



September 28, 2021

Via EMAIL
breeze.k.potter@oregon.gov

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

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

Dear Breeze Potter,

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

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

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

General Comments:

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

BRENNA VAUGHN
Executive Director

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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