

Division 54

CONVERSION OF A HYDROELECTRIC WATER RIGHT TO AN INSTREAM WATER RIGHT

Amend

690-054-0000

Purpose and Applicability

These rules establish definitions and procedures for the conversion of a Hydroelectric Water Right to an Instream Water Right in accordance with ORS 543A.305. The conversion process is for Hydroelectric Water Rights beneficially used and which ceased beneficial use within 5 years of October 23, 1999, or later. Conversion of a Hydroelectric Water Right to an Instream Water Right is not a new allocation of water within a stream basin. A Hydroelectric Water Right subject to these rules shall be considered for conversion to an Instream Water Right prior to any forfeiture proceeding under ORS 540.610. These rules do not apply to Projects on boundary waters that operate with water rights issued by the State of Oregon and by any other state, except upon the written request of the water right holder. These rules apply to instream conversion processes where a proposed final order is issued on or after July 1, 2026. The rules in effect prior to July 1, 2026, apply to instream conversion processes where a proposed final order was issued prior to July 1, 2026.

Statutory/Other Authority: ORS 536.027

Statutes/Other Implemented: ORS 543A.305

History:

WRD 2-2022, adopt filed 07/14/2022, effective 07/14/2022

Rule Summary: This rule is amended to state that the rule changes in Division 54 apply to instream conversion processes where a proposed final order is issued on or after July 1, 2026.

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

Statutes/Other Implemented: ORS 543A.305

History:

WRD 2-2022, adopt filed 07/14/2022, effective 07/14/2022

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

Statutes/Other Implemented: ORS 543A.305

History:

WRD 2-2022, adopt filed 07/14/2022, effective 07/14/2022

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

Statutes/Other Implemented: ORS 543A.305

History:

WRD 2-2022, adopt filed 07/14/2022, effective 07/14/2022

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: ORS 536.027

Statutes/Other Implemented: ORS 543A.305

History:

WRD 2-2022, adopt filed 07/14/2022, effective 07/14/2022

Amend

690-054-0050

Notice of Proposed Final Order

(1) The proposed final order shall be:

- (a) Distributed to the Holder, in accordance with ORS 183.415, 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 183

Statutes/Other Implemented: ORS 543A.305, ORS 183.415

History:

WRD 2-2022, adopt filed 07/14/2022, effective 07/14/2022

Rule Summary: This rule is amended to clarify that the notice of opportunity to protest and request a hearing is governed by ORS 183.415.

Amend

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 protest 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, email address, if available, 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 may file a petition for party status in any contested case hearing subsequently held on the protested matter, in the manner described in OAR 137-003-0535.
- (4) Each person submitting a protest shall raise all reasonably ascertainable issues and submit all reasonably available arguments supporting the person's position by the close of the protest period. A failure to raise a reasonably ascertainable issue in a protest with sufficient specificity to afford the department an opportunity to respond to the issue precludes consideration of the issue in the contested case proceeding.
- (5) Upon receiving a protest, the Director shall:
- (a) Send a copy of all protests timely filed to the protestant(s), if any ;
 - (b) If a protest was timely submitted, the Water Resources Director shall:
 - (A) Issue a final order if the holder has not filed a protest and the director finds that there are no significant issues related to the conversion; or
 - (B) Schedule a contested case hearing by referring 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, unless all protests have been withdrawn or resolved prior to referral.

Statutory/Other Authority: ORS 536.027, ORS 183

Statutes/Other Implemented: ORS 543A.305

History:

WRD 2-2022, adopt filed 07/14/2022, effective 07/14/2022

Rule Summary: This rule is amended to conform the Department's rules to the Department's authority. There is no authority for the agency to require requests for standing and collect fees for such requests for this type of transaction. Instead, individuals interested in participating must follow the process under the model rules of procedure to petition for party status. Retains consideration of "significant issues" but requires referral if the owner of the project protests. Finally, while the rule already requires reasonably ascertainable issues to be raised in a protest,

the rule lacks specificity about what a failure to do so means; this rule is amended to clarify that failure to raise an issue with sufficient specificity in a protest precludes consideration of the issue in the contested case.

Amend

690-054-0070

Time and Place of Hearings, Exceptions, Final Order

(1) The conduct of contested hearings shall be as provided in OAR chapter 690, division 002, and 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

Statutes/Other Implemented: ORS 543A.305

History:

WRD 2-2022, adopt filed 07/14/2022, effective 07/14/2022

Rule Summary: The rule is amended to reference to OWRD rules pertaining to Protests and Contested Cases (OAR chapter 690, division 2).

Adopt

690-054-0075

Final Orders on Default

(1) If no protest on a proposed final order that is governed by these rules is timely received, by operation of law, the proposed final order shall become a final order on the date that is 33 days after the close of the time period for submitting a protest, with no further action required by the Department.

(2) If all timely filed protests are withdrawn and the withdrawals are not based on a settlement agreement requiring changes to the proposed final order, the Department, if the matter has not been referred to the Office of Administrative Hearings, or the assigned administrative law judge, if the matter has been referred to the Office of Administrative Hearings, shall issue an order dismissing the request for hearing and notifying the parties that the Department's proposed final order is final, as of the date of the order of dismissal.

(3) If a protestant defaults as provided in OAR 137-003-0672(3)(b) or OAR 137-003-0672(3)(c), the assigned administrative law judge shall issue an order dismissing the request for hearing and notifying the parties that the Department's proposed final order is final, as of the date of the order of dismissal.

(4) Notwithstanding subsection (1), not more than 33 days after the close of the time period for submitting a protest, the Department may withdraw a proposed final order for reconsideration and issuance of a superseding proposed final order.

Statutory/Other Authority: ORS 536.027

Statutes/Others Implemented: ORS 543A.305, ORS 183

Rule Summary: This rule implements ORS 183, which allows the agency to define when a proposed final order will become final. The rule states that the order will become final as a result of (1) no protest being filed, (2) the withdrawal of protests, (3) or default of protestants. The rule specifies that proposed final orders become final if no protest is filed within 33 days and that the Department may withdraw the final order for reconsideration and issuance of a superseding proposed final order before 33 days elapse. This efficiency measure is consistent with changes made in other processes, which also makes for more efficiency in administration.

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

Statutes/Other Implemented: ORS 543A.305

History:

WRD 2-2022, adopt filed 07/14/2022, effective 07/14/2022