1.7 POWERHOUSE**

The 86-foot-wide by 51-foot-long concrete powerhouse structure will remain in place. All internal non-structural features of the building will be removed. Window glass will be replaced with steel plates or other architectural treatments to secure the facility. The metal-sided maintenance garage located immediately adjacent to the south side of the powerhouse will be removed. The outdoor traveling gantry crane that spans the powerhouse will be used to decommission and remove equipment from the interior of the powerhouse, and then the operable components of the crane will be dismantled and removed.

All oil and hydraulic fluids will be drained from the equipment located inside the powerhouse, and any loose equipment, parts and materials will be removed. Internal rotating generator and turbine components will be removed. The turbine pit will be sealed with concrete. A switch room, located on the west side of the operating floor level in the powerhouse contains distribution system switches and controls associated with the switchyard/substation located west of the powerhouse. Power will be maintained to this room and the switch/control panels will remain functional for as long as is necessary to support remaining facilities. These facilities may be relocated outside of the powerhouse in the future; however, they must remain in service until that time to facilitate operation of the local power distribution system.

The areas surrounding the surge tank and maintenance garage will be re-graded to match the surrounding contours. The powerhouse building, all remaining equipment, and adjacent remaining facilities will be secured for safety and to prevent unauthorized ingress.

## **1.8 SWITCHYARD**

The switchyard and transmission lines serve as part of PacifiCorp's local and regional transmission/distribution system and are independent of the Powerdale Project. All components related to the generation of power by the Powerdale Project will be removed from the switchyard. Equipment required to supply or control power to the distribution switch/control panels in the powerhouse and equipment associated with the operation of PacifiCorp's

transmission/distribution system will remain in service. The existing fencing around the switchyard and powerhouse will be modified as necessary to provide additional security once the powerhouse is no longer staffed.

## 2.0 DECOMMISSIONING SCHEDULE

PacifiCorp will accomplish the decommissioning of the Powerdale Project according to Section 4 and Appendix A of the Settlement Agreement. It is intended that the decommissioning activities can be completed in one construction season; April 1 through November 15. Required permits will be obtained prior to the construction season. Timing restrictions will be in effect for any in-water work in to protect sensitive life stages of aquatic species, and to minimize effects to terrestrial resources. For all in-water decommissioning work, PacifiCorp will conduct such work between July 15 and August 31, or outside of that time period with the approval of NMFS, USFWS and ODFW. For purposes of this decommissioning action, "in-water work" does not include dam removal or other decommissioning actions performed in areas that have been dewatered for purposes of decommissioning actions. Actions that are likely to occur outside of the July 15 to August 31 period include the following decommissioning actions:

- (i) Construction and removal of the upstream and downstream cofferdams, cofferdam materials, and culverts (Section 1.1.3).
- (ii) Removal of the artificial upstream fish passage channel and bypass flume (Section 1.1.2.1).
- (iii) Placement of materials (relocated cofferdam materials and available streambed materials) along the river to create access for removal of remaining portions of the dam and fish ladder (Section 1.1.3).
- (iv) Placement of materials to regrade and armor the east and west banks of the river to harden the disturbed areas (Section 1.1.3).
- (v) Regrading of the streambed above and below the dam as necessary to assist with removal of any barriers to fish passage created as a result of decommissioning activities (Section 1.1.3).

These activities are scheduled to occur outside of the July 15 through August 31 time period, as shown in Appendix A, Table B to the Settlement Agreement and, as such, are exempt from prior approval by NMFS, USFWS and ODFW. Preparatory work will be performed from April through June, and post-decommissioning work may be completed in November and December, after a return of the river to the natural channel.

PacifiCorp will provide NMFS, USFWS, ODFW and CTWS with reasonable notice prior to initiating in-water work to allow them to view the work and recommend fish salvage or other immediate measures to avoid fish stranding or delay.

### **3.0 DECOMMISSIONING PROTECTION, MITIGATION AND ENHANCEMENT MEASURES**

#### **3.1 EROSION AND SEDIMENT CONTROL PLAN**

PacifiCorp will develop and implement an Erosion and Sediment Control Plan (ESCP), in consultation with and with the approval of NMFS, USFWS, ODEQ, ODFW and CTWS, prior to any in-water decommissioning actions. The ESCP will identify specific methods to be implemented at each work area to protect water quality and aquatic habitat. The objectives of the ESCP will be to (i) protect the Hood River from unplanned releases of sediment and debris during decommissioning activities; (ii) appropriately dispose of sediment and decommissioning debris in accordance with applicable laws, the Spill Prevention Control and Countermeasure Plan, and public health and safety; (iii) implement permanent revegetation measures consistent with BMPs; and (iv) ensure that dam removal will be conducted in dry conditions using a cofferdam and artificial channel to divert flows from work areas.

The ESCP will also specify measures such as berms, ditches, sediment retention basins, silt fencing, and site restoration to be used for protecting natural resources during the decommissioning activities.

#### **3.2 SEDIMENT AND FISH PASSAGE MONITORING; CONTINGENCY PLAN**

PacifiCorp will perform a geomorphology study of the river channel shortly after the effective date of the Settlement Agreement for the purpose of describing current geomorphic conditions in the Hood River from 2,200 feet downstream of the dam to 1,000 feet upstream of the dam, or above the vegetated island, whichever is farther. This information will be used to predict potential impacts of sediment released from dam removal activities on fish passage and aquatic habitat downstream of the dam location.

PacifiCorp will develop a fish passage monitoring and mitigation plan in consultation with NMFS, USFWS, ODFW, ODEQ and CTWS. The plan will be approved by NMFS, USFWS and ODFW and implemented following removal of the cofferdams and the return of the river to its natural channel. In the event a fish passage obstruction, as defined by the plan, is cause or exacerbated by dam removal, PacifiCorp will restore adequate fish passage by implementing the mitigation measures set forth in the plan.

PacifiCorp will have no obligation to monitor or mitigate for obstruction to fish passage created by dam removal for more than one cycle of seasons beyond the return of the river to natural conditions, in accordance with the above mentioned geomorphology report, and as determined by a team composed of representatives of NMFS, USFWS, ODFW, CTWS and PacifiCorp.

#### **3.3 RARE, THREATENED AND ENDANGERED SPECIES PLAN**

PacifiCorp will complete surveys for federal- or state-listed rare, threatened and endangered species in areas planned for construction. All decommissioning activities will be planned and designed to minimize direct impacts on wildlife species and their habitat.

### **3.4 REVEGETATION AND MITIGATION PLAN**

PacifiCorp will consult with the Settlement Parties to develop a Revegetation and Mitigation Plan (RMP) that will address how PacifiCorp, in conducting decommissioning activities, will (i) minimize the area of disturbance to the extent possible; (ii) adhere to conditions in any applicable Army Corps of Engineers or Oregon Division of State Lands wetlands permit; (iii) consult with state and federal wildlife agencies, CTWS and, when necessary, the Columbia River Gorge Commission (CRGC) prior to determining appropriate protection measures; (iv) limit construction to the summer through fall time period; (v) revegetate disturbed areas with native vegetation to the extent possible based on existing vegetation cover type mapping and potential wetland delineations; and (vi) control sedimentation of aquatic habitat as set forth in the ESCP.

PacifiCorp will have no obligation to compensate for unavoidable wetland alteration following the removal of portions of the wood stave flowline and the associated artificial water source.

### **3.5 CULTURAL AND HISTORIC MEMORANDUM OF AGREEMENT**

PacifiCorp will draft a Memorandum of Agreement with the State Historic Preservation Officer (SHPO) prior to initiating any decommissioning activities. PacifiCorp will photographically document eligible properties for pictorial preservation by the National Register. Additionally, PacifiCorp will consider recordation of eligible properties to the Historic American Buildings Survey/Historic American Engineering Record standards, and architectural salvage. PacifiCorp will consult with the SHPO, the National Park Service, the U.S. Army Corps of Engineers, CTWS, the Oregon Historical Society, the Hood River County Historical Society, and the County of Hood River, as appropriate, prior to modifying any project structures.

In the event that ownership of the property and the remaining eligible facilities are transferred to another entity, PacifiCorp will provide documentation acknowledging that the facilities are eligible for listing in the National Register and require treatment in a manner consistent with the National Historic Preservation Act.

### **3.6 RECREATION PLAN**

PacifiCorp may restrict or prohibit public access to the day-use sites and the bypass reach while portions of the decommissioning activities take place. PacifiCorp will provide appropriate signage and public notification prior to demolition and restoration activities to inform the public of planned activities and temporary restrictions. PacifiCorp will implement a demolition program that minimizes the length of time that the river is affected to minimize impacts to the fishing experience and, where feasible, will restore river trails, access roads and parking areas to pre-construction conditions following decommissioning.

PacifiCorp will not be required to perform additional measures to address impacts to land use, land management, aesthetics or visual resources during or after decommissioning.

#### 4.0 DECOMMISSIONING COSTS

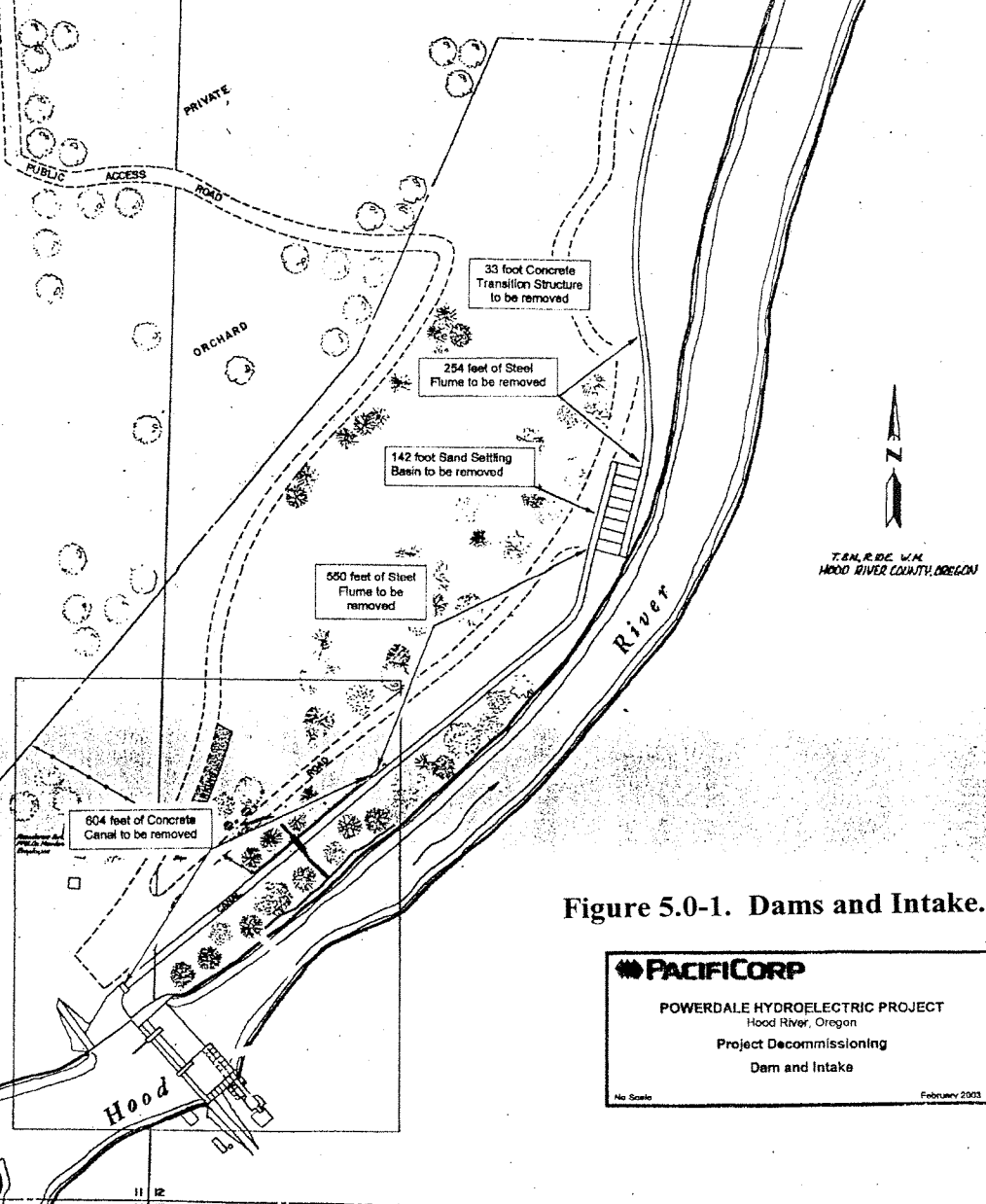
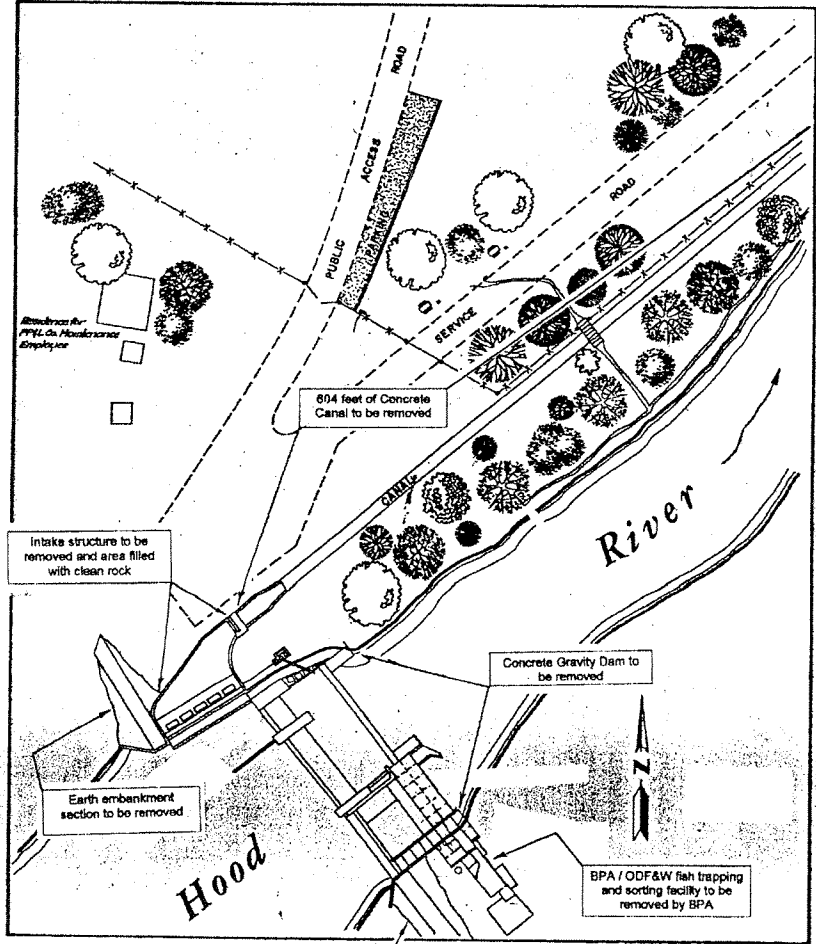
Table 4.0-1 presents the estimated costs of decommissioning the Powerdale Project as described in this Decommissioning Plan.

**Table 4.0-1. Decommissioning costs.**

<b>Project Element</b>	<b>Decommissioning Price</b>
Survey	\$27,000
River Diversion	\$400,000
River Bypass	\$317,000
Sediment and Erosion Control	\$148,000
Dam	\$1,280,000
Intake	\$378,000
Misc. Structures	\$30,000
Canal	\$37,000
Steel Flume	\$146,000
Sand Settling Basin	\$266,000
Transition Structure	\$58,000
Flowline	\$618,000
Surge Tank	\$157,000
Powerhouse	\$765,000
Substation	\$78,000
Restoration	\$58,000
<b>Project Total</b>	<b>\$4,763,000</b>

## **5.0 DECOMMISSIONING DRAWINGS**

The following general design drawings, showing the principal project works, graphically depict the Powerdale Project components and features proposed for decommissioning.



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TOWN OF W.A. HOOD RIVER COUNTY, OREGON

Figure 5.0-1. Dams and Intake.

**PACIFICORP**

POWERDALE HYDROELECTRIC PROJECT  
Hood River, Oregon  
Project Decommissioning  
Dam and Intake

No Scale February 2003

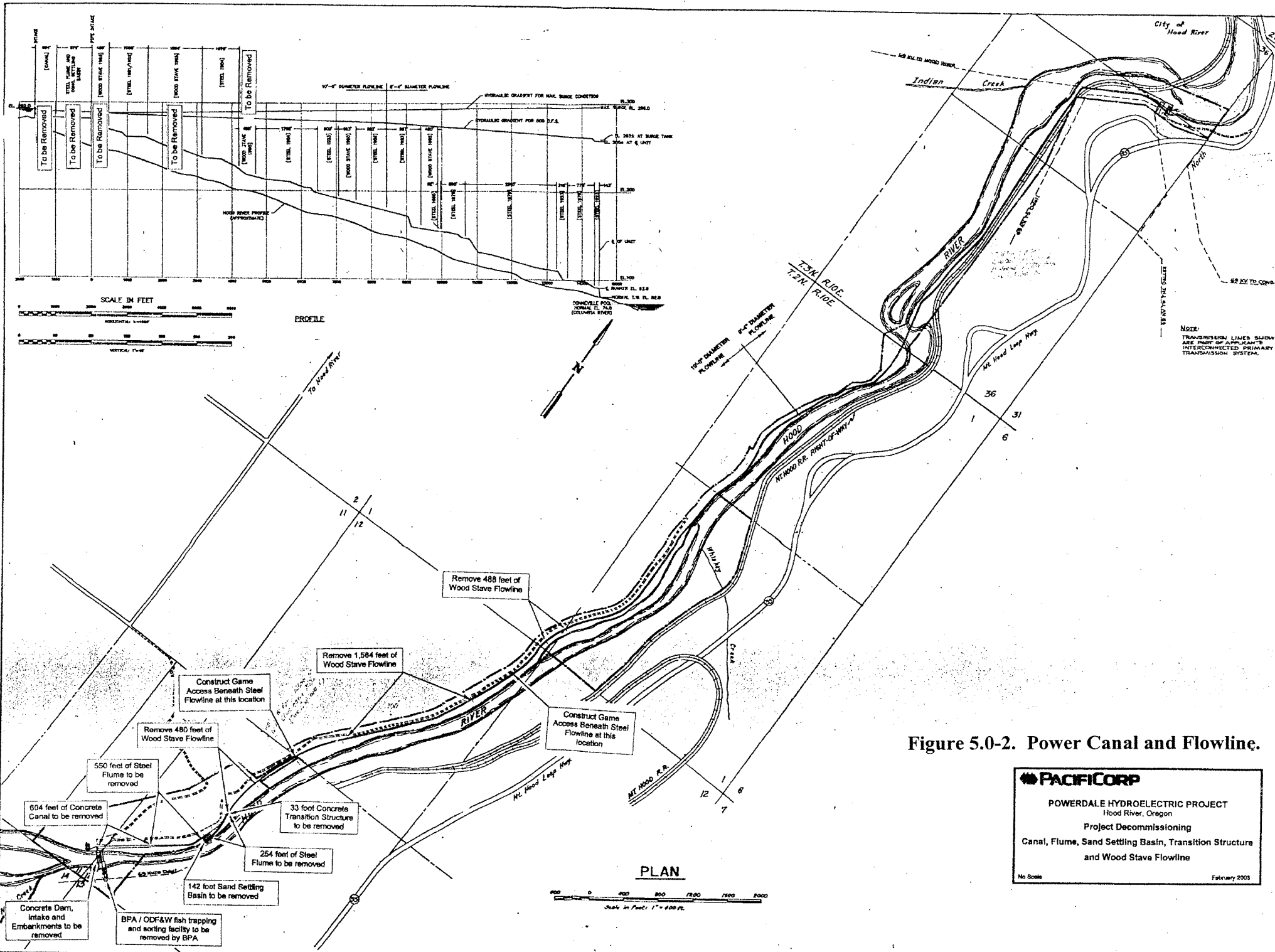


Figure 5.0-2. Power Canal and Flowline.

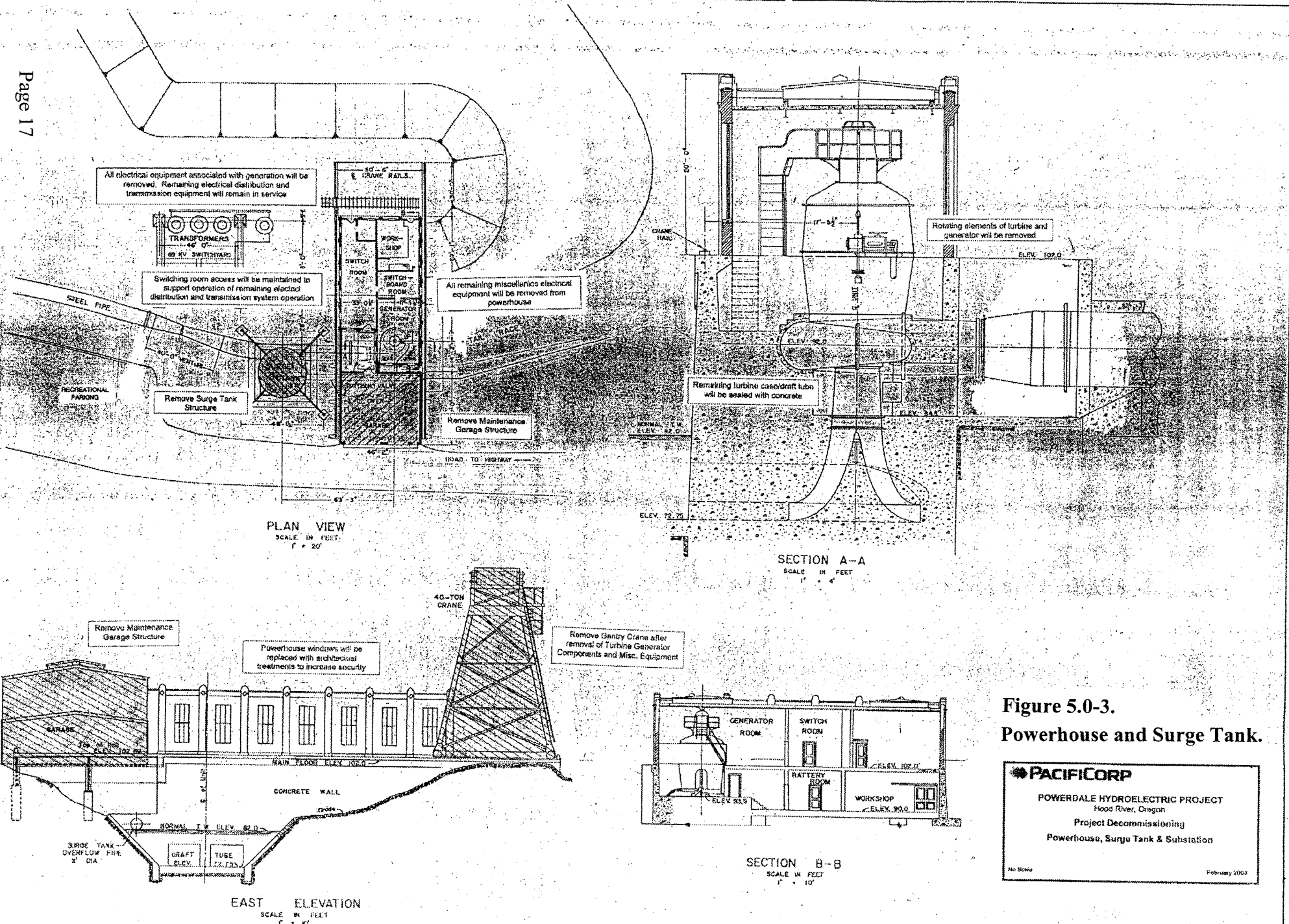
**PACIFICORP**

POWERDALE HYDROELECTRIC PROJECT  
Hood River, Oregon

Project Decommissioning  
Canal, Flume, Sand Settling Basin, Transition Structure  
and Wood Stave Flowline

No Scale February 2003





**Figure 5.0-3.**  
**Powerhouse and Surge Tank.**

**PACIFICORP**

POWERDALE HYDROELECTRIC PROJECT  
 Hood River, Oregon  
 Project Decommissioning  
 Powerhouse, Surge Tank & Substation

No Scale February 2003

## **APPENDIX C**

### **REPRESENTATIVES OF THE PARTIES**

APPENDIX C  
REPRESENTATIVES OF THE PARTIES

PacifiCorp:

William Eaquinto  
Vice President, Hydro Relicensing  
PacifiCorp  
825 N.E. Multnomah  
Portland, OR 97232  
Phone: (503) 813-5730  
Fax: (503) 813-6633

*with copy to:*

Randy Landolt  
Director, Hydro Resources  
PacifiCorp  
825 N.E. Multnomah  
Portland, OR 97232  
Phone: (503) 813-6650  
Fax: (503) 813-6659

---

National Marine Fisheries Service:

Brian Brown  
Assistant Regional Administrator, Hydro Program  
National Marine Fisheries Service  
525 Oregon Street  
Portland, OR 97232  
Phone: (503) 230-5417  
Fax: (503) 231-2318

*with copies to:*

Jane Hannuksela  
Attorney  
General Counsel Northwest Region  
National Oceanic and Atmospheric  
Administration  
7600 Sand Point Way N.E.  
Seattle, WA 98115  
Phone: (206) 526-6515  
Fax: (206) 526-6542

Keith Kirkendall  
FERC Policy Analyst  
National Marine Fisheries Service  
525 NE Oregon Street, Suite 500  
Portland, OR 97232-2737  
Phone: (503)230-5431  
Fax: (503)231-6893

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United States Fish and Wildlife Service:

Kemper McMaster  
State Supervisor  
U.S. Fish and Wildlife Service  
2600 S.E. 98<sup>th</sup> Ave., Suite 100  
Portland, OR 97266  
Phone: (503) 231-6179  
Fax: (503) 231-6195

*with copy to:*

Larry Rasmussen  
Fish and Wildlife Biologist  
U.S. Fish and Wildlife Service  
2600 S.E. 98<sup>th</sup> Ave., Suite 100  
Portland, OR 97266  
Phone : (503) 231-6179  
Fax: (503) 231-6195

---

Oregon Department of Fish and Wildlife:

Amy Stuart  
Hydropower Biologist  
Oregon Dep't of Fish and Wildlife  
2042 S.E. Paulina Hwy  
Prineville, OR 97754  
Phone: (541) 447-5111 ext. 27  
Fax: (541) 447- 8065

*with copy to:*

Rod French  
District Fish Biologist  
Oregon Dep't of Fish and Wildlife  
3701 W. 13th  
The Dalles, OR 97058  
Phone: (541) 296-4628  
Fax: (541) 298-4993

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Oregon Water Resources Department:

Kristen Bonanno  
Hydropower Coordinator  
Oregon Water Resources Department  
158 12<sup>th</sup> St. N.E.  
Salem, OR 97301  
Phone: (503) 378-8455 ext. 306  
Fax: (503) 378-6203

*with copy to:*

Larry Toll  
Oregon Water Resources Department  
421 E. 7<sup>th</sup> St.  
Courthouse Annex B, Room 218  
The Dalles, OR 97058  
Phone: (541) 298-4110  
Fax: (541) 298-2459

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Oregon Department of Environmental Quality:

Paul DeVito  
Natural Resource Specialist  
Oregon Dep't of Environmental Quality  
2146 N.E. Fourth St., Suite 104  
Bend, OR 97701  
Phone: (541) 388-6146 ext. 257  
Fax: (541) 388-8283

*with copy to:*

Kurt Burkholder  
Assistant Attorney General  
Oregon Department of Justice  
1515 SW Fifth Ave., Suite 410  
Portland, OR 97201-5451  
Phone: (503) 229-5725  
Fax: (503) 229-5797

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Confederated Tribes of the Warm Springs  
Reservation of Oregon:

Olney Patt, Jr.  
Tribal Council  
Confederated Tribes of the Warm Springs  
Reservation of Oregon  
P.O. Box C  
Warm Springs, OR 97761  
Phone: (541) 553-3257  
Fax: (541) 553-1268

*with copies to:*

Cynthia Starke  
Karnopp Petersen LLP  
1201 NW Wall Street  
Bend, OR 97701-1957  
Phone: (541) 382-3011  
Fax: (541) 388-5410

Mick Jennings  
Hood River Program Manager  
Confederated Tribes the Warm  
Springs Reservation of Oregon  
3430 W. 10<sup>th</sup> Street  
The Dalles, OR 97058  
Phone: (541) 296-6866  
Fax: (541) 296-8886

---

American Rivers:

Brett Swift  
Associate Director, NW Hydropower Program  
American Rivers  
320 SW Stark Street, Suite 418  
Portland, OR 97204  
Phone: (503) 827-8648  
Fax: (503) 827-8654

*with copy to:*

Andrew Fahlund  
Senior Program Director  
American Rivers  
1025 Vermont Ave, Suite 720  
Washington, DC 20005  
Phone: (202) 347-7550  
Fax: (202) 347-9240

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Hood River Watershed Group:

Charles Gehling  
Chairman  
Hood River Soil and Water Conservation District  
Hood River Watershed Group  
3007 Experiment Station Road  
Hood River, OR 97031  
Phone: (541) 352-7936/296-6866  
Fax: (541) 352-7924

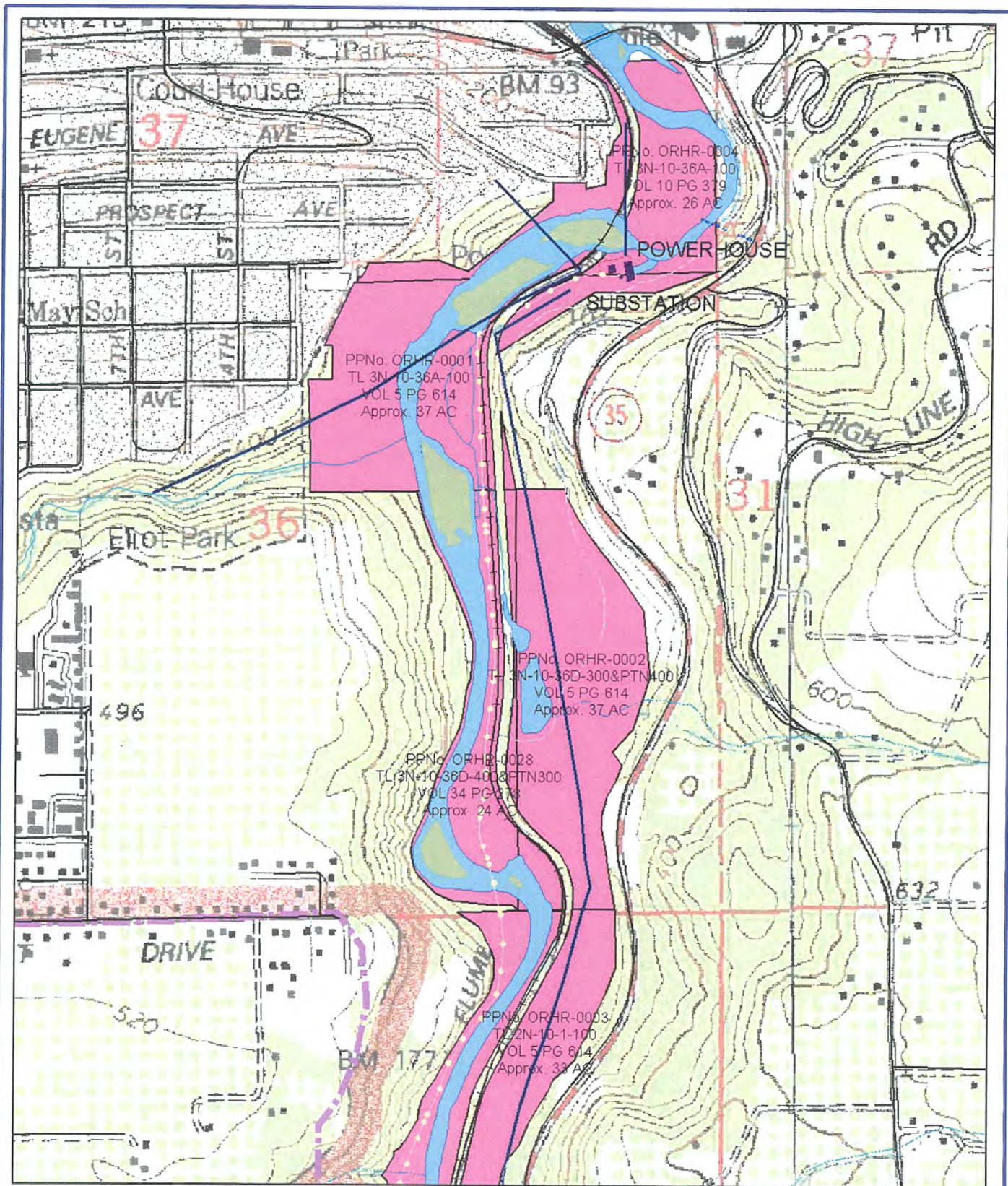
*with copy to:*

Holly Coccoli  
Coordinator  
Hood River Watershed Group  
3007 Experiment Station Road  
Hood River, OR 97031  
Phone: (541) 386-2275  
Fax: (541) 386-2985 c/o Discover Mortgage

**APPENDIX D**

**SUBJECT LANDS**

APPENDIX D - SUBJECT LANDS \*



Powerdale Sheet 1

- Public Access Easement
- Facility
- Railroad
- Gorge Scenic Area
- Subject Lands
- Facility Lines**
- POWERLINE
- FENCE
- FLUME
- MISC

**DISCLAIMER**  
 Areas were calculated from GIS data and are approximate and subject to survey. PacifiCorp makes no warranty as to the accuracy, reliability, or completeness of this data for individual or aggregate use with other data.

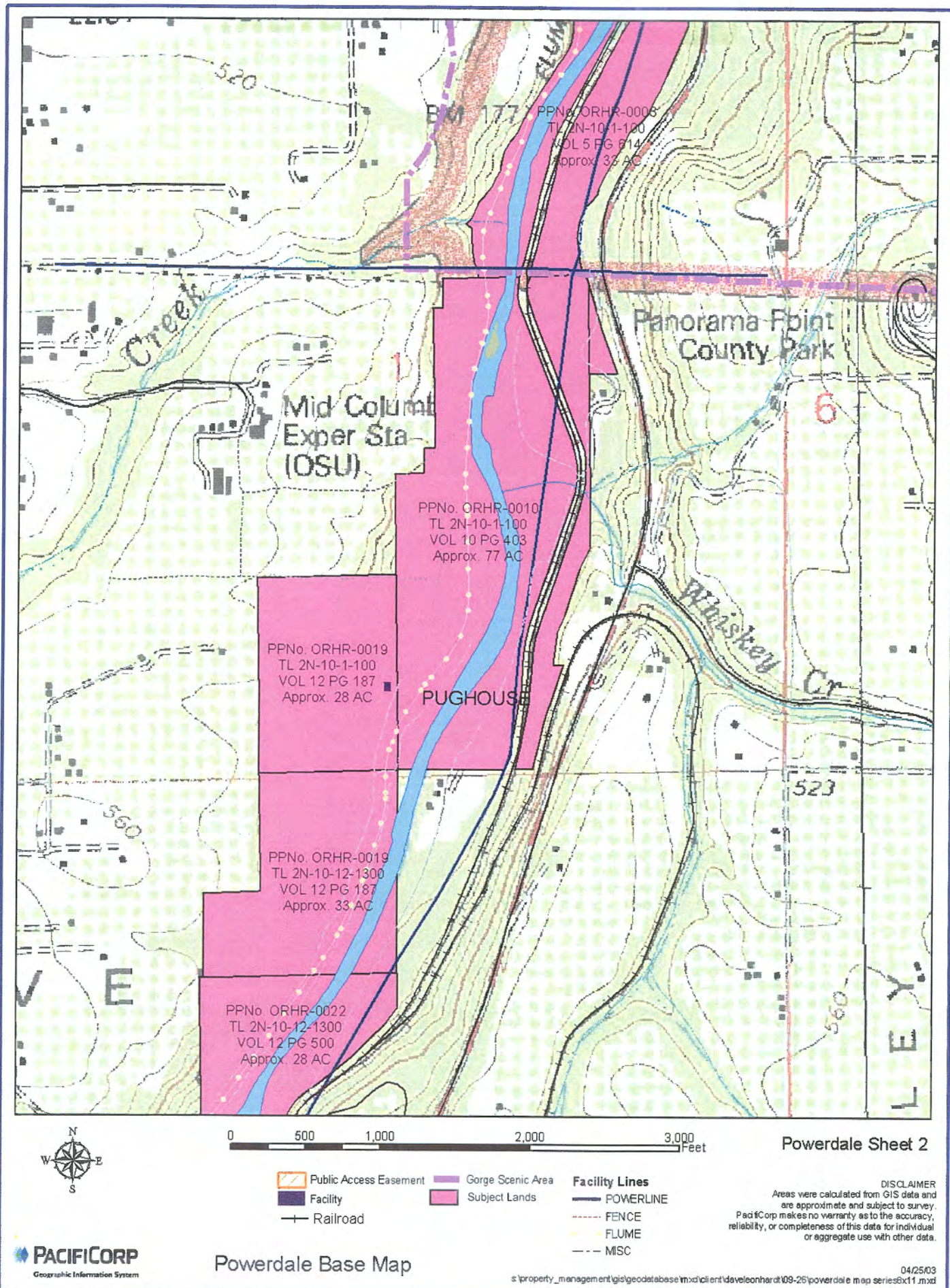


Powerdale Base Map

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\* The boundaries of these Subject Lands may be amended pursuant to Section 4.4.1 of the Settlement Agreement.

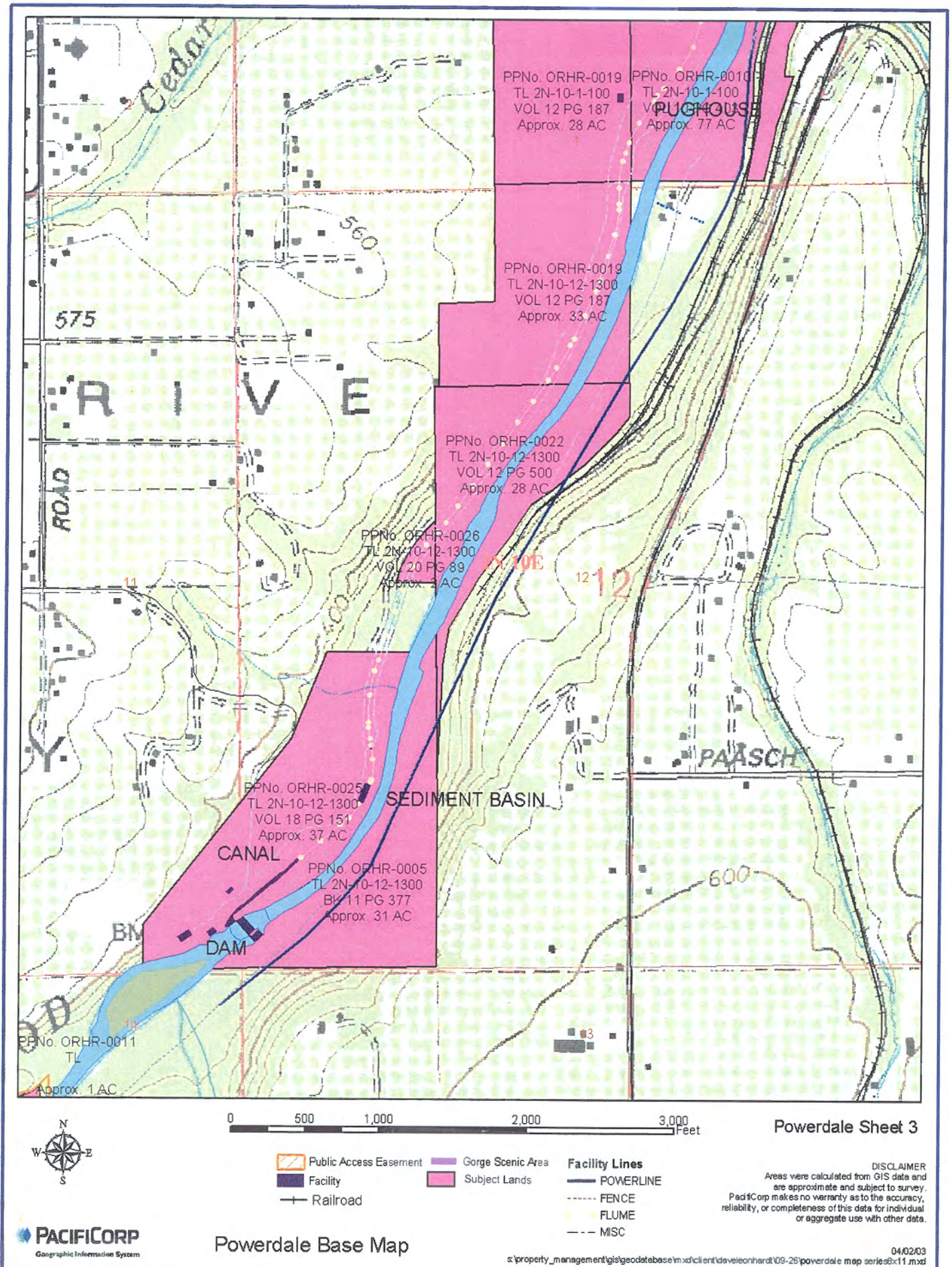
APPENDIX D - SUBJECT LANDS \*



\* The boundaries of these Subject Lands may be amended pursuant to Section 4.4.1 of the Settlement Agreement.



APPENDIX D - SUBJECT LANDS\*



\* The boundaries of these Subject Lands may be amended pursuant to Section 4.4.1 of the Settlement Agreement.

**APPENDIX E**

**ALLOWABLE INTERIM PERIOD ACTIONS AND  
ENCUMBRANCES**

APPENDIX E  
ALLOWABLE INTERIM PERIOD ACTIONS AND ENCUMBRANCES

**Project Name:** *Oregon State University (OSU) Agricultural Lease Agreement for the Mid-Columbia Agricultural Research and Extension Center in Hood River (File Number OR-HR-0019C).*

**Action:** PacifiCorp may enter into an Agricultural Lease Agreement with OSU on parcel PPNo. ORHR-0019; TL 2N-10-1-100; Vol. 12 PG 187. The lease term may be for one year, beginning November 1, 2002 and ending October 31, 2003, with the option to renew in one year increments until PacifiCorp disposes of the property.

**History:** For the past 35 years, PacifiCorp has permitted OSU to use for agricultural purposes the Northwest corner of land in parcel PPNo. ORHR-0019; TL 2N-10-1-100; Vol. 12 PG 187. Of the total 28 acres, 5.75 acres have been used for growing pear trees. The last lease agreement was signed August 6, 1996 and terminated March 1, 2000. Since that time, PacifiCorp has allowed OSU to continue use of the land with the intent to sign a new agreement. On Feb 25, 2000 PacifiCorp notified OSU of its expired lease agreement and presented OSU with PacifiCorp's new policy, which requires collection of rent for the use of company lands.

**Project Name:** *Hood River Valley Parks & Recreation District (HRVPRD) trail easement request (File Number: OR-HR-0001).*

**Action:** PacifiCorp may grant to HRVPRD a perpetual public trail right-of-way easement across PacifiCorp parcels 100 Sec. 36 Y 3N R10E in Hood River over the existing easement provided for a Sanitary Sewer (Ref P.S. 1709)..

**History:** HRVPRD requested a public trail right-of-way easement across PacifiCorp parcels 100 Sec. 36 Y 3N R10E in Hood River. The Indian Creek trail currently exists on PacifiCorp land and has been open for public use for the past 15-20 years. The proposed location of the new easement would be granted over an existing 10' permanent easement granted to the City of Hood River for Sanitary Sewer granted Dec 2, 1970, Ref P.S. 1709. HRVPRD presented a written trail easement proposal on Feb 27, 2001. On June 20, 2001, PacifiCorp responded with a letter expressing the company's willingness to support the trail easement as long as it did not jeopardize PacifiCorp's service commitment to the community. On June 10, 2002, a land survey of the Indian Creek Trail Segment #1 was completed. The survey provided a legal description for the easement as requested by PacifiCorp. The City and PacifiCorp are prepared to finalize the easement.

**Project Name:** *Jenny Copper request to sell or trade property (file not yet created).*

**Action:** PacifiCorp, after consultation with the Lands Stakeholders, may trade up to 5.7 acres of parcel PPNo. ORHR-0019 land with or grant an easement to Jenny Copper in exchange for fee simple ownership of or an access easement over Jenny Copper's property, Tax Lot # 300.

**Description:** Copper's land currently divides PacifiCorp's property TL 2N-10-12-1300. An original access easement across Jenny Coppers land was signed on Sep 28, 1950. The road currently provides access to the west side of the Powerdale Dam. The easement or right of way is twenty feet in width for private road purposes over and across the described property in Hood River County, otherwise known as Jenny Copper's property, Tax Lot # 300. By its terms, the easement ceases in the event that PacifiCorp's properties in Hood River are acquired by any governmental agency or corporation, or if PacifiCorp's use of the pipeline over the property discontinues for one year or more. If Copper's land is acquired or an access easement created, there would then be contiguous access along the west side of Hood River. Copper expressed interest in trading property with PacifiCorp on March 23, 2000. The land has not yet been acquired because the Copper has not completed a survey. The land could be acquired through a trade or purchase, or access granted by easement.

**Project Name:** *Ekker Land use Permit (File Number: OR-HR-0022A).*

**Action:** PacifiCorp may renew a land use permit to Jerry Ekker and Jannine Ekker, giving the Ekkers permission to occupy and use real property located in Hood River County until PacifiCorp disposes of the property.

**History:** The most recent permit to occupy real property was granted to the Ekkers on July 21, 1997. This permit ends on June 30, 2007. The purpose of renewing this permit would likely be to obviate the need for PacifiCorp to cut weeds and otherwise maintain the property.

**Project Name:** *Evans Land use Permit (File Number: OR-HR-0019B).*

**Action:** PacifiCorp may renew a permit to Helen C. Evans, giving Evans permission to occupy and use 3.5 acres of real property located in Hood River County until PacifiCorp disposes of the property.

**History:** The initial permit was granted on October 19, 1970. The purpose of renewing this permit would likely be to obviate the need for PacifiCorp to cut weeds and otherwise maintain the property.

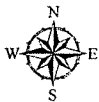
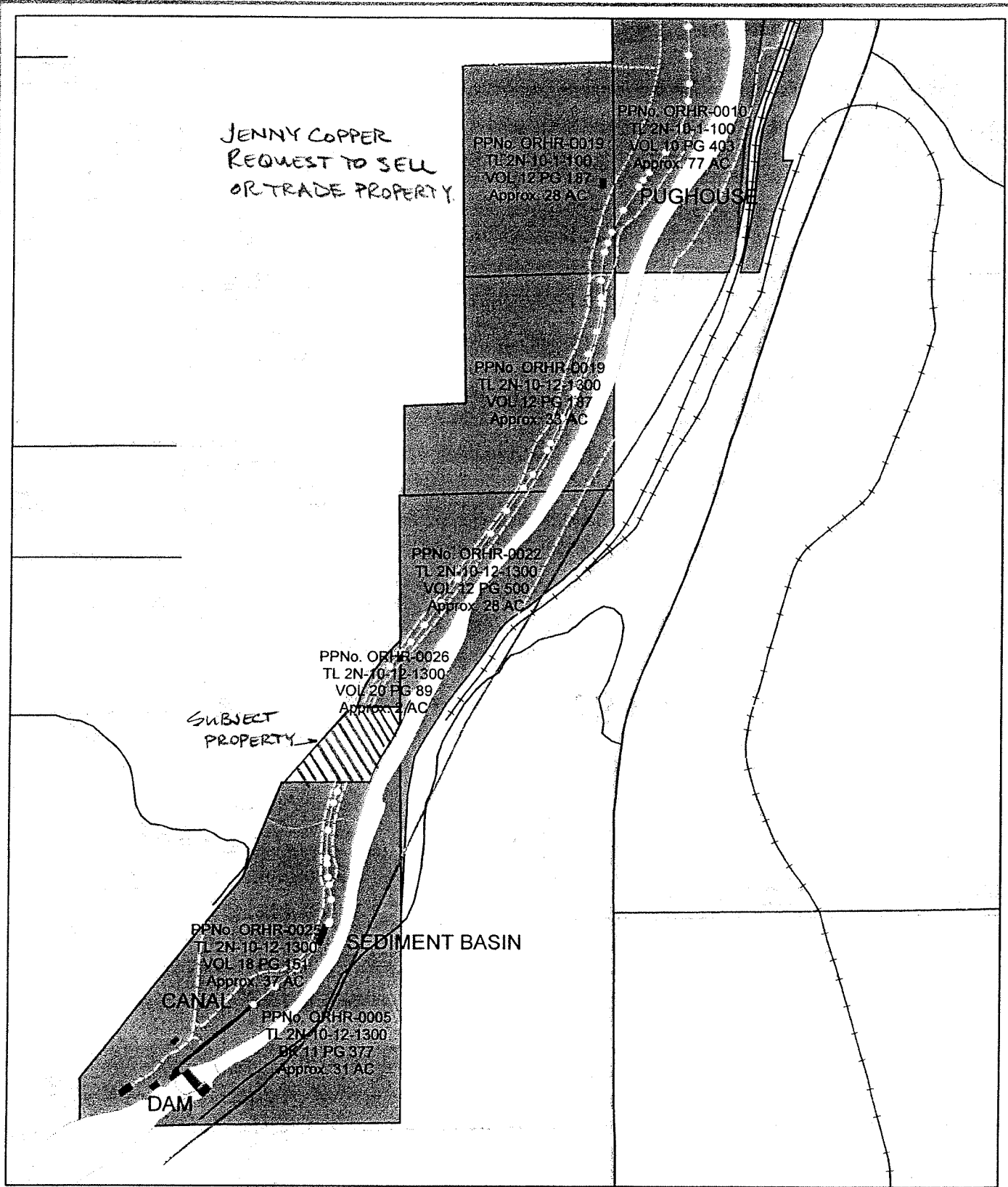
**Project Name:** *Benton Land use Permit (File Number: OR-HR-0019A).*

**Action:** PacifiCorp may renew a permit to John M. Benton and Julie Benton, giving the Bentons permission to occupy and use 3.5 acres of real property located in Hood River County until PacifiCorp disposes of the property. The property is 700' in length and 15' in width. TL 2N-10-1-100; Vol. 12 PG 187.

**History:** The initial permit was granted on July 6, 1982. The most recent permit was granted on June 16, 1995 and ends May 31, 2005. The purpose of renewing this permit would likely be to obviate the need for PacifiCorp to cut weeds and otherwise maintain the property.



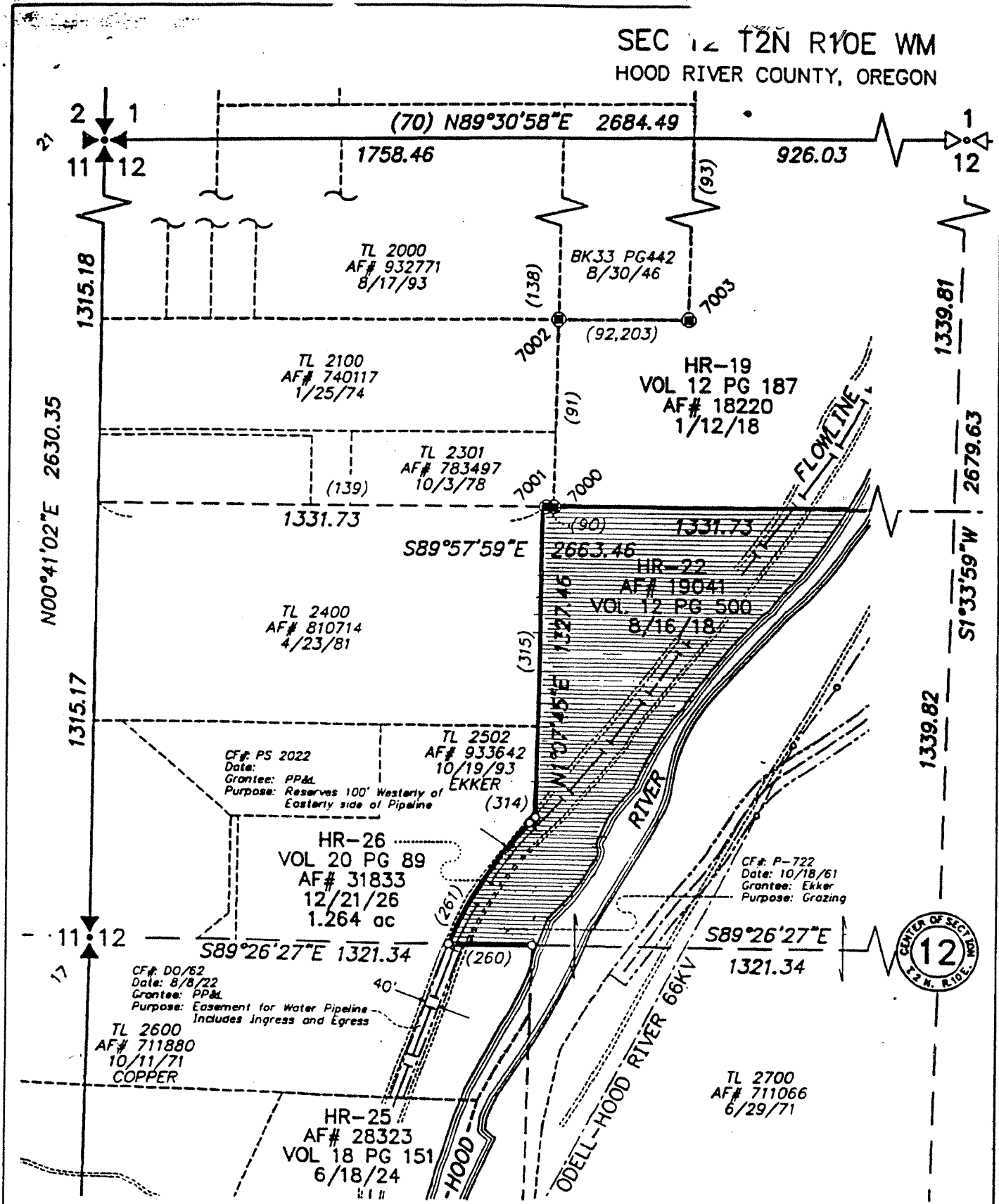




- |                        |                      |                       |
|------------------------|----------------------|-----------------------|
| Public Access Easement | Gorge Scenic Area    | <b>Facility Lines</b> |
| Facility               | PacifiCorp Ownership | — POWERLINE           |
| Railroad               |                      | - - - FENCE           |
|                        |                      | — FLUME               |
|                        |                      | - - - MISC            |

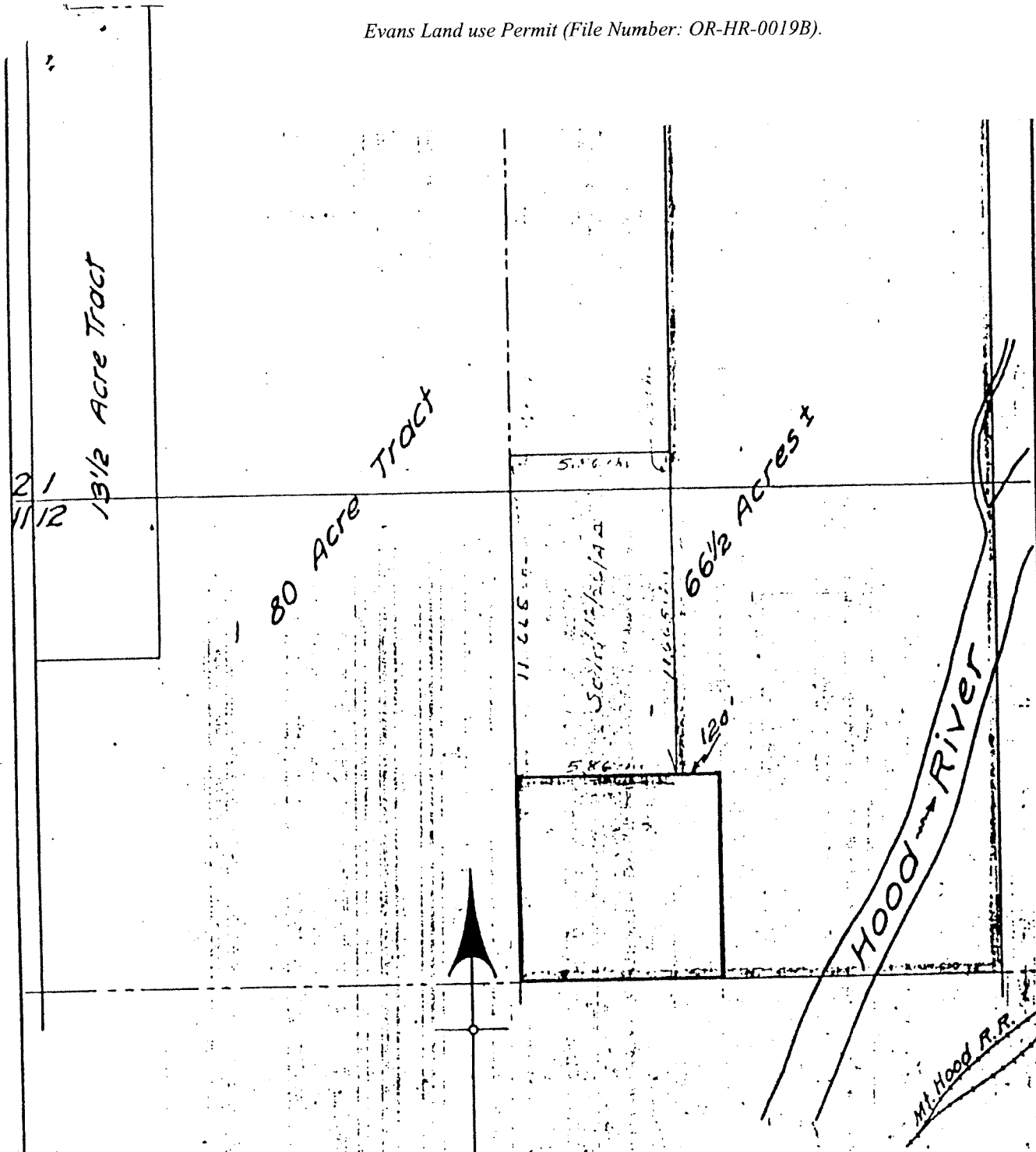
**DISCLAIMER**  
 Areas were calculated from GIS data and are approximate and subject to survey. PacifiCorp makes no warranty as to the accuracy, reliability, or completeness of this data for individual or aggregate use with other data.

SEC 12 T2N R10E WM  
HOOD RIVER COUNTY, OREGON



REV	DATE	DESC.	BY	CHK	APP
ER/PR					
DATE	7/19/95	POWERDALE HYDRO PROJECT		PACIFICORP	
ENG	DES	HR-26		SCALE 1"=400'	
DR	JMG	CH	MRH	REV.	0
APP					





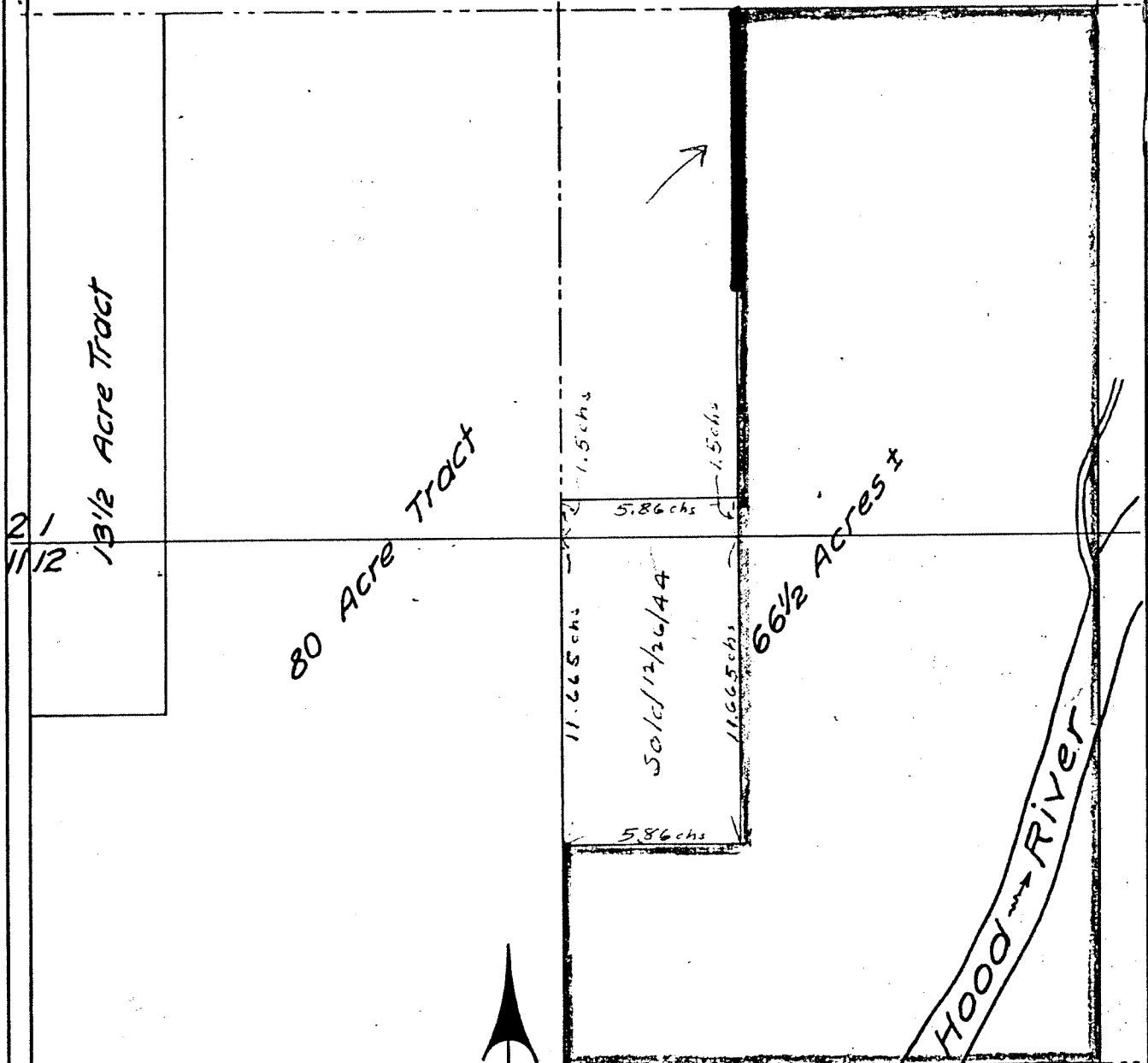
Made at Portland, Ore.  
 Wm. H. Galvani, Engineer.  
 Chief of Party.

DRAWN	M. A. B.	Feb	1916
TRACED	"	"	1916
CHECKED	R. L. S.	"	1916
APPROVED	W. H. G.	"	1916

Parcel of Land  
 in Secs. 1 & 12, T. 2N, R. 10E, W. 4M.  
 Hood River County, Ore.

PACIFIC POWER & LIGHT COMPANY  
 PORTLAND, OREGON

SCALE: 1" = 400' PA-1120



Made at Portland, Ore.  
 Wm. H. Galvani, Engineer.  
 Chief of Party.

DRAWN	M. A. B.	Feb. 1916
TRACED	"	" 1916
CHECKED	R. L. S.	" 1916
APPROVED	Wm. H. G.	1916

Parcel of Land  
 in Secs. 1 & 12, T. 2N., R. 10E., N.M.  
 Hood River County, Ore.

PACIFIC POWER & LIGHT COMPANY  
 PORTLAND, OREGON

SCALE: 1" = 400'

PA-1120

**EXHIBIT 1**

**PROPOSED SECTION 401 CERTIFICATION CONDITIONS FOR  
INTERIM OPERATION AND DECOMMISSIONING OF THE  
POWERDALE HYDROELECTRIC PROJECT**

EXHIBIT 1  
 PROPOSED SECTION 401 CERTIFICATION CONDITIONS  
 FOR INTERIM OPERATION AND DECOMMISSIONING  
 OF THE POWERDALE HYDROELECTRIC PROJECT

Unless otherwise specifically provided, the following certification conditions are effective 30 days after incorporation into a FERC license or order or other federal license or permit for interim operation and decommissioning of the Powerdale Hydroelectric Project. The conditions are in addition to certain rights and obligations of PacifiCorp and other parties set forth in the Settlement Agreement Concerning the Interim Operation and Decommissioning of the Powerdale Hydroelectric Project (Settlement Agreement), specifically PacifiCorp's obligations under the Settlement Agreement to implement certain measures at an earlier date, or to continue measures commenced at an earlier date, and including other parties' review and approval of certain activities under the Settlement Agreement.

1. Interim Operation: Conditions for Compliance with the Temperature Water Quality Standard and Total Maximum Daily Loads (TMDLs).

- a. *Temperature Management Plan.* In accordance with OAR 340-041-0026(3)(a)(D), PacifiCorp shall implement the Surface Water Temperature Management Plan approved by the Oregon Department of Environmental Quality (ODEQ) in conjunction with this certification and set forth in Conditions 1.b, 1.c, 1.d., 1.f., 1.g., 1.h., 1.i, 1.j., and 2.b.
- b. *Flows.* Subject to Condition 1.d., PacifiCorp shall implement in the bypass reach on an average hourly basis either the Hood River flow immediately upstream of the Project (less the amount required to compensate for flowline leakage up to a maximum of 25 cfs), or the minimum instream flows set forth in the following table, whichever is less. Minimum instream flow requirements may be met using a combination of flows from the fish ladder, fish screen bypass flow, trash sluice, and spillway gates.

January	140 cfs
February	220 cfs
March	220 cfs
April*	220 cfs
May*	250 cfs
June*	250 cfs
July	250 cfs
August	250 cfs
September	250 cfs
October	250 cfs
November	220 cfs
December	140 cfs

\* Minimum instream flows for temperature specified in this table for April 15 through June 30 are superseded by higher minimum instream flows provided in accordance with Conditions 2.a. and 2.b. for the same period.

- c. *Powerhouse Discharge*. Heat discharged to the Hood River through powerhouse cooling water may not exceed 19.31 million kilocalories per day.
- d. *TMDLs September 15-October 15*. To meet its load allocation (LA) under the TMDL from September 15 through October 15, PacifiCorp shall undertake the following measures:
- (1) PacifiCorp shall provide ODEQ with an annual temperature and flow monitoring report by December 31 of each year. The annual monitoring report shall include the required hourly temperature and flow data, pre- and post-deployment data, and monthly field audit data required by Condition 1.g. for that calendar year. The annual report shall identify any instances in which the seven-day moving average of daily maximum temperatures measured at the downstream end of the bypass reach exceeded 55°F during the period from September 15 through October 15. If any such instances are identified in the first three years of monitoring, PacifiCorp shall conduct and submit in the third annual temperature and flow monitoring report to ODEQ an evaluation of whether the temperature increase in the bypass reach was 0.25°F (as a seven-day moving average) more than the increase that would have occurred had the Project not diverted water from the bypass reach. In lieu of conducting this evaluation, PacifiCorp may assume that any temperature increase between the upstream and downstream ends of the bypass reach is due to Project diversions.
  - (2) If, based on the evaluation or assumed Project impact described in the preceding paragraph, ODEQ determines that the stream warming that occurred in the bypass reach was 0.25°F more than would have occurred had there been no Project diversions, PacifiCorp shall, within 90 days from written notification from ODEQ, submit to ODEQ a written proposal for measures that PacifiCorp will take to ensure that the Project-related warming in the bypass reach is not more than 0.25°F (as a seven-day moving average) when the seven-day moving average of daily maximum temperatures exceeds 55°F at the downstream end of the bypass reach between September 15 and October 15. The proposal shall include a proposed schedule for implementing the measures. The measures may include, but are not limited to, the following:
    - (a) Temperature modeling for the period September 15 through October 15 to determine what minimum instream flows would be necessary to reduce Project-related warming to 0.25°F or less (as a seven-day moving average) when the seven-day moving average of daily maximum temperatures at the downstream end of the bypass reach exceeds 55°F. If increased minimum flows are necessary and feasible, PacifiCorp shall provide the increased flows for the necessary period, subject to the limits set forth in Condition 1.d.(3).
    - (b) In the alternative, PacifiCorp may elect not to divert water (except for amounts required to compensate for flowline leakage up to 25 cfs) whenever and so long as the river temperature exceeds 55°F at the downstream end of the bypass reach between September 15 and October 15.

- (3) The following limitations apply to modifications of minimum instream flows under this Condition 1.d:
- (a) ODEQ will not require modification of flows beyond those reasonably necessary to prevent a Project-related instream temperature increase of 0.25°F or more. This limitation will only apply upon ODEQ's determination that PacifiCorp has satisfactorily demonstrated under prevailing conditions that any such modification would result in a Project-related temperature increase of less than 0.25°F.
  - (b) Modification of minimum instream flows shall be limited to no more than a 50 cfs increase in any two-year period.
  - (c) PacifiCorp's responsibility to fulfill minimum instream flow requirements shall be limited to reducing Project diversions from the bypass reach.
  - (d) No increase in minimum instream flows shall be required before September 15, 2006.
- e. *TMDLs Reservation.* In the event the Project continues to divert water for power generation or Project maintenance during and after 2012, ODEQ reserves the right to modify these certification conditions, in accordance with OAR Chapter 340, Division 48, as necessary to ensure implementation of TMDLs for any applicable period.
- f. *Resumption of Power Generation.* Following the period of temporary reduction of flow in the flowline (April 15 to June 30), PacifiCorp shall resume power generation in accordance with Condition 2.b.
- g. *Temperature Monitoring.* PacifiCorp shall monitor stream temperatures hourly from July 1 through October 15 each year at the sites PDBUP (upstream end of the bypass reach, approximately 50 meters downstream of the dam) and PDBDN (downstream end of the bypass reach, approximately 250 meters upstream of the powerhouse). The accuracy of temperature recorders shall be tested before and after field deployment to ensure that they are operating within their designated range of accuracy. In addition to pre- and post-deployment checks, the temperature recorders shall be audited monthly during the field measurement period. The pre- and post-deployment and monthly field audit checks shall be made using a National Institute of Standards and Technology (NIST) traceable (calibrated and maintained) thermometer accurate to  $\pm 0.2^{\circ}\text{C}$  or better, which has been checked against an NIST traceable thermometer. PacifiCorp shall also record average hourly flows released from the diversion dam into the bypass reach for the period July 1 through October 15. These flows shall be measured in accordance with Condition 1.h.

h. *Flow Monitoring.*

- (1) PacifiCorp shall measure instream flows by a Programmable Logic Control or alternative method for monitoring compliance with minimum instream flows, consistent with standard operating procedures developed by PacifiCorp in consultation with ODEQ, the Oregon Department of Fish and Wildlife (ODFW), the National Marine Fisheries Service (NMFS), the U.S. Fish and Wildlife Service (USFWS), and the Confederated Tribes of the Warm Springs Reservation of Oregon (CTWS).
  - (2) PacifiCorp shall publicly post hourly flow data on the Internet. The Internet posting shall clearly display the total average hourly river flow being released into the bypass reach directly downstream of the diversion dam. The Internet posting shall also display the average hourly flow being diverted to the flow conveyance system. Flows shall be reported in cfs. PacifiCorp shall post hourly flow measurements as timely as possible but no more than 24 hours after such measurements are taken.
  - (3) Unless otherwise agreed upon in writing by ODEQ and PacifiCorp in consultation with ODFW, OWRD, NMFS, USFWS, and CTWS, the following flow verification requirements shall apply: For the first two years, rating tables, including any discharge coefficients used to calculate the gaged flows being tracked by the PLC system, shall be verified at least once every six weeks during the periods when flows at the Tucker Bridge Gage are less than the sum of the minimum instream flow plus the power claim flow (generally about July through November); Rating tables shall be set-up to cover a range of operation settings; If after the initial two-year period a control structure rating table demonstrates stability, then verification measurements shall be conducted at least once per year; If after the initial two-year period a control structure demonstrates instability, or when maintenance changes flow conditions through a control structure, then more frequent than once-per-year verification measurements shall be conducted on an as-needed basis to re-establish a stable rating table for the particular control structure.
- i. *Measurable Increase.* Any Project-related instream temperature increase of 0.25°F or less above the relevant criterion shall not be deemed to contribute to an exceedance of the temperature criterion or to a violation of the temperature water quality standard.
  - j. *Monitoring Modifications.* ODEQ may make modifications to temperature monitoring required under Condition 1.g. that ODEQ considers to be reasonable and feasible, or, after consultation with ODFW, OWRD, NMFS, USFWS, and CTWS, make reasonable and feasible modifications to flow monitoring required under Condition 1.h, if:
    - (1) The monitoring requirements prove to be insufficient to provide the necessary data; or,
    - (2) Modifications to minimum instream flow requirements require modifications to monitoring requirements.

- k. *Temperature Flow Modifications.* With the approval of ODEQ, PacifiCorp may cease implementing or may implement modified flows under the Temperature Management Plan. ODEQ may approve cessation or modification if ODEQ determines that it will not impair the achievement of any TMDL or LA for the Project for temperature and will not contribute to the exceedance of the relevant temperature criterion in waters affected by the Project.
- l. *Duration of Conditions.* The above conditions in this section will cease to be effective upon commencement of removal of the dam structure.
2. Interim Operation: Conditions for Compliance with the Biological Criteria, pH, Dissolved Oxygen, and Turbidity Water Quality Standards, Protection of Beneficial Uses, and Compliance with Other Appropriate State Laws.
- a. *Flows.* Subject to Condition 1.d, PacifiCorp shall implement in the bypass reach either the Hood River flow immediately upstream of the Project (less the amount required to compensate for flowline leakage up to a maximum of 25 cfs), or the following minimum instream flows, whichever is less:
- February 1 to April 14: 220 cfs
  - April 15 to June 30: manage flows as set forth in Condition 2.b
  - July 1 to October 31: 250 cfs
  - November 1 to November 30: 220 cfs
  - December 1 to January 31: 140 cfs

Minimum instream flow requirements may be met using a combination of flows from the fish ladder, fish screen bypass flow, trash sluice, and spillway gates.

- b. *Temporary Reduction in Diversion Flow.*
- (1) From April 15 to June 30 each year, PacifiCorp shall reduce diversion flow to a maximum of 25 cfs. All flows in excess of the amount required to compensate for flowline leakage up to the maximum of 25 cfs shall be passed by the dam.
  - (2) PacifiCorp may resume power generation on July 1 of each year. For the 96 hours prior to the start-up of the turbine unit, PacifiCorp shall use multiparameter continuous monitoring devices approved by ODEQ to sample water quality at two sites in the river agreed upon by ODEQ. One site shall be just upstream of the powerhouse tailrace at site PDBDN as defined in Condition 1.g; the other shall be approximately 30 meters downstream of the powerhouse tailrace confluence with the river along the east bank. The continuous sampling devices shall sample and record hourly stream temperature, dissolved oxygen, pH, and turbidity. At least 72 hours prior to the start-up of the turbine unit, but not less than 24 hours after commencing the continuous monitoring, PacifiCorp shall open a 10-inch drain valve in the powerhouse near the tailrace to provide a slow exchange of flowline water. Upon



beginning generation on July 1, PacifiCorp shall set the turbine generator unit on the minimum wicket gate setting required to synchronize the turbine generator. PacifiCorp shall then ramp the turbine generator load in sufficiently small increments to the extent feasible to maintain the ramping requirements set forth in Condition 2.c. Monitoring under this Condition 2.b.(2) at the two sampling sites may cease 24 hours after beginning generation. The multiparameter devices shall be calibrated for each parameter according to the manufacturer's specifications prior to deployment. At the time the instruments are deployed in the water and when they are retrieved at each site, PacifiCorp shall audit the multiparameter devices by measuring stream temperature with an NIST traceable thermometer accurate to  $\pm 0.2^{\circ}\text{C}$  and measure stream dissolved oxygen via Winkler titration. Within 30 days after the instruments are retrieved, PacifiCorp shall forward ODEQ the electronic files of the continuous sampling, audit, and calibration data.

- (3) The procedure set forth in Condition 2.b.(2) might provide dilution of flowline water in excess of that necessary to comply with water quality standards. PacifiCorp may reduce or cease its monitoring effort under Condition 2.b.(2) following three consecutive years of monitoring data, of quality considered accurate and reliable by ODEQ, demonstrating that the flowline water does not contribute to an exceedance of a water quality standard at the downstream monitoring site described in that condition. In the absence of three years of such data, PacifiCorp may reduce or cease its monitoring effort under Condition 2.b.(2) if ODEQ provides written approval based upon an ODEQ determination that there is no reasonable potential for the flowline water to contribute to an exceedance of one or more water quality standards at the downstream monitoring site. If, notwithstanding use of the procedure described in Condition 2.b.(2), the flowline water causes an exceedance of water quality standards at the downstream monitoring site, ODEQ may direct PacifiCorp to develop and propose, within a reasonable time specified by ODEQ, alternative measures for ensuring that the flowline water does not cause an exceedance of water quality standards at the downstream monitoring site upon beginning generation. Upon approval by ODEQ, PacifiCorp shall implement the alternative measures, which may include increased diversion flow during the period April 15 through June 30.

*c. Ramping.*

- (1) PacifiCorp shall make reasonable efforts to limit the ramping rates in the bypass reach to no more than two inches per hour, and in any event such rates shall not exceed three inches per hour. In addition, PacifiCorp shall complete and implement standard operating procedures and a monitoring plan, developed in consultation with ODEQ, ODFW, NMFS, USFWS, and CTWS, for meeting and documenting compliance with the ramping limits. Should development or implementation of the monitoring plan, or the resulting data, show that a different ramping rate will result in the same protections for aquatic species (for example, when river flows into the Project are already high), PacifiCorp may propose such a different ramping requirement. Upon the approval of ODEQ in consultation with ODFW, NMFS,

USFWS, and CTWS, the approved variation shall be substituted for the ramping requirements set forth in this condition.

(2) “Ramping” means those Project-induced increases (up-ramping) and decreases (down-ramping) in river discharge and associated changes in water surface elevation over time resulting from generation of electricity by Project facilities, Project maintenance activities (i.e., planned outages) and unplanned (forced) outages. Ramping does not include changes in flows and change in river stage resulting from increases or decreases in stream flow unrelated to the Project. Ramping rates in this certification are stated in inches of change per hour. Ramping is measured as the distance between the maximum and minimum water level measured at a specified location over the applicable period of time; variation in water levels within the maximum and minimum water level during that period are not considered for purposes of measuring ramping. For example, if the relevant ramping limitation is one inch per hour, and the river gage is at four feet at noon, then during the next hour the water elevation may vary no more than between three feet eleven inches and four feet; between four feet and four feet one inch; et cetera. In each example, the amount of change between the minimum and maximum gage readings in a one-hour time period is not more than one inch, but could vary within that range more than once during the hour.

(3) Following an unplanned outage, PacifiCorp shall observe conditions directly downstream of the Project dam and powerhouse. Should PacifiCorp, ODFW, CTWS, NMFS, or USFWS identify a fish stranding problem, PacifiCorp shall use its best reasonable efforts to minimize the impacts of such stranding by relocating such fish to the river in consultation with ODFW, CTWS, NMFS and USFWS.

d. *Flow Monitoring.* PacifiCorp shall measure and report flows in accordance with Condition 1.h.

e. *Planned Outages.* PacifiCorp shall, to the extent feasible, limit planned outages to April 15 to June 30 to coincide with the temporary reduction of diversion flow required under Condition 2.b., or with the summer, and shall limit planned non-summer outages to 24 hours to the extent reasonably feasible. PacifiCorp shall notify ODFW, NMFS, USFWS, and CTWS of planned outages and subsequent start up periods to allow for monitoring of those areas with the greatest possibility for fish stranding.

f. *Flushing.* PacifiCorp shall restrict flushing of the sand settling basin to periods when bypass reach instream flows are at least 500 cfs, and preferably greater than 1,000 cfs.

g. *Intake Screens.* PacifiCorp shall continue to operate and maintain existing intake screens in working order. The maintenance shall include regular inspections and the repair, rehabilitation, or replacement, as needed, of seals and moving components such as chain drives, sprockets, screen baskets, motors, and screen wash equipment. If a screen is damaged beyond repair, PacifiCorp shall replace it with a screen of similar design;

however, PacifiCorp shall not be required to design or install an upgraded fish screen or otherwise make technological or other major improvements.

- h. *Fishway Auxiliary Water Intake.* PacifiCorp shall identify and obtain NMFS, USFWS, ODFW and CTWS written approval of a method for maintaining the fish ladder auxiliary attraction water bar rack within the ladder sufficiently free of debris to allow adequate attraction flows. Alternatives to be considered shall be limited to the following unless PacifiCorp and the aforementioned agencies agree otherwise: frequent manual cleaning, modification of the bar spacing on the existing intake trash rack, installation of an intake device incorporating v-bar screen technology, or changing the spacing of the bars on the rack within the ladder. Recommendations and supporting documentation shall be shared with NMFS, USFWS, ODFW and CTWS. No later than the first in-water work opportunity, PacifiCorp shall obtain approval and implement the approved method identified in this condition.
  - i. *Ground-Disturbing Activities.* Unless emergency conditions exist that require immediate action, PacifiCorp shall limit adverse effects on stream and wetland habitat from any ground-disturbing activities by (i) minimizing the area of disturbance; (ii) adhering to conditions in any applicable U.S. Army Corps of Engineers and Oregon Division of State Lands wetlands permits; (iii) consulting with state and federal wildlife agencies, CTWS, and, when necessary, the Columbia River Gorge Commission prior to carrying out the work to determine appropriate protection measures; (iv) limiting construction to the summer and fall; (v) revegetating disturbed areas with native vegetation to the extent feasible; and (vi) controlling sedimentation of aquatic habitat through erosion control measures contained in the applicable permits. PacifiCorp shall conduct a survey before the initial ground-breaking activity for rare, threatened and endangered species in areas planned for significant construction activities, and shall coordinate with the USFWS, ODFW, the Oregon Department of Agriculture, and the Oregon Natural Heritage Program to ensure that the target species list is current.
  - j. *Duration of Conditions.* The above conditions in this section will cease to be effective upon commencement of removal of the dam structure.
3. Decommissioning: Conditions for Compliance with Water Quality Standards, Protection of Beneficial Uses, and Compliance with Other Appropriate State Laws.
- a. Upon applying for a federal permit or permits for decommissioning activities, including a dredge and fill permit from the U.S. Army Corps of Engineers (Corps) pursuant to Section 404 of the Clean Water Act (§ 404 permit), PacifiCorp shall provide written notice to ODEQ of such application and of any proposed changes in decommissioning activities since the date of issuance of this certification. Within 60 days of ODEQ's receipt of notice from the Corps or other federal permitting agency that it is processing PacifiCorp's application, ODEQ will notify the federal agency and PacifiCorp either (i) that this certification is sufficient for purposes of the federal permit and permit conditions, or (ii) that, in light of new information related to the water quality impacts of decommissioning activities since issuance of this certification, there is no longer

reasonable assurance of compliance with state water quality standards. In the latter event, ODEQ will consider the new information, solicit and consider public and agency comment as required by law, and issue a Section 401 certification determination for purposes of the federal permit and decommissioning activities.

b. In the event ODEQ determines that this certification is sufficient for purposes of a federal permit or permits for decommissioning activities, PacifiCorp shall comply with the following conditions:

(1) *Decommissioning*. Unless otherwise approved by ODEQ in consultation with ODFW, NMFS, USFWS, and CTWS, PacifiCorp shall perform decommissioning in accordance with the Settlement Agreement and the Decommissioning Plan attached to and incorporated by reference into the Settlement Agreement.

(2) *Erosion and Sediment Control Plan*. Before commencement of any in-water decommissioning activities, PacifiCorp shall develop and submit to ODEQ for approval, in consultation with ODFW, NMFS, USFWS, and CTWS, an Erosion and Sediment Control Plan (ESCP) that identifies specific methods that will be implemented at each work area to protect water quality and aquatic habitat. The ESCP shall address (i) protection of the Hood River from unplanned releases of sediment and debris during decommissioning activities; (ii) disposition of sediment and decommissioning debris in accordance with applicable law, PacifiCorp's Spill Prevention, Control and Countermeasure Plan (SPCC Plan), and public health and safety; (iii) implementation of permanent revegetation measures consistent with best management practices; and (iv) dam removal, which shall be conducted in dry conditions using a coffer dam and artificial channel to divert flows from work areas. In addition, the ESCP shall specify measures such as berms, ditches, sediment retention basins, silt fencing, and site restoration to be undertaken by PacifiCorp. Upon ODEQ approval of the ESCP in consultation with ODFW, NMFS, USFWS, and CTWS, PacifiCorp shall implement the ESCP during decommissioning activities.

(3) *Timing and Notification of In-Water Work*. For all in-water decommissioning work, PacifiCorp shall conduct such work between July 15 and August 31, or outside of that time period with the approval of ODFW, NMFS, and USFWS. Actions that are likely to occur outside of the July 15 to August 31 period include the following decommissioning actions:

(a) Construction and removal of upstream and downstream cofferdams, cofferdam materials and culverts;

(b) Removal of the artificial upstream fish passage channel and bypass flume;

(c) Placement of materials (relocated cofferdam materials and available streambed materials) along the river to create access for removal of remaining portions of dam and fish ladder;

(d) Placement of materials to regrade and armor the east and west banks of the river to harden the disturbed areas; and

(e) Regrading of the streambed above and below the dam as necessary to assist with removal of any barriers to fish passage created as a result of decommissioning activities.

PacifiCorp shall provide NMFS, USFWS, ODFW, and CTWS reasonable notice before initiating any in-water work, regardless of when it occurs, to enable them to view the work and recommend fish salvage or other immediate measures to avoid fish stranding or delay. PacifiCorp shall undertake such measures with the assistance of ODFW and CTWS. For purposes of this requirement, "in-water work" does not include dam removal or other decommissioning actions performed in areas that have been dewatered for purposes of decommissioning actions.

(4) *Fish Passage During Dam Removal.*

(a) *Manner of Fish Passage.* During construction of the cofferdams associated with dam removal activities, PacifiCorp shall extend the existing fish ladder return channel upstream of the dam to above the upstream cofferdam work, and shall install culverts through the downstream cofferdam to provide continued access to the existing fish ladder entrance; provided that PacifiCorp shall not provide such fish passage through the cofferdam culvert if NMFS, USFWS, ODFW and CTWS agree that such passage is not necessary. Coincidental to the construction of the cofferdams, PacifiCorp shall construct an artificial channel extending from a mid-point on the existing fish ladder to a location immediately downstream of the downstream cofferdam. Upon completion of this channel and the bypass channel (described below), PacifiCorp shall close the fish access through the downstream cofferdam, allowing upstream migrants to enter the existing fish ladder structure through a newly constructed access. PacifiCorp shall place rock between the upstream return channel and water bypass intake to minimize upstream migrant entrainment into the downstream bypass flume. During dam removal, PacifiCorp shall divert river flow past the work zone using portions of the existing water conveyance system's steel flume by installing removed sections of the steel flume from above the upstream cofferdam to below the downstream cofferdam, passing over the overflow section and existing fish ladder. This will provide downstream fish passage. PacifiCorp shall position the bypass flume to discharge directly into a pool constructed at the entrance of the upstream passage channel to attract upstream migrants to the channel. The discharge area shall be designed with adequate pool area and depth to minimize impingement of downstream migrants on the bottom or sides of the pool. The requirements of this condition may be modified with the written agreement of PacifiCorp, NMFS, USFWS, ODFW and CTWS.

(b) *Final Fish Passage Design and Construction Plans.* Prior to changing any of the existing fish passage facilities or constructing any new fish passage facilities associated with dam removal, PacifiCorp shall prepare final fish passage design and

construction plans in consultation with NMFS, USFWS, ODFW and CTWS. The final design and construction plans shall be consistent with Condition 3.b.(4)(a) and the following criteria, which may be modified with the written agreement of PacifiCorp, NMFS, USFWS, ODFW and CTWS.

(i) The outfall from the flume shall be designed in accordance with, as appropriate, sections 7.4.1, 7.4.2, 7.4.3, 13.10.4, 13.10.5 and 13.10.6 of NMFS' Draft Anadromous Salmonid Passage Facility Guidelines and Criteria as of the Effective Date of the Settlement Agreement. In addition, the pool volume and depth will be designed to minimize pool bottom surface velocities and injury to fish. For purposes of section 13.10.5, the design will minimize, but may not completely avoid, creation of false attraction flows. The outfall shall have a 10-foot minimum drop to the pool below (to prevent adults from entering the pipe), and shall be designed to provide smooth, rounded edges and surfaces, using materials similar to the flume, to minimize injury to fish exiting the pipe and to jumping adults;

(ii) The pipe/flume shall be designed in accordance with, as appropriate, sections 13.9.3.1, 13.9.3.4, 13.9.3.5, 13.9.3.6, 13.9.3.9, 13.9.3.11, 13.9.3.13 and 13.9.3.14 of NMFS' Draft Anadromous Salmonid Passage Facility Guidelines and Criteria as of the Effective Date of the Settlement Agreement. Weathered steel surfaces presently existing on the steel flume sections, or alternatively the galvanized surfaces of standard culvert material, shall be considered acceptable for this application, provided that, if the interior surfaces of the existing steel flume are considered to be too rough to meet NMFS' Passage Facility Guidelines and Criteria, PacifiCorp shall install a liner or conduct sand blasting of the interior surfaces;

(iii) The temporary approach to the fishway channel entrance shall be constructed with "field placed" structure materials to optimize local hydraulic conditions. PacifiCorp shall provide NMFS, USFWS, ODFW and CTWS a minimum of seven days notice prior to the placement of these materials to allow their on-site participation in field direction of this placement work on-site;

(iv) The control structures within the temporary approach channel to the fishway entrance shall be placed at least one channel width apart. These structures shall have less than one foot of head differential (measured from upstream of the boulder control structures to the downstream water surface elevation), and shall not span the entire width of the approach channel (unless the depth provided over the channel-spanning structure is at least one foot);

(v) If fish will be passing through the temporary culvert(s) installed in the downstream coffer dam, such culverts shall meet, as appropriate, sections 9.7.5, 9.7.8 and 9.7.9 of NMFS' Draft Anadromous Salmonid Passage Facility Guidelines and Criteria as of the Effective Date of the Settlement Agreement. In addition, the bypass shall be designed in accordance with, as appropriate, sections

9.3.2 and 9.3.3 of NMFS' Draft Anadromous Salmonid Passage Facility Guidelines and Criteria as of the Effective Date of the Settlement Agreement;

(vi) The design shall provide supplemental flow to the fishway discharge to allow optimal operation of the fish ladder and temporary approach channel; and

(vii) The design shall be developed such that flow conveyed in the bypass flume is delivered below the temporary approach channel in a manner that will maximize both upstream and downstream passage. The design shall be developed such that the bypass flume and the upstream temporary approach channel work together to both attract adult fish to the temporary approach channel, minimize delay of both upstream and downstream migrants, and minimize injury to fish passing downstream.

*(c) Fish Passage Monitoring and Contingency Plan.* By October 1, 2004, PacifiCorp shall conduct a geomorphology survey consistent with the scope of work attached as Exhibit 2 to the Settlement Agreement. PacifiCorp shall provide a final geomorphology report to NMFS, USFWS, ODFW, ODEQ and CTWS. The report shall describe: (i) current geomorphic conditions beginning 2200 feet below the dam (near the stream gage) to 1,000 feet upstream of the dam, or above the vegetated island (whichever is farther); and (ii) the anticipated impact of sediment released from dam removal on fish passage and aquatic habitat downstream of the dam removal site. PacifiCorp shall develop and implement a fish passage monitoring and mitigation plan, in consultation with NMFS, USFWS, ODFW, ODEQ and CTWS, and approved by NMFS, USFWS and ODFW. In the event a fish passage obstruction, as defined by the plan, is caused or exacerbated by dam removal, PacifiCorp shall restore adequate fish passage by implementing mitigation measures set forth in the plan. PacifiCorp shall have no obligation to monitor or mitigate under this condition for more than one cycle of seasons beyond the return of the river to natural conditions, as determined by a team composed of representatives of NMFS, USFWS, ODFW, CTWS and PacifiCorp, in accordance with the geomorphology report.

4. General Conditions for Compliance with Water Quality Standards and Certification.

- a. *Fees.* PacifiCorp shall pay a fee for ODEQ's costs of overseeing implementation of this certification. The fee shall be \$ \_\_\_\_ (2003 dollars) annually, made payable to "State of Oregon, Department of Environmental Quality," and due on July 1 of each year after FERC approval of interim operation and decommissioning. The fee shall expire six years after the first July 1 following FERC approval of interim operation and decommissioning, unless terminated earlier by ODEQ because oversight of this certification is no longer necessary. One year before the sixth-anniversary expiration of the fee, ODEQ and PacifiCorp will review the need, if any, to modify, extend, or terminate the fee. PacifiCorp shall continue to pay any fee required after such review.
- b. *Spill and Waste Management.* PacifiCorp shall implement its SPCC Plan and Waste Management Guidelines. The SPCC Plan and Waste Management Guidelines must be

kept current. In the event of a spill or release or threatened spill or release of oil or waste to state waters, PacifiCorp shall immediately implement the site's SPCC Plan, modified SPCC Plan, or other applicable contingency plan and notify the Oregon Emergency Response System at 1-800-452-0311.

- c. *Certification Modification.* Subject to the provisions of OAR Chapter 340 Division 48, and, as applicable, 33 USC § 1341, ODEQ may reconsider, and add, delete, or alter, conditions to this certification as necessary to address changes in resource conditions or knowledge or to address any failure of certification conditions to protect water quality and beneficial uses. In accordance with 33 USC § 1341, any modification to conditions shall, so long as it is in effect, become a condition of any federal license or permit subsequently issued for the Project. With respect to a federal license or permit for the Project existing at the time of the modification to certification conditions, ODEQ may petition the federal agency to incorporate the modification into the federal license or permit.
- d. *Project Changes.* PacifiCorp shall obtain ODEQ review and approval before undertaking any change to the Project that might significantly affect water quality and that was not evaluated in connection with this certification, including changes to Project operation and flows.
- e. *Project Repair or Maintenance.* PacifiCorp shall obtain ODEQ review and approval before undertaking any Project repair or maintenance activity that might significantly affect water quality and that was not evaluated in connection with this certification.
- f. *Access.* PacifiCorp shall allow ODEQ reasonable access to Project records and the Project area as necessary to monitor compliance with certification conditions.
- g. *Posting of Certification.* PacifiCorp shall post a copy of this certification at a prominent location at the Project powerhouse.



**EXHIBIT 2**

**GEOMORPHOLOGY SURVEY SCOPE OF WORK**

EXHIBIT 2  
GEOMORPHOLOGY SURVEY SCOPE OF WORK

Background

PacifiCorp has commissioned a geomorphology study for a portion of the Hood River, in close proximity to the location of the present Powerdale diversion dam. The overall objective of this study is to evaluate potential changes to the profile and cross section of the Hood River in this general location, and determine the potential for the creation of barriers to fish passage or other potential aquatic habitat impacts. The work is being conducted in two phases. The first phase, which was completed in December 2002, was comprised of a limited field reconnaissance and preliminary discussions with members of the Powerdale Hydro Project Decommissioning Settlement Team. The second phase will consist of the hydraulic and geomorphic evaluations, an assessment of potential impacts and development of mitigation and monitoring strategies if the investigations determine they are necessary. More specific details of the Scope of Work are presented below.

Scope of Services – Phase 1

1. Site Visit - A geomorphologist and habitat biologist will visit the project site to collect necessary field data for this evaluation from a geomorphic perspective. The following tasks will be conducted.
  - 1.1. Characterize the channel that might be affected by decommissioning upstream and downstream of the dam.
  - 1.2. Determine the nature of bed and bank materials, and identify potential erosion and sedimentation issues.
  - 1.3. Determine the project survey needs and communicate these to the PacifiCorp Project Manager.
2. Technical Memorandum - Prepare a brief technical memorandum documenting the findings of the site visit, addressing initial feedback from the Settlement Team.

Scope of Services – Phase 2

1. Review Scope and Approach - Coordinate with the PacifiCorp Project Manager and key Settlement Team members to review the proposed scope and schedule for Phase 2. Obtain background information related to the project including drawings of the existing facility and decommissioning plans or other project features, reports on fisheries or habitat usage, and other information.
2. Topographic Survey - Conduct a topographical survey of the Hood River in the vicinity of Powerdale dam extending 2,200 feet below the dam (near the existing staff gauge) to 1,000 feet upstream of the dam or above the vegetated island (whichever is further). This survey shall include the following specific work.

- 2.1. Longitudinal profile of the thalweg, edge of water, and floodplain edge (banks), with data collected approximately every 25 feet horizontal, or at all elevation changes of 1 foot or more.
  - 2.2. Cross-sections every 300 feet, which include the active channel, banks and floodplain areas, from the upstream end of the survey area to at least 1.000 feet downstream of the dam.
  - 2.3. More closely spaced cross-sections near the dam (four above and two below, on channel width apart as measured downstream of the dam (50 to 100 feet apart).
3. Bed Material Sampling - Bed material sampling at four locations shall be conducted using the Wolman pebble count method for characterization of the surface particle size distribution. All sampling shall be conducted in rifles or runs.
    - 3.1. Upstream end of the topographic survey area (upstream of the island).
    - 3.2. Within the existing diversion dam pool area.
    - 3.3. Downstream of the diversion dam within 200 feet.
    - 3.4. At the downstream end of the topographic survey area.
4. Preliminary Hydraulic Analysis - Based on river surveys and aerial photos prepare a backwater model and complete a preliminary analysis of water levels, velocities and the extent of the backwater from the existing dam. Estimate changes in water levels and velocities to be expected following decommissioning.
 

The level of hydraulic analysis necessary for this project will be determined after the topographic survey and bed material data are collected. The technical team determining the need and intensity of a hydraulic analysis will include technical specialists from PacifiCorp, USFWS and NOAA Fisheries.
5. Additional Site Visit (optional) - If necessary an additional site visit will be conducted to collect additional field data for this evaluation.
  6. Detailed Hydraulic Analysis - Based on the surveyed profile and cross sections and site observations, evaluate the stability of bed material and predict the short and long term channel bed profiles that might be expected to develop along the Hood River, its side channels and tributaries following the removal of the Powerdale diversion dam.
  7. Assessment of Passage Issues - Based on site observations and the predicted bed profiles evaluate the potential for short-term or long-term upstream fish passage issues which may occur after removal of the Powerdale diversion dam.
  8. Site Habitat Impacts - Based on site observations, predicted bed profiles and cross sections evaluate potential physical changes to in-stream habitat, such as pool areas, or riparian vegetation that might occur following removal of the Powerdale diversion dam.

9. Mitigation or Compensation - Identify potential mitigation and monitoring strategies to address any issues regarding upstream passage or loss of habitat at the site. Review these potential strategies with the PacifiCorp project manager and the Powerdale Settlement Team.
10. Recommendations - Develop recommendations for:
  - 10.1. Modifications to the dam removal strategy to minimize the potential for fish passage problems.
  - 10.2. Provide a strategy for mitigation of other potential habitat impacts.
  - 10.3. Recommend a monitoring plan for the area covered by the topographic survey.
11. Present Findings / Deliverables
  - 11.1. Prepare a Draft Report summarizing the results of the investigations and study work.
  - 11.2. Collect comments from PacifiCorp and the Powerdale Settlement Team.
  - 11.3. Prepare a Final Report Incorporating review comments, all study data, documentation of model data and results, all associated figures and tables, and recommendations.

**EXHIBIT 3**

**FIRST AMENDED LEASE (HYDRO LANDS)**

EXHIBIT 3

**FIRST AMENDMENT  
OF  
PERMIT (HYDRO LANDS)**

THIS FIRST AMENDMENT is entered into on this 15 day of May, 2003, between PacifiCorp, an Oregon corporation (“**PacifiCorp**”) and the Bonneville Power Administration (“**Permittee**”).

**Recitals**

A. PacifiCorp and the Permittee entered into a “Permit (Hydro Lands)” dated June 21, 1995 (the “**Permit**”) concerning, among other matters set forth in the Permit, the Powerdale Dam Fish Trapping Facility (the “**Facility**”).

B. The Permit allows Permittee to occupy and use the real property located in Hood River, Oregon, and described on attached Exhibit A (the “**Premises**”), in accordance with the terms and conditions of the Permit.

C. PacifiCorp and Permittee wish to amend the Permit as set forth in this First Amendment.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Defined Terms. Except as otherwise noted, defined terms used in this First Amendment (as indicated by initial capitalization) shall have the meaning given to those terms in the Permit.

2. Term. Paragraph 1 of the Permit is hereby deleted and replaced with the following:

“1. Term: This permit shall be in effect for a term commencing on June 21, 1995 and ending on February 29, 2012.”

3. Removal of Facility Assets. The following is hereby added to the Permit as Paragraph 32:

“32. Removal of Facility Assets.

(a) Permittee acknowledges that PacifiCorp intends to remove the diversion dam at PacifiCorp’s Powerdale Hydroelectric Project (the “**Dam**”) pursuant to a Settlement Agreement executed in May, 2003 between PacifiCorp and the National Marine Fisheries Service, *et al.* (the “**Agreement**”). To facilitate removal of the Dam, Permittee authorizes PacifiCorp (i) to remove and

dispose of from the Premises the Facility and all associated buildings, structures, improvements, equipment, material, property and other assets of any nature whatsoever, including but not limited to the Water Line contemplated by Paragraph 15 and, at PacifiCorp's sole discretion, the portion of the access road contemplated by Paragraph 17 that is on PacifiCorp property (collectively, the "**Facility Assets**"), (ii) to restore the soil surface, subsurface, and vegetation on the Premises and the lands affected by the Water Line and, if applicable, the access road to a condition that will support native plant communities similar to those that occupied the site immediately before Permittee began its use and occupancy thereof (although PacifiCorp may use non-native grasses to control erosion if it is reasonable to do so), and (iii) to undertake all necessary and desirable design, permitting, engineering, project management, restoration and mitigation services in connection with such removal and restoration ((i) through (iii) are hereinafter collectively referred to as the "**Removal Work**"). PacifiCorp shall not, however, remove the portion or portions of the Facility required to pass fish during Dam removal until such fish passage is no longer necessary pursuant to the Agreement.

(b) On or before the tenth (10<sup>th</sup>) day of each month, PacifiCorp will submit an invoice to Permittee for any reasonable out-of-pocket and overhead costs paid or incurred by PacifiCorp in performing or causing the performance of Removal Work in the prior calendar month. The invoice shall have sufficient detail to allow Permittee to determine the appropriateness of each cost. Permittee shall reimburse PacifiCorp's costs within thirty (30) days of receipt of an invoice. Late payments shall bear interest at the rate of 10% per annum from the date due until paid; *provided, however,* that the interest rate shall not exceed the maximum rate allowed by law. If Permittee questions the reasonableness of any costs submitted on an invoice, Permittee shall pay any undisputed amount and shall notify PacifiCorp of the dispute as promptly as possible and in any case before payment is due. If subsequent efforts by the parties do not resolve the question, Permittee may audit PacifiCorp's costs paid or incurred in performing or causing the performance of Removal Work. Permittee shall complete any such audit no later than sixty (60) days after receiving PacifiCorp's invoice. If Permittee is determined to owe the disputed amount or any portion thereof, it shall pay the amount due plus interest at the rate set forth above. To the extent that PacifiCorp wishes to engage a third party to perform all or any part of the Removal Work, it shall consult with Permittee concerning the selection of the third party.

(c) Upon commencement of the Removal Work all right and title to Permittee's Facility Assets shall vest in PacifiCorp, and PacifiCorp shall have no liability to Permittee for damage to the Fish Trapping Facility Assets and associated improvements, equipment and property incurred in connection with removal by PacifiCorp."

4. Effect of First Amendment. The Permit, as modified by this First Amendment, remains in full force and effect in accordance with its terms. If there is a conflict between the Permit and this First Amendment, the First Amendment shall control.

IN WITNESS WHEREOF, the Parties have entered into this First Amendment as of the date set forth above.

**PACIFICORP**

By: Randy Landolt  
Printed Name: Randy Landolt  
Title: Managing Director, Hydro Resources

**BONNEVILLE POWER ADMINISTRATION**

By: John R Cowger  
Printed Name: JOHN R COWGER  
Title: Mgr, Real Property



## EXHIBIT A

### Legal Description

Tract PDFF-FF-1, a tract of land for the Powerdale Dam Fish Trapping Facility site, as described in Exhibit A attached hereto and by this reference made a part hereof.

Tract PDFF-FF-2: a strip of land 10-feet wide, for the construction, operation and maintenance of a waterline, being 5 feet on each side of and parallel with the centerline, with an extension thereof over and across Hood River, attached to the Pacificorp Powerdale Dam, in part of the SE1/4SE1/4 of Section 11 and part of the SW1/4SW1/4 of Section 12, Township 2 North, Range 10 East, Willamette Meridian, Hood River county, Oregon. Said waterline centerline is shown on the drawing attached hereto as Exhibit B and by this reference made a part hereof.

Tract PDFF-FF-AR-1,P1: a right-of-way of variable width for a road to be constructed over and across part of the W1/2SW1/4 and part of the NE1/4SW1/4 of Section 12, Township 2 North, Range 10 East of the Willamette Meridian, Hood River County, Oregon, as shown on the drawing attached hereto as Exhibit C and by this reference made a part hereof. This right-of-way is permitted to cross under Pacific's 69kV powerline as described in tracts PDFF-AR-1, 1A; PDFF-AR-1, 1B; PDFF-AR-1, 3A; PDFF-AR-1, 3B as described in Exhibit D attached hereto and by this reference made a part hereof.

Use of existing access road referred to as Copper Dam Road, across Pacific's property located in part of the W1/2SW1/4 of Section 12, and part of the SE1/4SE1/4 of Section 11, in Township 2 North, Range 10 East, lying northwesterly of the Hood River in Hood River County, Oregon. Copper Dam Road is shown on the drawing attached hereto as Exhibit B and by this reference made a part hereof.

Temporary use of staging area as shown on the drawing attached hereto as Exhibit E and by this reference made a part hereof. Temporary use of Pacific's powerline access road easement which crosses Neal Creek. Temporary use of staging area and access road easement will terminate upon completion of construction of the Powerdale Dam Fish Trapping Facility, or on December 31, 1997, whichever comes first.

**EXHIBIT 4**

**CONSERVATION EASEMENT FOR SUBJECT LANDS**

EXHIBIT 4  
CONSERVATION EASEMENT FOR SUBJECT LANDS

**DEED OF CONSERVATION EASEMENT  
FOR POWERDALE PROJECT LANDS**

THIS GRANT DEED OF CONSERVATION EASEMENT (“Conservation Easement”) is made this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by \_\_\_\_\_ (“Grantor”) in favor of Oregon Department of Fish and Wildlife (“ODFW”); Confederated Tribes of the Warm Springs Reservation of Oregon (“CTWS”); Hood River Watershed Group (“HRWG”), Hood River County Parks and Buildings (“HRCPB”); and Hood River Valley Parks and Recreation District (“HRVPRD”), referred to collectively as “Grantees.”

**I. RECITALS**

A. Grantor is the fee simple owner of the real property commonly known as the Powerdale Project Lands (the “Project Lands”) in Hood River County, Oregon, described in Exhibit A, attached to this deed and incorporated by reference.

B. Some or all Grantees are parties to the Settlement Agreement Concerning the Interim Operation and Decommissioning of the Powerdale Hydroelectric Project dated \_\_\_\_\_, 2003 (the “Settlement Agreement”). The Settlement Agreement provides for the conveyance of the Project Lands subject to a Conservation Easement for certain stated purposes to an entity to be identified by Grantees.

C. Grantees have identified Grantor as the party to take conveyance of the Project Lands in accordance with the terms of the Settlement Agreement.

D. Grantor intends to convey to Grantees the right to preserve and protect the wildlife habitat, recreation and other values of the Project Lands, in accordance with the Goals listed in Section III below, in perpetuity.

E. The parties to this Conservation Easement (“Parties”) intend that this Conservation Easement comply with the requirements of, and be construed in accordance with, ORS 271.715 to 271.795, as amended.

**II. CONVEYANCE AND CONSIDERATION**

For and in consideration of the conveyance of the Project Lands to Grantor in accordance with the Settlement Agreement, Grantor hereby voluntarily grants and conveys to Grantees a Conservation Easement of the nature and character and to the extent hereinafter set forth over the Project Lands in perpetuity. This Conservation Easement shall be an easement in gross and shall run with the land as an incorporeal interest in the Project Lands. Grantor shall record this Conservation Easement in the records of deeds of real property in the county where the Project Lands are located, as authorized by ORS 271.725 and ORS 93.710.

### **III. PURPOSE**

It is the purpose of this Conservation Easement to achieve the following Goals:

**Goal 1:** Protect the existing fish and wildlife habitat while allowing for habitat restoration and enhancement;

**Goal 2:** Retain existing recreational uses and allow improvements commensurate with those uses, provided such uses and improvements are consistent with Goal 1;

**Goal 3:** Allow for expanded recreational and educational opportunities, provided those are consistent with Goal 1; and

**Goal 4:** Acknowledge and preserve the right of CTWS tribal members to exercise their Treaty secured off-reservation fishing rights on the Subject Lands by utilizing the Subject Lands to access usual and accustomed fishing sites.

Grantor intends that this Conservation Easement will confine the use of the Project Lands to such activities as are consistent with this purpose. Grantees shall have the right, but not the obligation, to enforce any and all terms of this Conservation Easement.

### **IV. PROHIBITED USES**

Grantor will ensure that Project Lands will be managed in accordance with the Goals listed in Section III, above. The Parties intend that any activity that violates the Goals is prohibited. Prohibited uses of Project Lands include, but are not limited to, those specifically listed below:

1. Timber harvesting, or the removal of other shrubbery or vegetation, except harvesting conducted for the purpose of improving fish or wildlife habitat, or as is necessary for proper fire management, for disease protection, or as is necessary for protection of person or property;
2. All commercial or industrial uses of Project Lands, except that the existing fruit orchard and electrical generation uses may be continued pursuant to the terms of the applicable agreements and permits in existence as of the current date, including any subsequent amendments or renewals thereof;
3. Depositing of soil, trash, ashes, garbage, waste, bio-solids or any other material, except as allowed under applicable federal, state, and local laws at approved locations;
4. Diking, draining, filling, dredging or removal of any wetland or wetlands;
5. Excavating, dredging or removing of loam, gravel, soil, rock, minerals, sand, hydrocarbons or other materials, except as needed to achieve the Goals listed in Section III;

6. Otherwise altering the general topography of the Property, including but not limited to building of roads and flood control work, except for work related to the accomplishment of the Goals listed in Section III; and

7. Granting any easement, lien, or other property interest that might affect the purpose of this Conservation Easement without the written consent of all existing Grantees.

8. Any other use that, overall, the Grantor or Grantees determine has a material negative impact on those Goals listed in Section III.

## **V. PERMITTED USES**

Grantor reserves, for itself and its heirs, successors, and assigns, the right to pursue activities on or use of the Project Lands which are consistent with the purpose of this Conservation Easement and which are not otherwise prohibited under Section IV.

## **VI. RIGHTS CONVEYED TO GRANTEES**

To accomplish the purpose of this Conservation Easement, Grantor conveys the following rights to Grantees:

1. The right to enter the Project Lands at reasonable times to monitor compliance with, and to enforce or otherwise exercise their rights under, this Conservation Easement;

2. The right to prevent any activity on, or use of, the Project Lands that is inconsistent with the purpose of this Conservation Easement or Prohibited Uses; and

3. The right to require Grantor to restore any areas or features of the Project Lands that are damaged by any activity prohibited by, or inconsistent with, this Conservation Easement.

## **VII. ENFORCEMENT AND REMEDIES**

A. Remedies. Upon any violation of the terms of this Conservation Easement by Grantor, and after providing notice of such breach and opportunity to cure as provided below, Grantees, jointly or severally, may exercise any or all of the following remedies:

1. Institute suits to enjoin any breach or enforce any covenant by ex parte, temporary, and/or permanent injunction, either prohibitive or mandatory; and

2. Require that the Project Lands be restored promptly to their condition prior to the violation.

Grantees' remedies shall be cumulative and shall be in addition to any other rights and remedies available to Grantees at law or equity. If Grantors are found to have breached any of the Terms under this Conservation Easement, Grantors shall reimburse Grantees for any costs or expenses incurred by Grantees in enforcing this Conservation Easement, including court costs and reasonable attorney's fees.

B. Notice and Opportunity to Cure. At least thirty (30) days before filing any legal action to enforce this Conservation Easement, Grantee or Grantees shall provide Grantor with written notice identifying the violation and demanding corrective action to cure the violation and, if applicable, to restore the Project Lands; provided, however, that if at any time Grantee or Grantees determine that the violation constitutes immediate and irreparable harm, no written notice is required and Grantee or Grantees may immediately pursue legal remedies to prevent or limit such harm. If Grantor fails to cure any such violation within thirty (30) days of its receipt of such notice, Grantee or Grantees may institute suit as described above.

C. Effect of Failure to Enforce. No failure or delay on the part of Grantees to enforce this Conservation Easement or any of its terms shall discharge or invalidate this Conservation Easement or any of its terms; nor shall such failure or delay affect the right of Grantees to enforce the same at a later date, or in the event of a subsequent violation or breach.

D. Effect of Multiple Grantees. Each Grantee has independent authority to enforce this Conservation Easement. In the event that Grantees do not agree as to whether the Grantor is in compliance with this Conservation Easement, each Grantee may independently proceed with enforcement actions with the written consent of a majority of existing Grantees.

## VIII. MISCELLANEOUS

A. Modification. This Conservation Easement may not be modified except by a written instrument signed and dated by Grantor (or its successor) and each existing Grantee (or its successor).

B. Assignment. No Grantee may assign any of its rights, interests, or obligations under this Conservation Easement without the prior written consent of each existing Grantee.

C. Binding Effect. This Conservation Easement shall be binding on and inure to the benefit of the Parties and their respective heirs, personal representatives, successors, and permitted assigns.

**IX. SIGNATURE AND ACKNOWLEDGMENTS**

To have and to hold the easement herein granted unto GRANTEES and its successors and assigns, forever, IN WITNESS WHEREOF, the undersigned Grantor has executed this instrument this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
\_\_\_\_\_

NAME:  
TITLE:

STATE OF OREGON            )  
  ) ss.  
County of \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by \_\_\_\_\_.

\_\_\_\_\_  
Notary Public for Oregon

**EXHIBIT 5**

**APPLICABLE NMFS DRAFT ANADROMOUS SALMONID  
PASSAGE FACILITY GUIDELINES AND CRITERIA**



EXHIBIT 5  
APPLICABLE NMFS DRAFT ANADROMOUS SALMONID  
PASSAGE FACILITY GUIDELINES AND CRITERIA \*

\*\*\*

7.4 Vertical Drop Structures - Description: A vertical drop structure can function as an exclusion barrier by providing total project head in excess of the leaping ability of the target fish species. These can be a concrete monolith, rubber dam, or approved alternative. Vertical drop structure criteria include the following:

7.4.1 The minimum height for vertical drop structure shall be 10 feet relative to the tailrace high design flow elevation.

7.4.2 To minimize the potential for leaping injuries, a minimum of 2 feet cantilevered ledge shall be provided.

7.4.3 Provision shall be made to ensure that fish jumping at the drop structure flow will land in a minimum 5 foot deep pool, without contacting any solid surface.

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9.3.2 Culvert Slope - The culvert shall be placed level (0% slope).

9.3.3 Embedment - The bottom of the culvert shall be buried into the streambed not less than 20% of the culvert height at the outlet and not more than 40% of the culvert height at the inlet.

\*\*\*

9.7.5 Temporary crossings, placed in salmonid streams for water diversion during construction activities, shall meet all of the guidelines in this document. However, if it can be shown that the location of a temporary crossing in the stream network is not a fish passage concern at the time of the project, then the construction activity only needs to minimize erosion, sediment delivery, and impact to surrounding riparian vegetation.

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9.7.8 Construction disturbance to the area shall be minimized and the activity shall not adversely impact fish migration or spawning.

9.7.9 If salmon are likely to be present, fish clearing or salvage operations shall be conducted by qualified personnel prior to construction. If these fish are listed as threatened or endangered

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\* NMFS draft as of the Effective Date of the Settlement Agreement. The draft criteria listed in this Exhibit 5 are the agreed-upon criteria for this Settlement Agreement.

under the federal or state Endangered Species Act, consult directly with NOAA Fisheries biologists to gain authorization for these activities. Care shall be taken to ensure fish are not chased up under banks or logs that will be removed or dislocated by construction. Return any stranded fish to a suitable location in a nearby live stream by a method that does not require handling of the fish.

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13.9.3.1 Bypass pipes and joints shall have smooth surfaces to provide conditions that minimize turbulence, risk of catching debris and the potential for fish injury. Pipe joints may be subject to inspection and approval by NOAA Fisheries prior to implementation of the bypass.

\*\*\*

13.9.3.4 In general, bypass flows should be open channel. If required by site conditions, pressures in the bypass pipe shall be equal to or above atmospheric pressures. In no instance shall there be pressurized to non-pressurized (or vice-versa) transitions within the pipe. Bypass pipes shall be designed to allow trapped air to escape.

\*\*\*

13.9.3.5 Bends should be avoided in the layout of bypass pipes due to the potential for debris clogging and turbulence. The ratio of bypass pipe center-line radius of curvature to pipe diameter (R/D) shall be greater than or equal to 5. Greater R/D may be required for super-critical velocities.

13.9.3.6 Bypass pipes or open channels shall be designed to minimize debris clogging and sediment deposition and to facilitate inspection and cleaning as necessary. Access ports shall be provided to allow for detection and removal of debris.

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13.9.3.9 The design pipe velocity should be between 6 and 12 fps for the entire operational range. If higher velocities are approved, special attention to pipe and joint smoothness is required. In no instance shall pipe velocity be less than 2 fps

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13.9.3.11 Closure valves of any type are not allowed within the bypass pipe unless specifically approved based on demonstrated fish safety.

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13.9.3.13. There should not be a hydraulic jump within the pipe, unless a weak jump is specifically approved by NOAA Fisheries.

13.9.3.14 The bypass pipe design shall facilitate the detection and removal of debris that may lodge in the pipe.

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13.10.4 Maximum bypass outfall impact velocity (i.e. the velocity of bypass flow entering the river) including vertical and horizontal velocity components shall be less than 25.0 ft/s.

13.10.5 The bypass outfall discharge into the receiving water shall be designed to avoid attraction of adult fish thereby reducing the potential for jumping injuries.

13.10.6 The bypass outfall design must allow for the potential attraction of adult fish, by provision of a safe landing zone if attraction to the outfall flow can potentially occur.

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## 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



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“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.

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### 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

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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

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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:

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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 too 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:

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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

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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



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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

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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

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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

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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

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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

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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:

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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

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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**

