

**BEFORE THE WATER RESOURCES DEPARTMENT  
OF THE  
STATE OF OREGON**

In the Matter of Instream Transfer                     )  
Application T-9544, Jefferson County                 )     **FINAL ORDER**  
   )

ORS 540.505 to 540.580 establishes the process in which a water right holder may submit a request to transfer the point of diversion, place of use, or character of use authorized under an existing water right. OAR Chapter 690, Division 380 implements the statutes and provides the Department's procedures and criteria for evaluating transfer applications. OAR Chapter 690, Division 77 provides additional criteria for evaluating transfers to instream water rights.

**Applicant**

JOHN ESLER  
PORTLAND GENERAL ELECTRIC  
121 SW SALMON  
PORTLAND OR 97204

**Findings of Fact**

1. On September 11, 2003, John Esler, Portland General Electric (PGE), filed an instream transfer application to change the place of use and character of use under Certificate 80367. Ryland Moore, Oregon Water Trust, is the agent authorized to act on behalf of the applicant. The Department assigned the application number T-9544.
2. On March 9, 2004, an amended application was submitted to the Department by Ryland Moore, on behalf of the applicant.
3. On February 15, 2005, an amended Supplemental Form B was submitted to the Department describing the proposed shaping of the instream use proposed to be created by this transfer. Additional information describing the shape of the instream use proposed to be created by the transfer was submitted to the Department on March 28, 2005.
4. The right to be transferred is as follows:

**Certificate:**     80367 in the name of Portland General Electric  
**Use:**            Irrigation, Domestic and Livestock

|   |
|---|
| <p>This is a final order in other than contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60 day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080 you may either petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.</p> |
|---|

**Acres:** 101.9 acres, being 75.2 acres in Tract #1, 19.9 acres in Tract #2, and 6.8 acres in Tract #5

**Priority Date:** 1887 for Tract #1, 1899 for Tract #2, and 1903 for Tract #5

**Quantity:** there is no rate limitation on this right

**Rate/Duty:** not to exceed 1.5 acre-feet (af)/acre during any period of 30 days or 6.0 af/acre during any irrigation season

**Source:** Trout Creek, tributary to Deschutes River

**Authorized Point of Diversion:**

| Township | Range | Meridian | Sec | ¼ ¼   | Location  |
|----------|-------|----------|-----|-------|---|
| 9 S      | 14 E  | WM       | 13  | NE NW | South 58 Degrees East, 2200 Feet from NW Corner, Section 13 |

**Authorized Place of Use:**

| Township | Range | Meridian | Section | ¼ ¼   | Acres |
|----------|-------|----------|---------|-------|-------|
| Tract 1  |       |          |         |       |       |
| 9 S      | 14 E  | WM       | 10      | NW NE | 5.5   |
| 9 S      | 14 E  | WM       | 10      | SW NE | 9.4   |
| 9 S      | 14 E  | WM       | 10      | SE NE | 20.1  |
| 9 S      | 14 E  | WM       | 11      | SW NW | 5.8   |
| 9 S      | 14 E  | WM       | 11      | NE SW | 8.9   |
| 9 S      | 14 E  | WM       | 11      | NW SW | 5.7   |
| 9 S      | 14 E  | WM       | 11      | NW SE | 16.6  |
| 9 S      | 14 E  | WM       | 11      | SW SE | 3.2   |
| Tract 2  |       |          |         |       |       |
| 9 S      | 14 E  | WM       | 11      | NE SE | 3.6   |
| 9 S      | 14 E  | WM       | 11      | SE SE | 12.9  |
| 9 S      | 14 E  | WM       | 13      | NW NW | 2.1   |
| 9 S      | 14 E  | WM       | 14      | NE NE | 1.3   |
| Tract 5  |       |          |         |       |       |
| 9 S      | 14 E  | WM       | 10      | NE NW | 6.8   |

5. A total of 611.4 acre-feet of water may be beneficially used annually under the existing right.
6. Application T-9544 proposes to change the character of use to instream use for conservation, maintenance of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values.
7. Application T-9544 proposes to change the place of use of the right to create an instream reach from the point of diversion to the mouth of Trout Creek.

8. The applicant proposes the quantities water to be transferred instream to be protected follows:

| Priority Date | Rate (cfs)   | Volume (acre-feet) |
|---------------|--|--------------------|
| 1887          | 1.9 cfs May 1 – July 31<br>1.43 cfs August 1 – Sept. 30<br>1.56 cfs Oct. 1 – Oct. 5  | 451.2              |
| 1899          | 0.5 cfs May 1 – July 31<br>0.38 cfs August 1 – Sept. 30<br>0.41 cfs Oct. 1 – Oct. 5  | 119.4              |
| 1903          | 0.17 cfs May 1 – July 31<br>0.13 cfs August 1 – Sept. 30<br>0.14 cfs Oct. 1 – Oct. 5 | 40.8               |
|               |  | 611.4              |

9. There is an existing instream water right, Certificate 73189, for the same reach as that proposed for the new instream water right.
10. The applicant proposes a new instream use created as a result of approval of this transfer to be additive to the existing instream water right for migration, spawning, egg incubation, fry emergence and juvenile rearing, evidenced by Certificate 73189, during the period May 23 through May 31, and to replace a portion of the existing instream water right during the period June 1 through October 5.
11. Notice of the application for transfer was published pursuant to ORS 540.520, OAR 690-380-4000, and OAR 690-380-4020. No comments or protests were filed in response to the notices.
12. Water has been used within the last five years according to the terms and conditions of the right and no evidence is available that would demonstrate that the right is subject to forfeiture under ORS 540.610.
13. A diversion structure and delivery system sufficient to use the full amount of water allowed under the existing right are present.
14. The proposed change would not result in enlargement of the right.
15. The proposed change would not result in injury to other water rights.
16. The amount of the proposed instream flow and the timing of the proposed instream flow is allowable within the limits and use of the original water right.

17. The protection of flows within the proposed reach is appropriate, considering:
- a) The instream water right begins at the recorded point of diversion;
  - b) The location of confluences with other streams downstream of the point of diversion;
  - c) There are no known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
  - d) Any return flows resulting from the exercise of the existing water right would re-enter the river downstream of the reach of the instream water right.
18. On February 15, 2005, the applicant requested that any new instream use created as a result of this transfer be additive to the existing instream water right during the period May 23 through May 31. The existing instream water right, when issued, was given the full 73.0 CFS requested by the Oregon Department of Fish and Wildlife for this time period. The estimated natural flows for this time period in Trout Creek are 118.0 CFS. On January 12, 2005, and February 16, 2005, the Department received comments from the Oregon Department of Fish and Wildlife (ODFW) indicating that estimated natural flows in Trout Creek are often not present and that these flows are needed during a critical life stage for ESA listed steelhead. While information provided by the ODFW supports the need for protection of flows in Trout Creek, this information does not provide adequate explanation to demonstrate why additional flows above those granted in the existing instream water right are needed, specifically during the May 23 through May 31 time period. Therefore, the Department finds that a new instream water right created as a result of this transfer, if approved, may only replace a portion of the existing instream water right. Based upon this finding, the applicant has agreed that any instream use created as a result of this transfer will replace a portion of the existing instream water right.
19. The Department finds that the existing instream water right in the reach is sufficient to protect the monthly quantities of water necessary for migration, spawning, egg incubation, fry emergence and juvenile rearing and the right proposed for transfer will allow replacement of a portion of the existing instream water right with an earlier priority date.
20. By replacing a portion of Certificate 73189, the instream right will provide protection for streamflows previously identified as necessary for migration, spawning, egg incubation, fry emergence and juvenile rearing under an earlier priority date.

### **Conclusions of Law**

The changes in place of use and character of use proposed in application T-9544 are consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075.

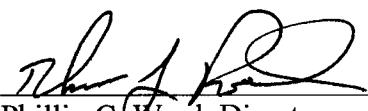
**Now, therefore, it is ORDERED:**

1. The changes in place of use and character of use proposed in application T-9544 are approved.
2. Water right certificate 80367 is cancelled and a new instream water right shall be issued.
3. The instream water right provides for the protection of streamflows from the point of diversion (NE ¼ NW ¼, Section 13, T9S, R14E, W.M.; South 58 degrees East, 2200 feet from the NW corner of Section 13) to the mouth of Trout Creek, tributary to the Deschutes River.
4. The quantities of water to be protected under the instream water right are:

| Priority Date | Rate (cfs)   | Volume (acre-feet) |
|---------------|--|--------------------|
| 1887          | 1.9 cfs May 1 – July 31<br>1.43 cfs August 1 – Sept. 30<br>1.56 cfs Oct. 1 – Oct. 5  | 451.2              |
| 1899          | 0.5 cfs May 1 – July 31<br>0.38 cfs August 1 – Sept. 30<br>0.41 cfs Oct. 1 – Oct. 5  | 119.4              |
| 1903          | 0.17 cfs May 1 – July 31<br>0.13 cfs August 1 – Sept. 30<br>0.14 cfs Oct. 1 – Oct. 5 | 40.8               |
|               |  | 611.4              |

5. The instream right established by this transfer shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or 537.470.
6. The former place of use shall no longer be irrigated, nor will water be used for domestic and livestock purposes, as part of this right.

Dated at Salem, Oregon this 29<sup>th</sup> day of July 2005.

  
For Phillip C. Ward, Director

Mailing Date: AUG 03 2005

## STATE OF OREGON

## COUNTY OF JEFFERSON

## CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

STATE OF OREGON  
WATER RESOURCES DEPARTMENT

confirms the right to use the waters of the TROUT CR, a tributary of the DESCHUTES R, for instream use for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.

This right was confirmed by decree of the Circuit Court of the State of Oregon for Jefferson County. The decree is of record at Salem, in the Order Record of the Water Resources Director, in volume 5, at page 57. The date of priority is 1887, 1899, and 1903. The amount of water to which this right is entitled is limited to an amount actually beneficially used, and shall not exceed:

| Period Instream               | Priority Date | Instream Rate   |
|-------------------------------|---------------|-----------------|
| May 1 through July 31         | 1887          | 1.9 CFS         |
|                               | 1899          | 0.5 CFS         |
|                               | 1903          | 0.17 CFS        |
|                               | <b>TOTAL</b>  | <b>2.57 CFS</b> |
| August 1 through September 30 | 1887          | 1.43 CFS        |
|                               | 1899          | 0.38 CFS        |
|                               | 1903          | 0.13 CFS        |
|                               | <b>TOTAL</b>  | <b>1.94 CFS</b> |
| October 1 through October 5   | 1887          | 1.56 CFS        |
|                               | 1899          | 0.41 CFS        |
|                               | 1903          | 0.14 CFS        |
|                               | <b>TOTAL</b>  | <b>2.11 CFS</b> |

or its equivalent in case of rotation, measured at the point of diversion.

The description of the stream reach in which flows are to be maintained is as follows:

From the location of the diversion authorized previously under Certificate 80367, located at:

| Twp | Rng  | Mer | Sec | Q-Q   | GLot | DLC | Survey Coordinates  |
|-----|------|-----|-----|-------|------|-----|---|
| 9 S | 14 E | WM  | 13  | NE NW |      |     | SOUTH 58 DEGREES EAST, 2200 FEET FROM NW CORNER, SECTION 13 |

To the mouth of Trout Creek.

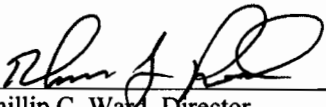
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The instream right established by this transfer shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346 and shall be in addition to instream water rights established pursuant to ORS 537.348 or 537.470, unless otherwise specified by a subsequent order establishing a new instream water right.

The right is subject to all other terms and conditions of Certificate 80367, and any related decree.

This certificate is issued to confirm a change in use and place of use approved by an order of the Water Resources Director approving Transfer 9544 and supersedes Certificate 80367, State Record of Water Right Certificates.

WITNESS the signature of the Water Resources Director, affixed July 29, 2005.

  
for Phillip C. Ward, Director