



# WaterWatch of Oregon

## Protecting Natural Flows In Oregon Rivers

June 12, 2026

Laura Hartt  
Oregon Water Resources Department  
725 Summer St. NE, Suite A  
Salem, OR 97301

### **Re: Comments, Phase Two Water Right Rulemaking, Div 52, 53 and 54**

Dear Laura,

Thank you for the opportunity to provide comments on the hearings draft for the Div 52, 53 and 54 rules. These comments supplement WaterWatch comments provided in both written and verbal form during the RAC process.

#### **I. Common Comments, Division 52, 53, 54:**

- Petitions for Party Status, protests, contested case hearings, exceptions: To the extent the OWRD is attempting to create efficiencies, we would urge the OWRD to ensure that all processes across all water right transactions are uniform, unless otherwise directed by statute. While we understand that HB 3544 and HB 3342 didn't directly apply to all the hydro statutes (e.g. conversions), OWRD is proposing to align some sections (e.g. contested cases and exceptions), but not others (petitions for party status). Having disparate processes for different transactions will only create confusion and inefficiencies, which is counter to the intent behind both bills.
- Agency discretion not to go to contested case hearing if significant issues are not raised: To the extent the rules retain the existing discretion of the Director to assess significant issues in relation to third party protests, this same discretion should apply to water right holder/operator protests. Absent that, a water right holder/operator could file a frivolous protest that raises no legal or factual arguments to refute the OWRD decision, which would result in a waste of state agency time/resources.
- Protest Fees: All rule provisions related to protest fees should be aligned with existing statute. For example, Div 52 and Div 53 only have a third-party protestant paying a protest fee. While the original rules were adopted before the state started requiring protest fees for applicants; since that time the state has updated Oregon's statutes to require fees for applicant protests (albeit only ½ of a third-party protestant). The rules should reflect this.

**II. Cleaning up the rules to align with statute:** We strongly support the agency's work to try to expunge rule sections that are not supported by statute; that said, we think there is quite a bit more work to be done here. We will note specifics by section.

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### A. Div 53 rule specific comment (not captured by common comments above)

- Application form, 690-053-0010(10), Evidence of Use: The rules propose to alter language related to the proof of use requirement. The proposed rule language qualifies the current requirement for “proof of use” with the language “or the right is not subject to forfeiture under ORS 540.610” (emphasis added). We have significant concerns with this addition given the interplay with other statutes.

It is important to note that ORS 540.610(2), which represents the bulk of the forfeiture statute, allows a water right holder that is presumed to have forfeited their water right due to non-use a process to “rebut” the presumption, it does not stipulate that the right is not subject to forfeiture. This section of statute only comes into play upon a showing of a failure to use water beneficially for five years. So in other words, ORS 540.610(2) cannot be used to assert that the use is not subject to forfeiture; rather, it only allows a rebuttal to the presumption that comes about from non-use. This makes the proof of use language very important. The only section of statute that allows an assertion of “the right is not subject to forfeiture” is Subsection (3), but even here some use is required, just not full use. In other words, in order employ Subsection (3), the applicant still needs to show proof of use. All of this makes the proposed rule language not only unnecessary, but also contrary to statute. Remedy: Strike the new proposed language from rule.

**B. Div 54 rule specific comments (not captured by common comments above):** Part of the stated purpose of this rulemaking is to clean up old rules to ensure that rules align with statute. To this end, the Div 54 rules need significant updating. Despite concerns raised by conservation groups, tribes and sister agencies in the previous Division 54 rulemaking, the Commission adopted rules that veer significantly from statute and undermine the very purposes of the law. Concerns include, but are not limited to, the following:

- 690-054-0010, Definitions
  - Subsection (7), Injury: The Div 54 definition of injury adds new considerations that apply only to instream conversions. The new considerations are found in OAR 690-054-0040(6) and include provisions such as the possibility of future regulation. This is not directed by statute and does not align with the OWRD’s determination of injury in any other process. This rule language places instream conversions at a distinct disadvantage as compared to consumptive use transfers. Remedy: Remove reference to OAR 690-054-0040(6).
- 690-054-0020, Notice of Consideration for Conversion, Eligibility Determinations and Preliminary Findings of Fact
  - Subsections (1)(c) and (d): The Div 54 rule do not allow for the conversion of a hydro right issued in conjunction with another right that is part of a larger distribution system, or storage. This is a gross misinterpretation of statute. 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 that portion that is used exclusively for hydroelectric purposes. Rules cannot narrow statutory language or intent. Remedy: Sections (c) and (d) should be struck and replaced with the statutory language.

- Subsection (3)(b)(B), Director’s preliminary finding on injury: This section expands the definition of injury to require consideration of whether the proposed conversion would result in new regulation. In no other instance (transfers, permit amendments, new water rights, etc) does the OWRD look at this in determining injury. This provision of the rules is not supported by statute, and strays significantly from the historical understanding of injury. Remedy: This section of rule should be struck.
- 690-054-0040 Proposed Final Order; Final Determinations and Finding of Fact
  - Subsection 0020(8): This section automatically subordinates the instream right resulting from the conversion to authorized water uses by other existing water rights as of October 23, 1999. This section not only makes all processes related to mitigation in the previous sections moot but does not follow the statutory structure that only protects “actual use” of authorized water uses by other existing water rights as of October 23, 1999. This is a significant departure from statute and significantly undercuts the purposes of the conversion statute. Remedy: To bring the rules into alignment with statute, this section should be struck, or, at the very least, insert the words “actual use”.

There are similar problems with Subsections (9) and (10).

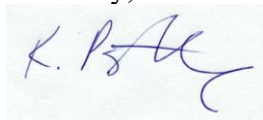
- 690-054-0080, Issuance of Instream Water Right: This section restricts the instream right associated with the conversion so that it “is not additive” to other instream rights. There is nothing in the Hydro Conversion statutes (ORS 543A.305) or the Instream Water Rights Act (ORS 537.332 et al) that directs or allows this. Remedy: Delete language from the rules.

In closing, while we appreciate the OWRD’s hard work to align rules with statute we would urge further consideration of the Div 54 draft rules to better align them with existing law, and/or schedule an additional rulemaking to address longstanding concerns raised in past rulemakings on these rules and their deviation from statute.

Additionally, going forward, we would also urge the OWRD to update the Div 51 rules, which are also related to hydroelectric use. There are provisions in the Div 51 rules that have no statutory basis (e.g. subordinating all new hydro rights to all other uses) and implicate other hydro processes.

Thank you for your consideration of our comments.

Sincerely,



Kimberley Priestley  
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