



# Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department  
North Mall Office Building  
725 Summer Street NE, Suite A  
Salem, OR 97301-1271  
503-986-0900  
FAX 503-986-0904

April 10, 2014

Julie Keil, Director  
Hydro Licensing and Water Rights  
Portland General Electric Company  
121 SW Salmon Street  
Portland, OR 97204

Re: Partial Assignment of SWR #387 and Water Use in Oak Grove Fork of the Clackamas River

Dear Director Keil:

This letter is to express my sincere thank you on behalf of the State of Oregon for the assignment of Surface Water Registration #387 to the Oregon Department of Fish and Wildlife (dated September 30, 2013.)

According to the comprehensive Settlement Agreement of March 2, 2006, the Department has provided notice of amendment to the registration statement on January 7, 2014. The Agreement provides for a change from hydroelectric use to instream use to provide enhanced protection for fish and aquatic resources.

The Department also takes notice of the documents added to the file including:

- \* Request for Assignment from Portland General Electric Company to Oregon Department of Fish and Wildlife;
- \* Affidavit of water use in support of assignment and amendment of SWR # 387;
- \* Water Rights Agreement of March 2, 2006;
- \* Documentation of Water Use for Power Generation;

The notice for the amendment to the surface water registration statement was published online in the Department's Water Rights Public Notice. A copy of the notice is attached to this letter.

Partial Assignment and Amendment  
to Surface Water Registration Statement

Surface Water Registration: **SWR 387**

Filed by: Portland General Electric Company  
Partially Assigned to: Oregon Department of Fish and Wildlife

Amendment type Change from hydroelectric use to instream use  
for enhanced protection for fish and aquatic resources.

Change from POD 70 to 100 cubic feet per second (cfs) diverted below  
Lake Harriet Dam, NE ¼ SE ¼, Section 5,  
Township 6 South, Range 7 East, W.M.  
and POU: to the powerhouse return flow on the Clackamas River  
NE ¼ SE ¼, Section 21, Township 5 South,  
Range 6 East, W.M.

Change to: From October 1 – October 15 100 cfs  
From October 16 – December 15 80 cfs  
From December 16 – March 31 70 cfs  
From April 1 – September 30 80 cfs  
Instream use in the Oak Grove Fork from  
1250 feet downstream of Lake Harriet Dam  
NE ¼ SE ¼, Section 5, Township 6 South, Range 7 East, W.M.  
To immediately above the powerhouse return flow above the  
Three Lynx Gage on the Clackamas River, NE ¼ SE ¼, Section  
21, Township 5 South, Range 6 East, W.M.

Notice of Appropriation: November 11, 1907

The Department also takes notice of the documents added to the file including:

- \* Request for Assignment from Portland General Electric Company to Oregon Department of Fish and Wildlife;
- \* Affidavit of water use in support of assignment and amendment of SWR # 387;
- \* Water Rights Agreement of March 2, 2006;
- \* Documentation of Water Use for Power Generation;

For more information, please contact Mary Grainey, 503-986-0833, at  
Oregon Water Resources Department  
725 Summer St. NE, Suite A  
Salem, OR 97301  
[Mary.S.Grainey@ wrd.state.or.us](mailto:Mary.S.Grainey@ wrd.state.or.us)

**MARTHA O. PAGEL**

Admitted in Oregon and Washington

Direct Line: Salem 503-540-4260; Portland 503-796-2872

E-Mail: mpagel@schwabe.com

October 8, 2013

**By Hand Delivery**

Mary E. Grainey  
Oregon Water Resources Department  
725 Summer Street NE, Suite A  
Salem, OR 97301-1271

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SALEM, OREGON

Re: Assignment and Request for Amendment of Surface Water Registration for PGE  
Clackamas/Oak Grove Project  
Our File No.: 068330/136050

Dear Mary:

It is my pleasure to deliver the enclosed materials on behalf of our client, Portland General Electric Company (PGE). The Assignment and Request for Amendment implement PGE's commitments pursuant to a comprehensive settlement agreement for reauthorization of the Clackamas Hydroelectric Project.

The materials include:

1. Letter from Julie A. Keil to Director Phil Ward
2. Request for Assignment Form and Required Fee for Portions of SWR 387
3. Affidavit of Water Use in Support of Assignment and Amendment of SWR 387
4. Supporting Documentation for the Affidavit
  - Exhibit 1) Copy of SWR Claim 387 (On File at OWRD)
  - Exhibit 2) Copy of Water Rights Agreement
  - Exhibit 3) Documentation of Water Use for Power Generation

Mary E. Graine  
October 8, 2013  
Page 2

We look forward to working with you to complete the process for approval of these requests. If you have questions or need any additional information, please contact.

Very truly yours,



Martha O. Pagel

MOP:kdo

Enclosures

cc: Rick Kepler, ODFW  
Julie Keil, PGE



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**Portland General Electric Company**  
121 SW Salmon Street • Portland, Oregon 97204  
PortlandGeneral.com

September 27, 2013

Phillip C. Ward, Director  
Oregon Water Resources Department  
725 Summer St. NE, Suite A  
Salem, OR 97301

**Re: Portland General Electric Company  
Clackamas River Hydroelectric Project (FERC Project No. 2195)  
Assignment and Amendment of Surface Water Registration #387 for Instream Flow**

Dear Director Ward:

Portland General Electric Company (“PGE”) is the licensee for the Clackamas River Hydroelectric Project (the “Project”). On December 21, 2010, the Federal Energy Regulatory Commission (“FERC”) issued an Order Issuing New License for the Project. *Portland General Electric Company*, 133 FERC ¶ 62,281, *order on reh’g*, 134 FERC ¶ 61,206 (2011). The license was based on a comprehensive Settlement Agreement, dated March 2, 2006, between PGE and 32 other parties, including the Oregon Water Resources Department (“OWRD”).

Enclosed for filing with OWRD on behalf of PGE in cooperation with the Oregon Department of Fish and Wildlife (“ODFW”) is PGE’s Assignment and Request for Amendment of Surface Water Registration (“SWR”) #387. As described further below, the assignment and amendment are intended to implement portions of the Water Rights Agreement executed as part of the March 2006 Settlement Agreement.

The assignment conveys a portion of PGE’s interest in SWR #387, which describes PGE’s un-adjudicated claims for operation of the Oak Grove Facilities. In addition to the change of ownership, PGE and ODFW seek an amendment of the SWR to reflect a change in use from hydroelectric power generation to instream flow. These changes are consistent with Section III.B. of the Water Rights Agreement, which describes a plan by which PGE would secure a single, time-limited hydroelectric water right – known as the “Super HE” -- to replace a total of four separate hydroelectric water rights and three surface water registrations that had previously authorized water use for the Clackamas Project. In exchange for issuance of the Super HE, PGE agreed to assign portions of SWR #387 to ODFW and to cooperate with ODFW in amending the claim. Upon the eventual completion of the Willamette Basin Adjudication, we expect these changes will result in an Instream Water Right that will be senior to the hydroelectric project and will therefore provide enhanced protection for fish and aquatic resources.

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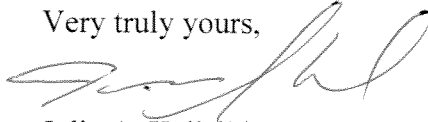
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SALEM, OREGON

Phillip C. Ward, Director  
Oregon Water Resources Department  
September 27, 2013  
Page 2

We look forward to working with you and OWRD staff to complete the assignment and amendment in furtherance of our Water Rights Agreement.

Very truly yours,



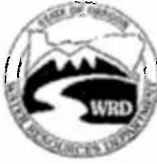
Julie A. Keil, Director  
Hydro Licensing and Water Rights

cc: Rick Kepler, ODFW

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**Oregon Water Resources Department**  
 725 Summer Street NE, Suite A  
 Salem, Oregon 97301  
 (503) 986-0900  
 www.wrd.state.or.us

# Request for Assignment

If for multiple rights, a separate form and fee for each right will be required.

I, Julie A. Keil on behalf of Portland General Electric  
*(Name of Applicant / Permit / Transfer Holder / License Holder/GR Certificate of Registration)*

121 SW Salmon St. Portland OR 97204 503-464-8864  
*(Mailing Address) (City) (State) (Zip) (Phone #)*

- hereby assign all my interest in and to application/permit/transfer/license/GR Certificate of Registration;
- hereby assign all my interest in and to a portion of application/permit/transfer/license/GR Certificate of Registration; *(You must include a map showing the portion of the application/permit/transfer/license/GR Certificate of Registration to be assigned.)*
- hereby assign a portion of my interest in and to the entire application/permit/transfer/license/GR Certificate of Registration:

Application # SWR 387 ; Permit # \_\_\_\_\_ ; Transfer # \_\_\_\_\_

License # \_\_\_\_\_ ; GR Statement # \_\_\_\_\_ ; GR Certificate of Registration # \_\_\_\_\_  
 -OR-

As filed in the office of the Water Resources Director, to:

Oregon Department of Fish & Wildlife (contact: Rick Kepler)  
*(Name of New Owner)*

3406 Cherry Ave. NE Salem OR 97303-4924 503-947-6084  
*(Mailing Address) (City) (State) (Zip) (Phone #)*

**Note:** If there are other owners of the property described in the Application, Permit, Transfer, License, or GR Certificate of Registration, you must provide a list of all other owners' names and mailing addresses and attach it to this form.

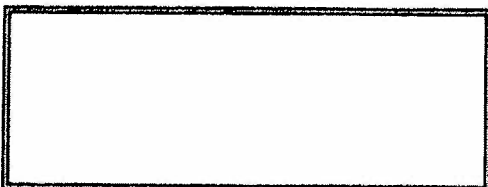
I hereby certify that I have notified all other owners of the property described in this Application, Permit, Transfer, License, or GR Certificate of Registration of this Request for Assignment

Witness my hand this 30<sup>th</sup> day of September, 2013.

Applicant/Permit Holder [Signature]

Applicant/Permit Holder \_\_\_\_\_

**DO NOT WRITE IN THIS BOX**



The completed "Request for Assignment" form *must* be submitted to the Department along with the recording fee of \$75.

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AFFIDAVIT OF WATER USE IN SUPPORT OF  
ASSIGNMENT AND AMENDMENT OF SURFACE WATER REGISTRATION

State of Oregon                    )  
  ) ss  
County of Multnomah            )

I, Julie A. Keil, being duly sworn, depose and say:

1. I am the Director of Hydro Licensing and Water Rights for Portland General Electric Company (PGE). In that capacity, I am responsible for securing state and federal water rights and licenses. I am also the custodian of PGE's records relating to compliance with state and federal license requirements.
2. In preparing this affidavit, I reviewed the PGE records relating to water use at the Clackamas Hydroelectric Project (Project).
3. The Project has utilized waters from Timothy Lake, Lake Harriet, and Frog Lake, along with the Oak Grove Fork of the Clackamas River and Three Lynx Creek in connection with the Oak Grove Facility of the Project since November 11, 1907, as described in a Surface Water Registration (SWR) 387 filed with the Oregon Water Resources Department (OWRD) on December 13, 1993. A copy of SWR 387 is attached as Exhibit 1.
4. The Project is also licensed by the Federal Energy Regulatory Commission (FERC) under FERC No. 2195. Pursuant to agreements reached in 2006, as part of the FERC relicensing process, PGE agreed to assign a portion of SWR 387 to the Oregon Department of Fish and Wildlife (ODFW) and to cooperate with ODFW in changing the use of that portion of the claim to instream flow purposes. Details of the assignment and change of use are described in a Water Rights Agreement dated March 2, 2006, a copy of which is attached as Exhibit 2.
5. In order to complete the process for an assignment and amendment of the SWR, PGE has been asked by OWRD to provide documentation of water use during the past five years.
6. The following document from PGE's records demonstrates water use for power generation during the time period of 2007 through 2012. A copy of this document is attached as Exhibit 3.

Oak Grove Powerhouse Generation Summary (2007-July 2013)

SIGNATURE AND ACKNOWLEDGEMENT ON FOLLOWING PAGE

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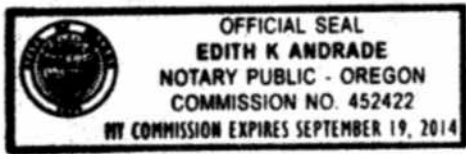


[Signature]  
Signature

30 Sept 2013  
Date

STATE OF OREGON            )  
  ) ss.  
County of Multnomah        )

This instrument was acknowledged before me this 30<sup>th</sup> day of September, by JULIE KEIL, Hydro Licensing Director of Portland General Electric Company, an Oregon corporation, on behalf of the corporation.



Edith K. Andrade  
NOTARY PUBLIC FOR OREGON  
My Commission Expires: September 19, 2014

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# **Supporting Documentation for the Affidavit**

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**Exhibit 1:**  
**SWR Claim 387**  
**(on file at OWRD)**

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# Exhibit 2

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**Clackamas River Hydroelectric Project  
(FERC No. 2195)**

**Water Rights  
Agreement**

**Submitted by:  
Portland General Electric Company**

**March 2, 2006**

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# Water Rights Agreement

## I. Introduction

The goal of the Water Rights Subgroup (Subgroup) was to develop recommendations for settlement of water rights issues. The Subgroup met numerous times, and prepared this Water Rights Agreement and attachments (“Water Rights Agreement” or “Agreement”), which is an attachment to the overall Settlement Agreement for the Clackamas River Project (FERC No.2195). The Water Rights Subgroup members recognize that not all parties to the overall Settlement Agreement will be signatory parties to the final Water Rights Agreement, but intend that all signatories to the Water Rights Agreement (the “Parties”) shall be bound as provided herein.

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## II. Background

Under Oregon law, a state-issued water right is required for all water uses initiated after 1909 (when the first comprehensive water code was enacted). Water uses established prior to 1909 can be recognized through a process known as “adjudication.” If a pre-1909 claim is approved during adjudication, it becomes a decreed water right. Although the state has been involved in the adjudication process for nearly 100 years, many of the state’s largest river basins, including most of the Willamette system, have not yet been adjudicated.

The Clackamas Project (Project) has four state-issued time-limited hydroelectric (HE) water rights currently undergoing the state reauthorization process under Oregon Revised Statutes (ORS) Chapter 543A and three pre-1909 claims for perpetual duration hydroelectric water rights. The pre-1909 claims include portions of the River Mill, Faraday, and Oak Grove

developments, which are part of the Project. The pre-1909 claims were recorded and preserved with the Oregon Water Resources Department (OWRD) through the timely filing of Surface Water Registration (SWR) forms.

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### III. Settlement Concepts

#### A. The "Super HE"

PGE will apply, through the state water right reauthorization process, for what the Subgroup is describing as a "Super HE." The Super HE is a single time-limited water right authorizing all hydroelectric water use for the Project. The Super HE will be issued by OWRD through the state reauthorization process, after completion of the Federal Energy Regulatory Commission (FERC) relicensing process and any appeals thereto. The Super HE is composed of the following four elements:

1. Continuing water use authorizations for the four existing HE rights. The specific priority dates and quantities of water from each of the four existing HE rights will be set forth in the merged, time-limited water right. This merged water right forms the base of the Super HE;
2. Water use authorization for existing hydroelectric water use at the Project that is currently authorized under pre-1909 SWR numbers 386, 387 and 388, with the Super HE conditioned to ensure that the SWR and the duplicative HE amounts are not additive at any point in time. For purposes of the Super HE, this water use will have a priority date consistent with PGE's notice of intent to FERC to reauthorize this project (1998); and
3. Water use authorization for any additional water released from existing storage or live flow at North Fork (684 cfs) or live flow at Faraday (654 cfs) with a priority date of 1998; and
4. Replacement water for the instream water right in the Oak Grove Fork (ranging from 70 cfs to 100 cfs depending on the time of year, as detailed below) that is not currently authorized under either an existing HE or a pre-1909 SWR. This water use will also have a 1998 priority date consistent with the date of the notice of intent to add this water use.

As described more fully in Section B.3 of this Agreement, the Parties expressly intend and the Super HE shall be conditioned to insure, that the existing Clackamas Instream Water

Right (Certificate #59491) with a priority date of August 26, 1968 will not be adversely affected by the authorization in the Super HE for additional water, and will be satisfied before any of the additional water is used, including any water released from existing storage. If PGE succeeds in a future adjudication and receives decreed pre-1909 hydroelectric water right certificates for the Project, those decreed pre-1909 certificated rights will be duplicative of some of the water use authorized under the Super HE. However, water use authorized under the Super HE, and pre-1909 claims or pre-1909 decreed certificated rights must not be additive at any point in time. Given this requirement, the Super HE authorizes PGE to use only the amount of water needed for operation of the Project (i.e. not twice that amount). The Super HE will be conditioned to reflect this requirement, as shown in the draft water right certificate that is attached to and incorporated into this Agreement.

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Upon adjudication, to eliminate “paper” duplication between the Super HE and a certificated pre-1909 right, the Super HE must be cancelled to the extent that it duplicates the pre-1909 certificated right. As a result, PGE would have a combination of time-limited “HE” water rights (the Super HE) and perpetual duration pre-1909 certificated water rights that in total provide 100% of the water use authorization PGE needs <sup>to</sup> maintain existing project capability as reflected in the new FERC license. Partial cancellation of the Super HE will also significantly reduce the amount of hydroelectric fees that PGE pays to the State. The Super HE will be conditioned to reflect the requirement that the water amounts are not additive, as shown in the draft water right certificate. Upon adjudication, the duplicative Super HE water rights can only be cancelled and cannot be used, sold or transferred.

A partial draft certificate is attached to reflect the concepts above. However, it is not meant to reflect the complete Settlement Agreement or final certificate conditions. The Parties



will work collaboratively with OWRD to develop a final version of the draft certificate of water right.

### ***B. Instream Flow Protection***

#### Introduction

As described more fully below, if the Super HE is approved, PGE will ensure greater long-term protection for the minimum flow amounts required under the new FERC license in two ways: First, PGE will convert portions of its pre-1909 unadjudicated claims at Oak Grove to instream flow use. The action at Oak Grove will involve an immediate assignment of the pre-1909 claim to the state to mirror the FERC mandated dry year base flows. Second, at Faraday, in the event of a future sale of the Faraday development or change in type of project use, or decommissioning, PGE will convert a portion of its pre-1909 claim (or adjudicated right) to the state for instream flow purposes, as described below. A sale, transfer or change in ownership of PGE or of its entire Clackamas River Hydroelectric Project will not trigger this conversion obligation, provided however, that the new owners will be subject to these same obligations at Faraday. Moreover, to clearly describe the interplay between Project operations and instream flows, the portion of the Super HE that authorizes use of new water will be conditioned to ensure protection of the existing Instream Water Right. In agreeing to these actions, the Parties do not intend to reduce or expand PGE's current power production capacity, as authorized under the pre-1909 claims.

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1. Oak Grove

Upon approval of the Super HE, PGE will assign to the state (through the Oregon Department of Fish and Wildlife, hereinafter "ODFW") the following amounts in the Oak Grove Fork below Lake Harriet to the Three Lynx gage on the Clackamas River:

From April 1 – September 30	80 cfs
From October 1 – October 15	100 cfs
From October 16 – December 15	80 cfs
From December 16 – March 31	70 cfs

These flow amounts, are intended to mirror the new FERC mandated dry year base flows at Oak Grove, and are greater than the minimum required under the current license, or under an existing state Instream Water Right (ISWR) in the same reach. Depending on the time of year, the state ISWR is from 10 to 60 cfs (Certificate 79481; 4/30/1991).

Following assignment of the designated portion of PGE's interest, the SWR will be amended to reflect the partial change in ownership, and partial change in use from hydroelectric to instream flow. As described above, the Super HE will include corresponding amounts of replacement water for PGE, with a priority date of October 22, 1998, that will be authorized for power production to offset the amount to be assigned for instream flow purposes.

a. Process

The process for amending an SWR to reflect changes in ownership, point of diversion, place of use, or type of use is described in OAR 690-028-055. The steps include public notice,

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and a determination by OWRD that the proposed change will not result in injury to other water rights. However, acceptance of the amendment by OWRD does not constitute a determination on the validity of the claim for purposes of a later adjudication proceeding. Once accepted, the SWR amendment authorizes implementation of the proposed changes while awaiting the adjudication.

ODFW and PGE will be required to prove certain aspects of the pre-1909 claim in a future adjudication. PGE will be responsible for proving the legal elements for the period of time that the pre-1909 claim was used for hydroelectric purposes, and ODFW will be responsible for demonstrating instream use for the period of time after the date of assignment for instream use. ODFW's evidentiary obligation will be minimal: to demonstrate that the water was protected, to the extent available, for instream use. This could be shown by stream flow records at the identified locations of use.

At this point, there is no way to predict when OWRD will begin the formal adjudication proceeding. However, it is reasonable to expect that the adjudication will not take place for many years. Therefore, under this Water Rights Agreement, PGE will also assume responsibility for maintaining and preserving records of water use and other information currently in its possession that will be needed as evidence in a future adjudication. The Implementation Plan attached to this Agreement includes a more detailed description of the process by which parties will receive notice of, and have the opportunity to participate in the adjudication, to the extent allowed by law.

If the instream use claim is approved in the adjudication, the decreed right will be held by OWRD in trust for the people of Oregon, as an Instream Water Right. To clarify and facilitate

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future management of the adjudicated water rights, the Instream Water Right will have the priority date assigned in the adjudication to the underlying pre-1909 SWR, and the remaining PGE right for hydroelectric power will have a priority date of one minute later. Any decreed instream right will be perpetual in duration and enforceable against junior water rights with the pre-1909 priority date approved for the original hydroelectric project. In this manner, the assignment and eventual adjudication will provide a permanent senior priority date for the specified minimum flow amounts.

b. Issues and Analysis

The Parties specifically note that the proposed instream assignment does not imply that the amount assigned (based on FERC mandated dry year base flows) is a sufficient quantity to achieve any specific objectives for conservation, maintenance and enhancement of fish and wildlife, as provided under ORS 537.336(1). However, the Parties recognize that the proposed assignment offers potential long-term protection of the negotiated minimum flow amounts, with a senior priority date.

The Parties agree to support or not oppose any effort by ODFW to increase the existing Instream Water Rights in the Oak Grove reach to amounts equal to the FERC mandated dry year base flows. The Parties further acknowledge that ODFW shall have the prerogative to pursue requests for additional Instream Water Rights in amounts greater than the FERC mandated dry year base flows in this reach; however, nothing in this Agreement shall bind the Parties to support, and the Parties expressly reserve the option to oppose, such action.

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The Parties recognize that the applicable OWRD rule, OAR 690-028-055, relating to amendment of a surface water registration, requires a finding that the change will not result in injury to other water rights. This finding is not required under the applicable statute, ORS 539.240. The Parties do not necessarily agree on whether such an injury may occur as a matter of law or fact, as a result of the proposed amendment. However, the Parties do agree that the provisions contained in the Water Rights Agreement and Implementation Plan should be sufficient to fully address any claim of injury with respect to the interests of existing water right holders prior to adjudication and to allow for approval of the amendment. The Parties therefore agree to support, or not oppose, approval of the SWR amendment, recognizing that OWRD must make a final determination at the time an amendment request is submitted.

Following adjudication, if the amount of water approved for the project pursuant to claims filed by PGE and the State is less than the total amount claimed by PGE under the original surface water registration (before the amendment and assignment) the amount of any reduction shall be distributed proportionately.

Nothing in this Agreement is intended to bind OWRD in its role as an adjudicator.

2. Faraday

At the Faraday diversion reach, the Parties intend to ensure instream flow protection, under the pre-1909 priority date, in the event that PGE decommissions the project or proposes to sell or convert the hydroelectric water right to another type of use. As described below, PGE will enhance protection of the flow amounts ranging from 400 cfs to 640 cfs under Instream Water Right 59491, with a priority date of August 26, 1968, by assigning or transferring

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corresponding amounts of water under PGE's pre-1909 SWR (or adjudicated right, if applicable), to the state.

a. Project Decommissioning

Decommissioning of an existing hydroelectric project is addressed in ORS 543A.300 *et seq.* Under these provisions, if an existing project is no longer used for hydroelectric purposes, the holder of the water right has the option, within five years after ceasing power production, to transfer the use to another purpose, or to voluntarily allow the water right to be converted into an Instream Water Right. If no action is taken by the project owner, after five years the statutes describe a process for mandatory conversion of the hydroelectric water right to instream use, subject to injury analysis. ORS 543A.305.

Pursuant to this statutory framework, in the event of decommissioning of the Clackamas Project, PGE will, at a minimum, convert to an instream water right a portion of the pre-1909 SWR or adjudicated right equal to the flow amounts currently protected under Instream Water Right Certificate 59491. Nothing in this Agreement is intended to limit PGE's option or ability to convert a greater amount to instream flow, under ORS 543A.305(3), or the right or ability of any other Party to advocate for or against protection of higher flows.

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b. Change of Use

In the event PGE intends to change the use of water from hydroelectric to some other purpose, PGE will, at a minimum, first convert a portion of the pre-1909 SWR or adjudicated right to an instream water right equal to the amounts currently protected under Instream Water Right 59491 with a priority date of August 26, 1968. As provided below, any such transfer of an

adjudicated right shall include conditions to avoid injury to any existing water rights that are senior to the 1968 priority of the current Instream Water Right.

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c. Issues and Analysis

In order to approve the proposed amendment of PGE's pre-1909 SWR at Faraday, OWRD must find the change will not result in injury to other water rights. This finding can readily be made with respect to the pre-1909 claim because the State does not enforce for or against the claim.

However, OWRD staff believe the proposed transfer of 400 to 640 cfs to an ISWR after the adjudication, could result in the potential for injury to other water rights under certain limited circumstances. OWRD could conclude that some existing water right holders would be injured if the state asserted a call on behalf of an instream water right with a pre-1909 priority date at a time when the minimum levels for prior hydroelectric uses were not otherwise satisfied. Some of the Parties disagree with this potential outcome, but the Parties, as a whole (including OWRD), recognize that the potential for injury, if any, can be avoided by conditioning the pre-1909 portion of the Instream Water Right as follows: "this instream water right shall not affect authorized water uses with a priority date before August 26, 1968 during times when this ISWR [the 400 to 640 cfs with a pre-1909 priority date] is not otherwise satisfied."

With such a condition in place, municipal water providers agree that they will not use their original points of diversion on Memaloose Creek and on the South Fork of the Clackamas River, (certificate # 80417 and permit #s 3778, 9982), above the Faraday reach except: 1) if OWRD does not approve the proposed South Fork and Memaloose water rights permit amendment requests for permits #s 3778, 9982 for additional points of diversion in the lower

Clackamas River, or 2) during emergencies that preclude the use of lower points of diversion, such as water contamination or other environmental conditions.

This specific subordination to water rights senior to the existing 1968 ISWR is not intended to suggest, and nothing in this Agreement will allow or be interpreted to allow subordination of the transferred portion of the ISWR with a pre-1909 priority date to future water rights. The Parties therefore recommend OWRD include the following language in the future instream water right: "this subordination clause does not allow nor should it be interpreted to allow subordination of the ISWR to future water rights."

To help clarify the water rights to which the proposed subordination clause would apply, within 6 months of this Agreement, OWRD will develop a list of known, affected water rights. The Parties recognize that OWRD will undertake its best effort to compile a complete and accurate list; however, OWRD cannot warrant that the list would include all water rights that might be affected, and the failure to include any particular water right on the list would not affect the applicability of the proposed subordination. In addition, the Parties recognize the OWRD records do not contain information about exempt water uses that may also be subject to this subordination provision.

Nothing in this section is intended to bind OWRD in its role as adjudicator.

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3. "New Water" at Faraday

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In addition to the above provisions regarding possible future changes in uses and protection of instream flow, the Parties agree that additional releases of water from existing storage authorized under the Super HE shall be conditioned to ensure that the 1968 Instream Water Right (59491) is not adversely affected. Although the Super HE would be junior to the



Instream Water Right, the Instream Water Right currently contains wording that makes it subordinate to any water legally stored or released from storage. The proposed condition will ensure that, notwithstanding the subordination provision of the Instream Water Right, use of the additional water at Faraday or North Fork including water from storage will not occur unless the 1968 Instream water right is first fully met. The Super HE condition will clarify that PGE may not utilize releases of additional water from existing storage unless the 1968 Instream Water Right is fully satisfied. In agreeing to this provision, the Parties understand that the condition on the Super HE should not result in regulation or limitation of operations at the North Fork site, because at that location the project is non-consumptive, with no diversion reach. Therefore, use of water for hydroelectric purposes would not interfere with or reduce the amount of water that would continue to flow downstream toward the reach protected under the Instream Water Right. The proposed condition could result in regulation at Faraday, however, because of the existence of a diversion reach.

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*C. Procedural Options for Authorization of Additional Water Use*

As discussed above, water use authorization for any additional water from storage, live flow or replacement water for the instream water rights that is not currently authorized under either an existing HE or a pre-1909 SWR will be added to the Super HE time-limited water right. This water use will also have a priority date consistent with the date of the notice of intent to add this water use.

The parties discussed a variety of procedural options which might be used to achieve the authorizations necessary to assign some portion of PGE's unadjudicated pre-1909 claims at Oak Grove and Faraday to the state for instream purposes while allowing the project to operate at its

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total capacity when water is available. However, OWRD has determined that the most appropriate procedural approach will be for PGE to request an “exception” to the Willamette Basin Plan. Therefore, the Parties agree to utilize the exception process, as described in this section.

A basin plan, adopted as an administrative rule by the Water Resources Commission (WRC), provides guidance to OWRD in evaluating new water right applications. The Willamette Basin Plan, applicable to this project, currently contains provisions that would limit new hydroelectric water use in the Project area. Although the Clackamas Project is not “new,” the concept of the Super HE requires issuance of a new, time-limited water right for those portions of the project that are not currently included in a separate HE. In addition, as proposed under the Settlement Agreement, the Project will include authorization for an increase in current diversions. Therefore, the OWRD may not be able to accept an application for the expanded water use sought through the Super HE unless PGE applies for, and the WRC grants, PGE’s request for an exception to the Willamette Basin Plan, OAR Chapter 690 Division 502. Such application for a basin plan exception would emphasize the unique circumstances in this case, including but not limited to the facts that most of the project is already authorized under either pre-1909 claims or the existing HEs; the Agreement provides for the conversion of a portion of one of the existing pre-1909 claims to instream flow protection; and the proposed uses appear to fall within the categories appropriate for consideration as basin plan exceptions under ORS 536.295.

The Parties do not fully agree that a basin plan exception is required, as a matter of law, to implement the Water Rights Agreement; however, the Parties are willing to proceed with the basin plan exception, subject to clarification that this action would not establish precedent as to

the unresolved issue of whether ORS 543A would allow reauthorization, as proposed, without the exception.

To facilitate the basin plan exception process, PGE shall work in collaboration with the Parties to develop the necessary request letter and proposed findings, which shall be adopted by consensus and included as an attachment to the Implementation Plan for this Agreement. The request letter and proposed findings shall include specific reference to the statutory authority for such exceptions, in ORS 536.295(1)(a) – (g) and will be structured on a reach by reach basis. The Parties agree that the proposed basin plan exception can be approved under one or more of the categories listed in ORS 536.295, including (1) (a), (f), or (g); however, the Parties do not fully agree as to whether ORS 536.295(1)(c) should or could legally be used as a basis for approval. The Parties further agree that if the request and findings are made on a reach by reach basis, ORS 536.295(1)(a) could be used as additional basis for the new water at North Fork and Faraday, and ORS 536.295(1)(f) could be used as additional basis for the new water at Oak Grove Fork. Therefore, for purposes of consensus, the Parties agree that the request for a basin plan exception shall be prepared on the basis of ORS 536.295(1)(a), (f) or (g), but shall not propose justification under subsection (1)(c) for any diversion that results in a section of stream being bypassed. If OWRD or the Water Resources Commission considers granting the exception under subsection (1)(c), or any subsection not discussed herein, the Parties specifically reserve the option to argue against approval based on that criterion.

The Parties to the Water Rights Agreement agree they will not challenge PGE's request or the proposed findings when submitted to the Water Resources Commission if consistent with this Water Rights Agreement.

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*D. Water Availability*

Approval of any new water right application also requires a finding by OWRD relating to “water availability.” In this case, OWRD’s standard analysis of water availability shows that water is not available for new consumptive water rights during a portion each year in the Project area. However, because of the unique circumstances in this case (where most of the project is already authorized under either pre-1909 claims or the existing HEs, with the exception of more efficient, higher capacity turbines at North Fork and Faraday,) OWRD may be able to find that the “new” water use can be approved despite a lack of water availability by making findings under OAR 690-410-0070(2)(a). Under this rule, an exception to the water availability standard may be taken when there is a “high public interest” in the water use, and the use is conditioned to protect “instream values.”

The Parties agree that the required findings for the proposed Super HE can be based on the public and instream benefits to be achieved from implementation of a complete Settlement Agreement, including the proposed instream assignment and other project operating conditions that would protect instream values. The Parties agree to work together to develop proposed findings that specifically address the provisions of OAR 690-410-0070(2)(a), which shall be adopted by consensus and included as part of the Implementation Plan for this Agreement. These findings will likely vary by reach. The Parties agree that those findings will be consistent with the following analysis attached hereto as Attachment 3.

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This Agreement does not imply that the Parties agree on whether the amount of water protected as minimum flows is sufficient to meet all instream flow needs.

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The Parties agree to support or not to challenge approval by the OWRD of the water use specified in the Super HE if it is consistent with this Agreement.

#### **IV. Federal Reserved Water Rights**

The Parties recognize the unique water rights issues presented for the federal agencies or any Tribal parties to the Settlement Agreement that are participating in the negotiating process. Therefore, the Parties agree that nothing in this Water Rights Agreement or final Settlement Agreement is intended in any way to affect, diminish, impair, or predetermine any federal-reserved or state-law-based water right that the United States may have in the Willamette River or its tributaries.

#### **V. No Precedent Established**

The Parties support the provisions of this Agreement, as a whole, to address the unique facts, circumstances and legal issues presented in connection with water rights for the PGE Clackamas Project; however, the Parties do not intend any provisions of this Agreement to establish precedent regarding interpretation of laws, rules, practices or policies of OWRD outside the context of this Agreement.

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#### **VI. Dispute Resolution**

All disputes among the Parties regarding the obligations of the Parties under this Agreement shall, at the request of any Party, be subject to dispute resolution. The Parties agree to devote such time, resources, and attention to dispute resolution as are needed and as can be reasonably provided to attempt to resolve the dispute at the earliest time possible; and each Party shall cooperate in good faith to promptly schedule, attend, and participate in the dispute resolution. Each Party shall promptly implement all final agreements reached, consistent with its applicable statutory and regulatory responsibilities. If completion of the dispute resolution

procedure would foreclose a Party from seeking judicial or other review of an action inconsistent with this Agreement, that party may pursue whatever action is necessary to preserve the viability of the action or remedy sought pending completion of the dispute resolution process. The Parties may, by unanimous agreement, attempt to resolve the dispute using a neutral mediator unanimously selected by the disputing Parties. The mediator shall mediate the dispute in accordance with the instructions and schedule provided to it by the Parties. Any of these time periods may be reasonably extended or shortened by agreement of the Parties, or as necessary to conform to the procedure of an agency or court with jurisdiction over the dispute. Unless otherwise agreed among the Parties, each Party shall bear its costs for its own participation in the dispute resolution.

To the extent provided by applicable law, any Party may seek administrative or judicial review of any action by OWRD inconsistent with this Agreement. The dispute resolution procedures of this Agreement do not preclude any Party from timely filing and pursuing administrative review under OWRD's applicable rules, or judicial review, of any such action that is inconsistent with this Agreement or any action that relates to subjects not resolved by this Agreement. However, the Parties shall follow dispute resolution procedures to the extent practicable while any such review of and inconsistent or non-related action is pursued. If a Party has filed for administrative or judicial review and the Parties subsequently agree to modify this Agreement to conform to the action, the filing Party or Parties shall withdraw the appeal, or recommend such withdrawal, as appropriate.

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## VII. Effect of Attachments

Documents attached to this Agreement in draft form reflect the agreement of the Parties and the concepts described in the Agreement. Final versions of these documents shall be consistent with this Agreement and the draft attachments. However, OWRD does not intend to predetermine the outcome of the state water right reauthorization process, and reserves its right to take all actions necessary to comply with ORS 543A.120 *et seq.* and applicable state law.

Within 180 days after signing this Agreement, the Parties shall reconvene for the purpose of reviewing and finalizing the Implementation Plan and other attachments that are included in draft/conceptual form with this Agreement. The Implementation Plan and other Attachments shall be developed collaboratively and shall reflect consensus of the Parties.

## VIII. Successors, Transferees and Assigns

This Agreement shall apply to and be binding on the Parties and their successors, transferees, and assigns, to the extent allowed by law. Upon completion of a succession, transfer or assignment, the initial Party shall no longer be a Party to this Agreement. No change in ownership of the Project or transfer of the new FERC license by PGE shall in any way modify or otherwise affect any other Party's interests, rights, responsibilities, or obligations under this Agreement.

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## Conclusion

This Agreement provides an innovative approach to ensure adequate water rights for the Project, while protecting against injury to other water rights and providing an opportunity for enhanced long-term protection of minimum instream flow levels.

The Parties agree:

- That PGE will pursue an exception to the OWRD water availability determination and Willamette Basin Plan to implement the provisions of the Water Rights Agreement.
- That OWRD will process the “Super HE” through the state water right reauthorization process under the terms and conditions described in the Settlement Agreement, this Water Rights Agreement, and attachments hereto, including the draft water right certificate;
- That PGE will assign a portion of its pre-1909 SWR at Oak Grove to ODFW, for instream flow, as provided in this Agreement and attachments hereto;
- That PGE will provide for conversion of a portion of its pre-1909 SWR (or future adjudicated right) at Faraday to reflect the flows currently protected by ISWR certificate 59491, priority date August 26, 1968, if PGE decommissions the Project or takes other action to change the character of use from hydroelectric power production as provided in this Agreement and attachments hereto;
- That the Parties to this Water Rights Agreement will support, or will not challenge, the above actions that are taken in a manner consistent with this Agreement and attachments hereto;
- That the final Water Rights Agreement and attachments will be attached to and made part of the eventual adjudication claims submitted by PGE and ODFW in seeking approval of

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decreed and certificated water rights for the pre-1909 hydroelectric uses and subsequent instream assignment.

- That the Parties will work together to develop a detailed Implementation Plan and other attachments that will be attached to and made part of the Water Rights Agreement.
- That this Agreement will be attached as an Appendix to the Settlement Agreement.
- That nothing in this Agreement will be construed to establish precedent with respect to OWRD laws, rules, practices or policies outside of the context of this Agreement.

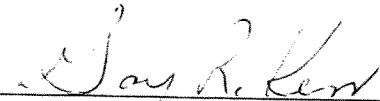
**Attachments**

1. Draft Implementation Plan
2. Draft Super HE
3. Draft Water Availability Findings
4. Draft List of Water Rights Senior to the August 26, 1968 ISWR

IN WITNESS WHEREOF the Parties have entered into this Agreement as of the date first above written.

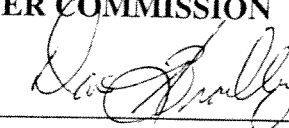
**CLACKAMAS RIVER WATER**

By: \_\_\_\_\_

  
Gary Kerr  
General Manager

**NORTH CLACKAMAS COUNTY  
WATER COMMISSION**

By: \_\_\_\_\_

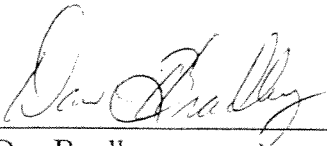
  
Dan Bradley  
General Manager

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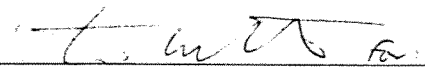
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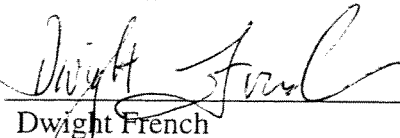
OAK LODGE WATER DISTRICT

By:   
Dan Bradley  
General Manager


OREGON DEPARTMENT OF FISH AND WILDLIFE

By:   
Roy Elicker  
Interim Director

OREGON WATER RESOURCES DEPARTMENT

By:   
Dwight French  
Administrator, Water Rights Adjudications Division

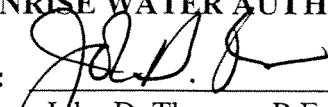
PORTLAND GENERAL ELECTRIC COMPANY

By:   
Peggy Y. Fowler  
Chief Executive Officer

SOUTH FORK WATER BOARD

By:   
Alice Norris, Chair

SUNRISE WATER AUTHORITY

By:   
John D. Thomas, P.E.  
General Manager

WATERWATCH OF OREGON

By:   
John DeVoe  
Executive Director

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# Attachment 1

## Draft Implementation Plan For Water Rights Agreement

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IMPLEMENTATION PLAN FOR  
WATER RIGHTS AGREEMENT

**I. Introduction**

The Water Rights Agreement (or “Agreement”) entered into by the Water Rights Subgroup includes a number of actions that must be taken by Portland General Electric (PGE), the Oregon Water Resources Department (OWRD), or other parties to the Agreement. This Implementation Plan provides additional details and timelines regarding such actions.

**II. Procedural Overview**

As further described in the Agreement, water use for the Clackamas Project is currently authorized under a combination of state hydroelectric licenses originally issued for the project, and pre-1909 water uses authorized under Surface Water Registration (SWR) claims filed with OWRD. (An SWR describes water uses that are claimed to have vested prior to 1909, when the state’s first comprehensive water use code was enacted, and constitutes authorization for continued water use until completion of a formal adjudication of water rights in the affected river basin.) A key element of the Agreement provides for the issuance of a Super HE that will authorize all aspects of the Clackamas Project under a single, state-issued water right. Issuance of the Super HE will require completion of steps traditionally associated with obtaining a new state water right, as described in the applicable provisions of ORS Chapter 543A (dealing with reauthorization of hydroelectric projects, and describing the process for obtaining a state water right in connection with reauthorization.) Section IV, below, describes the specific steps that will be required prior to issuance of the Super HE.

The Agreement also includes provisions for potential long-term protection of instream flow in the Oak Grove and Faraday reaches of the project. Current hydroelectric water use in these reaches is authorized under SWRs, which will remain in effect until completion of a formal adjudication in the Clackamas Basin. During the adjudication process, all claims are reviewed and ultimately approved, modified or denied. Because formal adjudication is not likely to occur for quite some time, the Agreement includes provisions for how the water rights will be managed prior to, and after adjudication, in order to accomplish the instream protection objectives. These provisions are addressed in Sections V and VI, below.

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**III. Definitions**

A. PGE "Surface Water Registration" (SWR) means the Surface Water Registrations and supporting documents filed by PGE on December 30, 1992, as follows: SWR No.386, River Mill; SWR No. 388, Cazadero/Faraday; SWR No.387,Oak Grove.

B. "Hydroelectric License" (HE) means an existing time-limited hydroelectric water right issued by the State of Oregon that authorizes use of water for existing project facilities as follows: HE 186, Timothy Lake; HE 202, North Fork; HE 203, Faraday Addition; HE 220 River Mill Unit 5.

C. "Instream Water Right" means a water right certificate for instream purposes, held in trust by the OWRD for the benefit of the people of the State of Oregon, as provided in ORS 537.332.

D. "Adjudication Claim" means a claim submitted by PGE or ODFW in a future Clackamas Basin Adjudication to support quantification and approval of a claim for pre-1909 water use, including the portions of PGE's surface water registrations that are subject to assignment and amendment for instream flow purposes, as provided herein.

E. "Super HE" means a water right issued by OWRD to PGE to confirm use of water for all aspects of the Clackamas River Hydroelectric Project as provided under the Water Rights Agreement, and this Implementation Plan.

F. "Parties" are the signatories to the Water Rights Agreement.

**IV. Processing of the Super HE**

A. Introduction

The Super HE will be processed in accordance with ORS 543A.120-145 and other rule requirements specified in the Agreement. These statutes provide that OWRD will issue a water right upon successful reauthorization of an existing hydroelectric project. Additionally, "new water" may be added to the hydroelectric water right, as provided in ORS 543A.145 and by applying the processes and requirements described in Section III.B.3, C and D of the Agreement. As described in these sections of the Agreement, the process will include the specific steps of seeking an "exception" to the Willamette Basin Program, and requesting a finding from OWRD that water be appropriated under OAR 690-410-070(2)(a), as described below.

B. Request for Basin Program Exception

1. Within 120 days after the effective date of the Agreement, PGE shall revise its application for reauthorization of state water rights for the Project to be consistent with the Water Rights Agreement and overall Settlement Agreement.

2. At the time of submitting a revised application for reauthorization of the state water rights for the Project, PGE shall also submit a written request to the OWRD and the

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Water Resources Commission (WRC) for approval of a basin program exception. The written request shall reflect consensus of the Parties. PGE shall further collaborate with the Parties and shall obtain consensus of the Parties before submitting the final request to OWRD. The request shall be presented by OWRD to the WRC for approval at the first opportunity following submission of the written request. The Parties to the Agreement, except for OWRD, shall either support or shall not oppose approval of the basin program exception by WRC, as provided under the Agreement.

3. As provided in the Agreement, OWRD does not intend to predetermine the outcome of the state water right reauthorization process, and reserves its right to take all actions necessary to comply with ORS 543A.120 *et seq.* and applicable state law. Upon receipt of the revised application for reauthorization and request for exception, OWRD shall forward to the WRC the request for an exception to the Willamette Basin Program (OAR 690-502) so that the application may be processed further under ORS 543A.120. If the WRC approves a basin program exception, then OWRD shall issue a Proposed Final Order (PFO) consistent with this Agreement, in accordance with ORS 543A.120. If, however, OWRD issues a PFO that is materially inconsistent with this Agreement, or if, after any protest or otherwise, OWRD issues a Final Order that is materially inconsistent with this Agreement, the Parties shall address any such inconsistency in accordance with Section 7.2.2 of the Settlement Agreement (Resolution of Disputes Before Issuance of New License). The Parties recognize that the PFO issued by OWRD must also include water quality findings consistent with a 401 Certification to be issued by the Department of Environmental Quality (DEQ), under a separate process. Therefore, the PFO shall not be issued until DEQ completes the 401 certification.

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C. Request for Additional Water Use – Water Availability

In addition to the Request for a Basin Program Exception as described in Section B., above, PGE shall submit to OWRD a written request to allow an additional use where the OWRD has found that water is not available under its Water Allocation Policy. The request shall specify applicable provisions under OAR 690-410-0070(2)(a) consistent with the Agreement. The purpose of this request is to allow approval of the Super HE, even though sufficient water may not be available for the project under the methodology used by OWRD for evaluating water availability. The written request shall be consistent with the Agreement and the Water Rights subgroup shall have an opportunity to review it prior to filing. Subject to approval by the WRC of the basin program exception described above, in preparing a PFO for the application, OWRD shall make findings under OAR 690-410-0070(2)(a), relating to water availability, consistent with the Agreement.

The Parties also agree that water use authorized under the new Super HE to duplicate existing hydroelectric water use currently authorized under pre-1909 SWR numbers 386, 387 and 388, shall be conditioned to ensure that the SWR and the duplicative HE amounts are not additive at any point in time. Upon adjudication, to eliminate “paper” duplication between the Super HE and a certificated pre-1909 right, the Super HE must be cancelled to the extent that it duplicates the pre-1909 decreed right. As a result, PGE would have a combination of time-

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limited "HE" water rights (the Super HE) and perpetual duration pre-1909 certificated water rights that in total provide 100% of the water use authorization PGE needs maintain existing project capability as reflected in the new FERC license. Upon adjudication, the duplicative Super HE water rights can only be cancelled and cannot be used, sold or transferred.

**V. Assignment and Amendment of PGE SWR for Instream Flow at Oak Grove**

A. Within one year of issuance of the FERC license for the Clackamas Project, PGE shall assign an interest in the PGE Surface Water Registration No. 387 for Oak Grove, to the Oregon Department of Fish and Wildlife (ODFW), as provided in Section II. B. of the Agreement. The purpose of this assignment is to eventually secure a senior priority date for protection of instream flows in an amount equal to the FERC required dry year base flows under the FERC license. Within 30 days of the assignment, PGE and ODFW shall jointly file notice of the assignment and an application for amendment of the SWR to reflect the proposed instream use, as required by OWRD under OAR 690-028-055, and shall include a copy of the Agreement and this Implementation Plan.

B. The amendment shall be processed pursuant to ORS 539.240(11), and the applicable rules of OWRD.

C. The Parties recognize that OAR 690-028-055, relating to amendment of a surface water registration, requires a finding by OWRD that the proposed change will not result in injury to other water rights. The Parties do not necessarily agree on whether any such injury may occur, as a matter of law, as a result of the proposed amendment. However, the parties do agree that the provisions contained in the Agreement and this Implementation Plan are sufficient to address any claim of injury with respect to their interests, and are sufficient to allow for approval of the amendment. The Parties therefore agree to support, or not oppose, approval of the amendment.

D. PGE shall work cooperatively with ODFW to preserve and maintain evidence for eventual use in the adjudication. Prior to OWRD approval of the assignment and amendment, PGE shall have sole responsibility to maintain evidence of water use needed to support the pre-1909 adjudication claim. Upon OWRD approval of the assignment and amendment, ODFW shall maintain records, as appropriate, to demonstrate use of water for instream flow purposes.

**VI. Potential Future Instream Flow Enhancement at Faraday**

A. Introduction

Section III.B.2. of the Agreement describes the Parties' intention to protect instream flow in the Faraday reach, in the event that, at some point in the future, PGE decommissions the Faraday Development or proposes to convert the hydroelectric water right to another type of use. The Agreement provides that, under such circumstances, PGE will take steps to enhance protection under an existing state Instream Water Right (Certificate No. 59491) with a priority

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date of August 26, 1968, by assigning or transferring (whichever is applicable) a portion of the PGE pre-1909 SWR or adjudicated water right, to the State.

B. Implementation Steps for Assignment of Pre-1909 SWR.

1. If PGE intends to decommission the Faraday Development of the Clackamas Project as provided under ORS 543A.300 *et seq.*, or to change the type of use from hydroelectric prior to adjudication of the SWR, PGE shall first assign to ODFW a portion of SWR 388 equal to the amounts currently protected under Instream Water Right 59491. The assignment shall be filed prior to or simultaneously with commencement of the decommissioning or change of use.

2. Within 30 days of the assignment, PGE and ODFW shall jointly file notice of the assignment and an application for amendment of the SWR to reflect the proposed instream use, as required by OWRD under OAR 690-028-055. The notice shall include a copy of the Agreement and Implementation Plan.

3. The amendment shall be processed by OWRD pursuant to ORS 539.240(11), and the applicable rules of OWRD.

4. The Parties recognize that OAR 690-028-055, relating to amendment of a surface water registration, requires a finding that the proposed change will not result in injury to other water rights. The Parties do not necessarily agree on whether any such injury may occur, as a matter of law, as a result of the proposed amendment. However, the parties do agree that the provisions contained in Section III.B.2. of the Agreement are sufficient to address any claim of injury with respect to any of their interests, and are sufficient to allow for OWRD approval of the amendment. (See further discussion in Section VI.C. 4 and 5, below.)

5. The Parties, except for OWRD, agree to support or not oppose the SWR amendment. OWRD does not intend to predetermine the outcome of the process, but does support and agree with the preliminary injury analysis described in the Agreement.

6. Following assignment and amendment of the SWR by OWRD, PGE shall work cooperatively with ODFW to preserve and maintain evidence for eventual use in the adjudication. Prior to approval of the assignment and amendment, PGE shall have sole responsibility to maintain evidence of water use needed to support the pre-1909 adjudication claim. Following approval of the assignment and amendment, ODFW shall maintain records, as appropriate, to demonstrate use of water for instream flow purposes.

C. Implementation Steps for Possible Future Transfer of Pre-1909 Water Right

1. If PGE intends to decommission the Faraday Development of the Clackamas Project as provided under ORS 543A.300 *et seq.*, or to change the type of use from hydroelectric after successful adjudication of the SWR, PGE shall first file an application to transfer to OWRD a portion of pre-1909 water right equal to the amounts currently protected under Instream Water Right 59491.

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2. PGE shall bear all costs of applying for and obtaining approval of the transfer application.
3. Prior to filing the transfer application, PGE shall provide notice to the Parties and shall collaborate with the Parties in developing the application to ensure that it is consistent with the Agreement and this Implementation Plan.
4. The Parties recognize that applicable statutes and rules applying to a transfer/change in use of a water right, require a finding by OWRD that the proposed action will not result in injury to other water rights. The Parties do not necessarily agree on whether any such injury may occur, as a matter of law, as a result of the proposed instream transfer. However, the parties do agree that the provisions contained in Section III.B.2. of the Agreement are sufficient to address any claim of injury with respect to their interests. Specifically, the Agreement requires a condition on the Instream Water Right resulting from the proposed transfer as follows: "This instream water right shall not affect authorized water uses with a priority date before August 26, 1968 during times when this ISWR is not otherwise satisfied." This provision is intended to protect other water rights that are senior to the current 1968 Instream Water Right, but junior to a pre-1909 water right that may be approved for PGE, from regulation in favor of the Instream Water Right following the proposed transfer.
5. To help clarify the water rights to which this condition would apply, within six months of signing of the Agreement, OWRD shall finalize a list of known, affected water rights. OWRD shall provide the Parties with a copy of the list. The Parties recognize that OWRD will undertake its best effort to compile a complete and accurate list; however, OWRD cannot warrant that the list would include all water rights that might be affected, and the failure to include any particular water right on the list would not affect the applicability of the subordination condition in the Instream Water Right. In addition, the Parties recognize that OWRD records do not contain information about exempt water uses that may also be subject to the subordination condition.
6. As provided in Section III.B.2 of the Agreement, upon issuance of an Instream Water Right with a pre-1909 priority date, and with the condition described above, the municipal water providers that are Parties to the Agreement will not use their original points of diversion on Memaloose Creek and on the South Fork of the Clackamas River (pursuant to certificate 80417 and permits 3778 and 9982), above Faraday reach except: 1) if OWRD does not approve the proposed South Fork and Memaloose water rights permit amendment requests for permits 3778 and 9982 for additional points of diversion in the lower Clackamas River, or 2) during emergencies that preclude the use of lower points of diversion, such as water contamination or other environmental conditions.
7. The Parties, except for OWRD, agree to support, or not oppose the South Fork transfer application to the extent consistent with the Agreement and Implementation Plan.
8. OWRD does not intend to predetermine the outcome of any transfer process, but does support and agree with the preliminary injury analysis described in the Agreement.

## **VII. Adjudication Process**

A. The Parties recognize that it may be quite some time before OWRD commences formal adjudication of the Clackamas Basin. However, the Parties intend to monitor the process and to work together, as provided in the Agreement and this Implementation Plan, to support approval of the assigned portions of PGE's SWRs, as permanent Instream Water Rights.

B. For the assigned portions of the PGE SWRs, PGE shall have responsibility in the adjudication to present evidence in support of the SWRs from the date of claimed priority to the date of amendment; ODFW shall have responsibility for demonstrating continuing beneficial use of the water for instream purposes after the date of amendment. PGE shall bear the full cost of proving the entire quantity of water claimed until the time of the amendment. ODFW shall bear the cost of proving the amended portion of the claim from the date of amendment.

C. To provide an opportunity for participation in the adjudication process, OWRD shall provide written notice to the Parties of the commencement of adjudication proceedings, and shall establish a process for ensuring on-going notice to the parties throughout the adjudication process. To the extent authorized under ORS Chapter 539, the Parties further agree to support any request for standing to participate in the adjudication that may be filed by any of the Parties in order to advocate on behalf of the assigned portion of the Adjudication Claim.

D. In presenting and defending the Adjudication Claim for the Instream Water Right, ODFW and any of the parties who may be granted standing in the proceedings, shall advocate to the Adjudicator and the Court for approval of Instream Water Rights in the amounts and subject to the terms and conditions of this agreement. The OWRD shall provide notice to the Parties of any protests filed against the Adjudication Claim, and shall advise the Parties of any settlement efforts regarding such protests. PGE and ODFW or any Parties granted standing in the adjudication proceeding shall not agree to any compromise or settlement affecting the assigned portion of the Adjudication Claim that would modify the terms and conditions of this Agreement without the prior written consent of all Parties.

E. The Water Rights Agreement and this Implementation Plan shall be attached to and made part of the Adjudication Claim(s) submitted by PGE and ODFW for the amended portion of the claim(s).

## **VIII. Dispute Resolution**

All disputes among the Parties regarding the obligations of the Parties under this Implementation Plan shall be subject to dispute resolution in the manner described in Section V. of the Water Rights Agreement.

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## **Attachment 2**

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**D R A F T**  
STATE OF OREGON  
COUNTY OF CLACKAMAS  
DRAFT CERTIFICATE OF WATER RIGHT

**For Discussion Purposes**

THIS DRAFT CERTIFICATE ISSUED TO:

PORTLAND GENERAL ELECTRIC CO.  
121 SW SALMON ST.  
PORTLAND, OR 97204

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for the right to use the waters of: TIMOTHY LAKE, LAKE HARRIET, OAK GROVE FORK OF THE CLACKAMAS RIVER, THREE LYNX CREEK, NORTH FORK RESERVOIR, FARADAY LAKE, ESTACADA LAKE, AND THE CLACKAMAS RIVER FOR THE DEVELOPMENT OF HYDROELECTRIC POWER.

This certificate reauthorizes the hydroelectric project developed under HE 186, HE 202, HE 203 and HE 220. The project has also operated with water under Surface Water Registrations (SWR) 386, 387, and 388.

This right allows:

storage of 69,000 acre feet of water with a priority date of March 18, 1953, in Timothy Lake, located in the NE ¼ NE ¼ Section 27, Township 5 South, Range 8 East, W.M.;

release of water from Timothy Lake at a rate not to exceed 300 cfs above inflow, for power purposes at Oak Grove, North Fork, Faraday and River Mill powerhouses;

10 cfs of water released from Timothy Lake with a priority date of March 18, 1953, for 108 theoretical horsepower for backup power supply at Timothy Lake lodge

storage of 300 acre feet of water with a priority date of October 22, 1998, in Lake Harriet located in the NW ¼ SW ¼ Section 4, Township 6 South, Range 7 East, W.M., (this right duplicates SWR 387);

600 cfs of water with a priority date of October 22, 1998, diverted from Oak Grove Fork at Lake Harriet, located in the NW ¼ SW ¼ Section 4, Township 6 South, Range 7 East, W.M.; for power purposes at Oak Grove powerhouse, (this right duplicates SWR 387);

2.5 cfs of water with a priority date of October 22, 1998, diverted from Three Lynx Creek, in the SE ¼ SE 14 Section 16, Township 5 South, Range 6 East, W.M., for fire protection and station use at the Oak Grove powerhouse, (this right duplicates SWR 387);

water for power purposes to replace water assigned to instream bypass flows from Lake Harriet to the Oak Grove Powerhouse in the SW ¼ NW ¼ Section 22, Township 5 South, Range 6 East, W.M. with a priority date of October 22, 1998, in the amounts of: 70 cfs from January 1 to March 31, 80 cfs from April 1 to September 30, 100 cfs from October 1 to October 15, 80 cfs from October 16 to December 15, and 70 cfs from December 15 to December 31.;<sup>1</sup>

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<sup>1</sup> This right represents a commitment by PGE to assign a portion of its Pre-1909 Surface Water Registration Claim SWR 387 to an instream right to enhance instream fish habitat. This right will replace the instream water assignment at a junior priority status.

storage of 252 acre feet of water, with a priority date of March 18, 1953, in Frog Lake located in the NE ¼ SW ¼ Section 35, Township 5 South, Range 6 East, (W.M.);

19,500 acre feet of storage with a priority date of September 26, 1955, in North Fork Reservoir located in the NW ¼ NE ¼ Section 11, Township 4 South, Range 4 East, W.M.;

5400 cfs of water with a priority date of September 26, 1955, from Clackamas River at the North Fork Dam in the NW ¼ NE ¼ Section 11, Township 4 South, Range 4 East, W.M., and to impound all, or any part of said water in the North Fork Reservoir;

654 cfs of water with a priority date of October 22, 1998, from the Clackamas River at the North Fork Dam in the NW ¼ NE ¼ Section 11, Township 4 South, Range 4 East, W.M., and to impound all, or any part of said water in the North Fork Reservoir;

2650 cfs of water with a priority date of September 26, 1955, water from the Clackamas River at Faraday Diversion Dam in the SW ¼ NE ¼ Section 3, Township 4 South, Range 4 East, W.M. and to impound all, or any part of said water in the Faraday Diversion Dam reservoir, (subject to minimum bypass flows listed in Special Conditions);

684 cfs of water with a priority date of October 22, 1998, from the Clackamas River at Faraday diversion Dam in the SW ¼ NE ¼ Section 3, Township 4 South, Range 4 East, W.M. and to impound all, or any part of said water in the Faraday Diversion Dam reservoir;

2370 cfs of water with a priority date of October 22, 1998, from the Clackamas River at Faraday diversion dam, and to impound all, or any part of said water in the Faraday Diversion Dam reservoir, (this right duplicates SWR 388), (subject to minimum bypass flows listed in Special Conditions);

4641 cfs of water with a priority date of October 22, 1998, from the Clackamas River at River Mill Dam in the NW ¼ of the NW ¼ of Section 20, Township 3 South, Range 4 East, W.M. and to impound all, or any part of said water in Estacada Lake, (this right duplicates SWR 386), (subject to minimum flows listed in Special Conditions);

950 cfs of water with a priority date of March 4, 1960, from the Clackamas River at River Mill Dam, and to impound all, or any part of said water in Estacada Lake, (subject to minimum bypass flows listed in Special Conditions).

Water may be stored in Timothy Lake during a 12 month period beginning April 1 and ending March 31 of each year.

Notwithstanding the subordination clause of Instream Water Right Certificate 59491, the 684 cfs of additional water at Faraday may not be diverted unless the flows defined in Instream Water Right Certificate 59491 are first fully satisfied.

### Project Components

The word "project" as used in this document means the complete unit, improvement and development including the dams and appurtenant works and structures, storage reservoirs, and miscellaneous works, powerlines, and structures used in connection with the unit or any part thereof, rights of way, lands, flowage rights and all other properties, rights and structures necessary or appropriate in the use, operations and maintenance of the project.

The Project is located in Clackamas County, Oregon, near the city of Estacada, on the Clackamas River and Oak Grove Fork of the Clackamas River. It consists of four developments. From

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upstream to downstream, the developments are the Oak Grove Development, the North Fork Development, the Faraday Development, and the River Mill Development.

The four Project developments have a combined maximum generating capability of 173 megawatts (MW), including 44 MW at the Oak Grove Development, 58 MW at the North Fork Development, 46 MW at the Faraday Development, and 25 MW at the River Mill Development.<sup>2</sup>

### **Oak Grove Development**

The Oak Grove Development includes a system of storage reservoirs and pipelines. Timothy Lake, the most upstream component of the Oak Grove Development, has a storage capacity of 69,000 acre-feet with flashboards. The dam is about 105 feet high, 635 feet long and 40 feet wide on top. Surface area of the reservoir is about 1430 acres. A 25 kW hydroelectric generator is located at the toe of the Timothy Lake Dam to supply backup power for the Timothy Lake Lodge complex and station service.

Water released from Timothy Lake, plus inflow from the intervening catchment area of 72.5 square miles, flows down the Oak Grove Fork approximately 10 miles to Lake Harriet. Lake Harriet dam is 68 feet high and has a storage capacity of 300 acre-feet of water.

From Lake Harriet, the water is diverted through an intake structure into a 9-foot-diameter steel pipeline that carries it downstream 4.1 miles to Frog Lake, an off-stream forebay reservoir with a gross storage capacity of 252 acre-feet for the Oak Grove Powerhouse. From Frog Lake, a 9-foot-diameter pipeline conveys the water 2.3 miles to a surge tank located just above the powerhouse. From here, the water flows down two riveted steel penstocks into the Oak Grove Powerhouse to operate two Francis-type turbines. The hydraulic capacity of the turbines is 740 cfs. The Oak Grove Development is Portland General Electric's (PGE's) highest head hydroelectric facility (880 feet), requiring only 15 cfs for each MW of generating capacity. The total theoretical horsepower for the Oak Grove Development is 60,250 THP (602.5 cfs \* 880 feet of head/8.8)

### **North Fork Development**

The 58-MW North Fork Development is the uppermost of three developments on the Clackamas River. The North Fork Dam is located North Fork Reservoir with an approximate gross storage capacity of 18,630 acre-feet. The dam is 207 feet high, 676 feet long, and 8 feet wide at the crest. Two penstock intake gates are located on the upstream face of the dam. These direct flow to the two 14-foot-diameter penstocks, which extend horizontally through the dam to the two Francis-type turbine generator units within the North Fork Powerhouse. The maximum plant output is at about 130 feet of head. The hydraulic capacity of the plant is 6054 cfs. The total theoretical horsepower for the North Fork Development is 89,434 THP (6054 cfs \* 130 feet of head/8.8).

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<sup>2</sup> PGE, Final License Application for the Clackamas River Hydroelectric Project, August 2004, Ex. A, p. A7.

### Faraday Development

The Faraday Development has an output of 46 MW. Water releases from North Fork Dam flow down the Clackamas River approximately 1.6 miles to the Faraday Diversion Dam, which impounds a reservoir with a gross storage capacity of approximately 1,200 acre-feet. The diversion dam is 55 feet high and 407 feet in length. A gated intake diverts part of the river flow through a 1/2-mile-long, 23-foot-diameter tunnel and a 0.75 mile-long canal into Faraday Lake, the forebay for the Faraday Powerhouse. The dam at the lake is 33 feet high and 1200 feet long. Faraday Lake has a storage capacity of approximately 430 acre-feet. A concrete intake structure and an emergency spillway are located at the downstream end of the forebay. Intake gates are provided for each of the six penstocks serving the six turbine-generator units. Five 8-foot-diameter riveted steel penstocks lead to the original five-unit powerhouse to operate the five horizontal Francis-type turbines. The hydraulic capacity of these five units is 2370 cfs under a head of 130 feet. A sixth 14-foot-diameter welded steel penstock leads to the newer semi-outdoor portion of the powerhouse to operate a vertical Francis-type turbine. The hydraulic capacity of the 6th Unit is 3334 cfs, also under a head of 130 feet. The Faraday powerhouse discharge joins flow in the bypass reach below the Faraday Diversion Dam. The total theoretical horsepower at Faraday is 84,253 THP (5704 cfs \* 130 feet of head/8.8).

### River Mill Development

The River Mill Development has an output of 25 MW. Discharge releases from the Faraday Powerhouse combine with flow from the Faraday Diversion Dam bypass reach and proceed down the Clackamas River to Estacada Lake, the reservoir behind River Mill Dam. The storage capacity of Estacada Lake is 2,300 acre-feet. The dam is 85 feet high and 936 feet long. The powerhouse section of the dam is 173 feet long. Intake gates are located on a sloping face behind trash racks on the upstream face of the powerhouse. The gates lead to 11-foot-diameter penstocks, which supply each of the five turbine-generator units. The hydraulic capacity of the plant is 4840 cfs with 81 feet of head. The total theoretical horsepower at River Mill is 44,550 THP (4840 cfs \* 81 feet of head/8.8).

\*\*\* Insert Conditions of Settlement \*\*\*

### Other Conditions

This water right represents the total hydraulic capacity of the Project as of the date of this certificate. A portion of this right duplicates the pre-1909 Surface Water Registration Claims, SWR-386, 387, and 388, filed by the Portland General Electric Company according to ORS 539.240. The duplicative portion of this right shall not be additive to SWR 386, 387, or 388. To the extent that those claims are allowed in a future adjudication, the duplicative junior water rights shall be canceled at the time of the final decree, so that the total water allowed under all rights does not exceed the total hydraulic capacity of the Project as of the date of this certificate. This right, together with any other right for the use of these Project waters shall not exceed the quantity (in cfs) of water allowed as of the date of this certificate.

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Use under this certificate is contingent upon the assignment of a portion of SWR 387 to an instream right in the Oak Grove Fork of the Clackamas River. Any other assignment or amendment of Surface Water Registrations SWR 386, 387, or 388 shall be consistent with ORS 539.240 and OAR 690-28, and shall require, at the same time as the assignment or amendment, an (equivalent modification ?? see note) to this water right.

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## **Attachment 3**

### **Draft Water Availability Findings**

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Assessment of Water Availability and Amount of Water Necessary for  
Proposed Use

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**Project Water Needs**

**a. Oak Grove:**

Water is diverted from the Oak Grove Fork at Lake Harriet at rates of 200 to 600 cubic feet per second (cfs) depending on inflows to the lake. PGE is requesting up to 600 cfs of flows in the new water right to duplicate its claim to pre-1909 water use under Surface Water Registration (SWR) 387.

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**b. Clackamas River at North Fork Development**

Water is diverted through the North Fork Powerhouse at rates of 600 to 5400 cfs depending on inflows to the reservoir. PGE is requesting that up to 654 cfs of these high flows be released through the more efficient turbines in the North Fork powerhouse at the dam.

**c. Clackamas River at Faraday Development**

Water is diverted at the Faraday Diversion Dam at rates of 400 to 5020 cfs depending on releases from the North Fork Reservoir. PGE is requesting that up to 684 cfs of these high flows be used through the more efficient turbines in the Faraday powerhouse. PGE is also requesting that 2370 cfs of water be allowed to duplicate its pre-1909 claim under Surface Water Registration SWR 388.

**d. Clackamas River as River Mill**

Water is diverted through the River Mill Powerhouse at rates of 400 to 4840 cfs depending on inflows to the reservoir. PGE is requesting up to 4840 cfs of flows in the new water right to duplicate its claim to pre-1909 water use under Surface Water Registration 386.

**OWRD Assessment of Water Availability:** An assessment of water availability has been completed by the OWRD. This assessment compared a calculation of natural streamflow minus the consumptive portion of all relevant rights or record. A copy of this assessment is in the file. This assessment determined that water is not available for further appropriation, at an 80% exceedence probability, from "X month" to "X month" during the requested period of use.

Since water is not available from "X month to X month", the proposed use may not be allowed unless certain findings are made. Under OAR 690-410-070(a), the surface waters of the state shall be allocated to new out-of-stream uses only during the months or half-month periods when the allocations will not contribute to overappropriation.

As noted, the Clackamas River is over-appropriated from "X month" to "x month" at an 80% exceedence level. However, when a stream is over-appropriated, some additional uses may be allowed where public interest in those uses is high and the uses are conditioned to protect instream values (OAR 690410-070 2a).

Public interest, as a standard for reviewing new uses of water, means a beneficial use which is consistent with state law and included providing the greatest good for the people of the state based on current values, protecting water rights and conserving water resources for present and future generations (OAR 690-400-010[12]). In reviewing this application for public interest, the Department considered the benefits and the impacts of this application with regards to fish and wildlife, the local economy, tourism/recreation and existing water rights (more?). The Department also took into consideration the potential impacts that denial of the applications could have upon the Project and (the economy?).

To determine whether the proposed use could be conditioned to protect instream values, the Department relied primarily on the Settlement Agreement that was signed by 33 parties including representatives of: PGE; federal, state, tribal and city governments; water providers; conservationists; and boating parties. Conditions on the proposed use were examined for their ability to mitigate potential impacts of the proposed use upon fish and wildlife habitat as well as upon existing water rights.

The applicant has submitted information to demonstrate that the proposed use is of high public interest and can be conditioned to protect instream values.

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**A. High Public Interest Information**

(insert language discussing the benefits of the project).

**B. Instream Value Information**

As noted above, the amount of water requested by PGE for the Clackamas River Hydroelectric Project is not available for the proposed use from "x month" to "x month" at an 80 percent exceedence level. To protect instream values, PGE has agreed to a number of conditions based upon discussions with the Water Rights Subgroup of the Settlement Agreement. These conditions include:

**a. Oak Grove:** PGE has agreed to provide minimum flows in the Oak Grove Fork below Lake Harriet to protect instream values. The minimum flows, even in dry years, will be maintained at levels greater than the current instream water right. PGE has agreed to assign a portion of its pre-1909 power claim to an instream flow right, by amending SWR 387, and requests to replace that water with equivalent flows with an October 22, 1998, priority date.

The instream flow values will be in the amounts of: 70 cfs from January 1 to March 31, 80 cfs from April 1 to September 30, 100 cfs from October 1 to October 15, 80 cfs from October 16 to December 15, and 70 cfs from December 15 to December 31.

**b. North Fork:** Water released through the North Fork Powerhouse flows directly to the Clackamas River; therefore all releases contribute to the instream water right.

**c. Faraday:** PGE has agreed to provide increased minimum flows in the Faraday bypass reach of 270 cfs on a year round basis. This minimum flow may be reduced after eight years to 250 cfs, if specific fish survival standards are met. Before using additional water through the more efficient turbines, PGE will bypass flows to fully satisfy instream water right certificate 59491. That right requires 400 cfs between July 1 and Sept 15, and 640 cfs from Sept 16 through June 30.

**d. River Mill:** PGE has agreed to operate the River Mill powerhouse to match the flow that would exist if the North Fork, Faraday, and River Mill dams did not exist. The River Mill unregulated inflow is in effect, the same as the North Fork Reservoir inflow. Water released through the River Mill Powerhouse flows directly to the Clackamas River; therefore all releases contribute to the instream water right.

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\*\*NOTE: need to work with Mary on Scenic Waterway Language

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**C. OWRD Water Availability Finding for the Clackamas River Hydroelectric**

**Power Project:** Water is not available for the proposed use at an 80 percent exceedence level based upon the Department's analysis of water availability. However, as previously described, when a stream is over-appropriated, some additional uses may be allowed where public interest in those uses is high and the uses are conditioned to protect instream values (OAR-690-410-070 2a). Based upon review of information supplied by the applicant and the Settlement Agreement signed by 33 Parties, the Department finds:

- The use of water for the Clackamas River Hydroelectric Power Project is of high public interest.
- The proposed use can be conditioned to provide for the protection of instream values.
- The proposed use ..... (can insert all findings WRD thinks important, i.e. economy, etc)

Based upon these findings, the Department has determined that the applicant has demonstrated that the use can be conditioned to protect instream values and that the use of water for the Clackamas River Hydroelectric Project is of high public interest. The Department finds that water may be appropriated year round, as conditioned in the attached draft permit.

## **Attachment 4**

### **Draft List of Water Rights Senior to the August 26, 1968 ISWR**

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App	Number	Perm	Number	Cert	Priority	Date	Use	the company
		S	2257	80417	07/17/1914	MU		OUTH FORK WATER BOARD
S	5942	S	3778		01/16/1918	MU		OUTH FORK WATER BOARD
S	9294	S	6141	7443	12/11/1923	IR		
S	10317	S	6916	7347	08/01/1925	ID		S. MOUNT HOOD NATIONAL FOREST
S	10375	S	6882	8424	09/03/1925	DO		
S	10375	S	6882	8424	09/03/1925	FI		
S	11007	S	9982		08/11/1926	MU		Y OF OREGON CITY
S	11123	S	7595	9479	10/07/1926	FI		
S	11123	S	7595	9479	10/07/1926	ID		
S	11376	S	7847	9946	03/18/1927	DO		
S	11376	S	7847	9946	03/18/1927	PW		
S	11932	S	8306	11223	02/03/1928	IR		
S	11936	S	8326	11099	02/06/1928	AS		
S	13105	S	9358	8551	10/31/1929	DO		
S	13153	S	9400	10167	11/26/1929	ID		
S	13154	S	9401	10964	11/26/1929	IR		
S	13589	S	9757	11103	07/26/1930	DI		
S	11007	S	9982		01/16/1931	MU		Y OF OREGON CITY
S	14593	S	10603	20818	05/28/1932	DO		RTLAND GENERAL ELECTRIC CO.
S	16523	S	12320	11995	08/20/1936	DO		
S	16523	S	12320	11995	08/20/1936	RM		
S	18695	S	14321	15103	05/03/1940	DO		
S	18695	S	14321	15103	05/03/1940	RM		
S	18724	S	14373	14292	05/20/1940	DO		MOUNT HOOD NATIONAL FOREST
S	18725	S	14342	14281	05/20/1940	DO		MOUNT HOOD NATIONAL FOREST
S	18725	S	14342	14281	05/20/1940	FP		MOUNT HOOD NATIONAL FOREST
		S	15303	24478	06/24/1942	IR		
S	19739	S	15326	15754	07/06/1942	IR		
S	20954	S	16470	24514	07/09/1945	DI		
S	20954	S	16470	24514	07/09/1945	DI		
S	22596	S	17781	22462	06/02/1947	IR		
S	24133	S	18997	21474	09/20/1949	IR		
S	25513	S	20044	21556	12/19/1950	IR		
S	26024	S	20176	23555	06/12/1951	DO		E TIMBER CO.
R	26362	R	1244	21422	08/27/1951	FI		
S	26466	S	20748	21421	09/20/1951	FI		
R	26531	R	1268	22425	10/01/1951	ST		
S	26532	S	20793	22424	10/01/1951			
S	26676	S	20888	23239	11/30/1951	DO		AW MOUNTAIN RANCH
R	28590	R	1598	22619	07/10/1953	ST		
R	29866	R	1725	23373	04/05/1955	IM		E TIMBER CO.
S	29867	S	23472	23374	04/05/1955	IM		E TIMBER CO.
S	29972	S	23610	26471	05/10/1955	MU		OF ESTACADA
S	30200	S	23815	24563	08/08/1955	IR		
R	30553	R	1963	29315	02/16/1956	IM		
S	30554	S	24590	29316	02/16/1956	IM		
R	31099	R	1941	28536	09/07/1956	ST		
S	31100	S	24512	28537	09/07/1956	IR		
S	31211	S	24580	30452	11/13/1956	DO		FLAND GENERAL ELECTRIC CO.
S	31211	S	24580	30452	11/13/1956	FP		FLAND GENERAL ELECTRIC CO.
S	31211	S	24580	30452	11/13/1956	PW		FLAND GENERAL ELECTRIC CO.
S	31434	S	24795	31830	03/19/1957	DO		
S	31453	S	24842	30239	03/28/1957	DO		MOUNT HOOD NATIONAL FOREST
		S	24893	44453	05/03/1957	DO		FLAND GENERAL ELECTRIC CO.
		S	24893	44453	05/03/1957	DO		FLAND GENERAL ELECTRIC CO.
R	32094	R	2112	29324	01/31/1958	IM		LUMBER CO. INC.
S	32095	S	25309	29325	01/31/1958	IM		LUMBER CO. INC.
R	32156	R	2114	30143	02/28/1958	FI		FLAND GENERAL ELECTRIC CO.
S	32182	S	25355	30144	03/13/1958	FI		FLAND GENERAL ELECTRIC CO.
S	32381	S	25570	30145	06/09/1958	DO		FLAND GENERAL ELECTRIC CO.
S	33217	S	26260	30054	07/07/1959	DO		
S	33217	S	26260	30054	07/07/1959	IR		
		S	26389	47051	10/08/1959	DO		
S	33413	S	26422	29077	10/09/1959	IR		
S	34499	S	27087	34122	12/06/1960	IR		
S	38999	S	29052	34106	08/19/1963	IR		
R	42532	R	4865	41408	05/19/1967	FI		
S	44003	S	32895	44146	08/24/1967	IR		ION DEPARTMENT OF TRANSPORTATIONPARKS DIV SALEM, OREGON
S	45090	S	33698	38055	05/22/1968	IR		

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# Exhibit 3

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# Oak Grove Powerhouse Generatic

Flow conversion is 15.4 CFS/MWa  
 (MWa is the average Gross MW generation for each month)

Year/ Month	2007		2008		2009		2010		21
	MWa	CFS	MWa	CFS	MWa	CFS	MWa	CFS	
January	38.0	585.3	32.5	500.5	37.7	581.1	33.6	517.5	35.6
February	37.4	575.9	31.2	479.8	26.0	400.3	24.1	370.4	37.7
March	38.0	586.0	27.1	417.2	30.2	464.8	24.3	374.2	35.9
April	36.4	560.7	25.7	395.6	38.0	585.4	35.3	543.0	38.0
May	27.6	425.5	37.6	579.3	38.2	588.5	33.3	512.7	38.0
June	20.5	315.0	38.0	585.6	30.9	475.7	32.6	502.3	34.4
July	17.6	271.1	25.2	388.4	21.2	326.3	21.1	325.3	24.2
August	20.4	314.1	21.7	334.3	19.7	303.0	17.4	268.4	20.1
September	20.2	310.5	26.4	406.6	22.8	351.6	22.1	340.4	22.9
October	22.2	342.2	27.4	421.8	27.9	429.5	23.9	368.5	24.5
November	23.8	366.0	23.0	353.4	27.4	421.2	29.5	454.5	23.8
December	33.6	518.1	22.5	346.2	26.1	401.3	34.4	530.4	24.4

Data Source: Monthly Westside Hydro Generation Reports

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OCT 08 2013

WATER RESOURCES DEPT  
 SALEM, OREGON



## Mary Graine

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**From:** Mary Graine  
**Sent:** Wednesday, October 09, 2013 3:00 PM  
**To:** 'John Esler'  
**Subject:** RE: Location of "top" of the in-stream water right for the Oak Grove Fork

Thanks John! That is very useful information, I am adding it to the Surface Water Registration File. -- Mary

Mary S. Graine P.E., C.W.R.E.  
Hydroelectric Program Coordinator  
Oregon Water Resources Department  
725 Summer St. NE Suite A  
Salem, OR 97301  
503-986-0833  
[Mary.s.graine@wrd.state.or.us](mailto:Mary.s.graine@wrd.state.or.us)

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**From:** John Esler [<mailto:John.Esler@pgn.com>]  
**Sent:** Wednesday, October 09, 2013 10:49 AM  
**To:** Mary Graine ([Mary.S.GRAINEY@state.or.us](mailto:Mary.S.GRAINEY@state.or.us))  
**Cc:** Martha Pagel ([mpagel@schwabe.com](mailto:mpagel@schwabe.com))  
**Subject:** Location of "top" of the in-stream water right for the Oak Grove Fork

Hi Mary –

The distance from the base of Harriet Dam to the Crack in the Ground turbine is 1,250 feet (418.9 yards). The approximate location of the new turbine tailrace is Long/Lat: 121°58'26.425"W 45°4'34.361"N (NAD83).

JE

John Esler  
Hydropower Licensing - Project Manager  
Portland General Electric  
121 SW Salmon St (3-WTC-BRHL)  
Portland OR 97204  
503-464-8563 (w)  
503-705-1786 (c)  
[John.Esler@PGN.COM](mailto:John.Esler@PGN.COM)

STATE OF OREGON  
COUNTY OF CLACKAMAS  
CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO:

PORTLAND GENERAL ELECTRIC CO. (PGE)  
121 SW SALMON ST.  
PORTLAND, OR 97204

for the right to use the waters of: Timothy Lake, Lake Harriet, Oak Grove Fork of the Clackamas River, Three Lynx Creek, North Fork Reservoir, Faraday Lake, Estacada Lake, and the Clackamas River for the Development of Hydroelectric Power and incidental uses related to the Hydroelectric Project, as more fully described in Exhibit 1, which is attached and incorporated into this certificate.

This certificate amends water right certificate number 86764 which reauthorized the hydroelectric project developed under HE 186, HE 202, HE 203 and HE 220. The project has also operated with water under Surface Water Registrations (SWR) 386, 387, and 388. This certificate confirms the prior certificate and includes amendments numbered #1 and #2 to allow the installation of five small turbines within the Project.

This right allows:

storage of 69,000 acre feet of water with a priority date of March 18, 1953, in Timothy Lake, located in the NE ¼ NE ¼ Section 27, Township 5 South, Range 8 East, W.M.;

release of water from Timothy Lake at a rate not to exceed 300 cfs above inflow, for instream purposes and for power purposes at Timothy Lake, Oak Grove, North Fork, Faraday and River Mill powerhouses;

10 cfs of water released from Timothy Lake with a priority date of March 18, 1953, for 108 theoretical horsepower for backup power supply at Timothy Lake lodge;

storage of 300 acre feet of water with a priority date of October 22, 1998, in Lake Harriet located in the NW ¼ SW ¼ Section 4, Township 6 South, Range 7 East, W.M., (this right duplicates SWR 387);

600 cfs of water with a priority date of October 22, 1998, diverted from Oak Grove Fork at Lake Harriet, located in the NW ¼ SW ¼ Section 4, Township 6 South, Range 7 East, W.M.; for power purposes at Oak Grove powerhouse, (this right duplicates SWR 387);

2.5 cfs of water with a priority date of October 22, 1998, diverted from Three Lynx Creek, in the SE ¼ SE 14 Section 16, Township 5 South, Range 6 East, W.M., for fire protection and station use at the Oak Grove powerhouse, (this right duplicates SWR 387);

**APPEAL RIGHTS**

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.

## Settlement Agreement

On March 29, 2006, PGE filed with FERC a Settlement Agreement that it had reached with 32 other parties on proposed environmental measures to be implemented as part of any new license for the project. The 32 settlement parties included federal, state, and local government agencies, Indian tribes and non-governmental organizations. The settlement contains 55 proposed license articles recommended for inclusion in a new FERC license (Exhibit A to the Settlement Agreement), and a Water Rights Agreement addressing issuance of the water right certificate (Appendix A to the Settlement Agreement). The proposed license articles are set out in Attachment 1 to this document. The entire Settlement Agreement is available for review at the OWRD office in Salem.

Settlement Agreement parties (March 2006):

Portland General Electric Company, Bureau of Land Management, US Fish & Wildlife Service, National Marine Fisheries Service, USDA Forest Service, Oregon Department of Environmental Quality, Oregon Department of Fish And Wildlife, Oregon Parks and Recreation Department, Oregon State Marine Board, Oregon Water Resources Department, Confederated Tribes of The Grand Ronde Community of Oregon, Confederated Tribes of Siletz Indians of Oregon, Confederated Tribes of The Warm Springs Reservation of Oregon, City of Estacada, Clackamas River Basin Council, Clackamas River Water, Sunrise Water Authority, South Fork Water Board, North Clackamas County Water Commission, Oak Lodge Water District, Alder Creek Kayak and Canoe, All Star Rafting, American Rivers, American Whitewater, Association of Northwest Steelheaders, Blue Sky Rafting, Destination Wilderness, The Native Fish Society, Oregon Trout, Playboatingnorthwest.Com, River Drifters Whitewater Tours, Trout Unlimited, and WaterWatch Of Oregon

The Settlement Agreement is a comprehensive settlement resolving all issues raised by all parties to this proceeding. The Settlement Agreement includes a number of exhibits, which reflect the specific substantive agreements of all Parties and which are incorporated into and made a part of the agreement itself. These are as follows:

- Exhibit A - Proposed License Articles
- Exhibit B - Interim Measures
- Exhibit C - Project Operating Plan
- Exhibit D - Fish Passage and Protection Plan
- Exhibit E - Terrestrial Resources Plans
  - E-1 Terrestrial Resources Management Plan
  - E-2 Vegetation Management Plan
- Exhibit F - Blue-Green Algae Monitoring Plan
- Exhibit G - Recreational Resources Management Plan
- Exhibit H - Clackamas River Hydroelectric Project Mitigation and Enhancement Fund Implementation Plan
- Exhibit I - Wetlands Mitigation Measures
- Exhibit J - Historic Properties Management Plan

Water Right Certificate 59491 are first fully satisfied. (See proposed license article 13 in the Settlement Agreement).

5. This water right represents the total authorized hydraulic capacity of the Project as of the date of this certificate. A portion of this right duplicates the pre-1909 Surface Water Registration Claims, SWR-386, 387, and 388, filed by the Portland General Electric Company according to ORS 539.240. The duplicative portion of this right shall not be additive to water used or claimed under SWR 386, 387, or 388. To the extent that those claims are allowed in a future adjudication, the duplicative junior water rights shall be canceled at the time of the final decree, so that the total water allowed under all rights does not exceed the total hydraulic capacity of the Project as of the date of this certificate. This right, together with any other right for the use of these Project waters shall not exceed the quantity (in cfs) of water allowed as of the date of this certificate. Upon adjudication, the duplicative water rights can only be cancelled and cannot be used, sold or transferred.
6. This certificate acknowledges the assignment of a portion of SWR 387 to an instream right in the Oak Grove Fork of the Clackamas River. Any other assignment or amendment of Surface Water Registrations SWR 386, 387, or 388 shall be consistent with ORS 539.240 and OAR 690-28, and shall require, at the same time, a review to determine if modification should be made to this water right to be consistent with the terms of the Settlement Agreement.
7. If PGE intends to decommission the Faraday Development of the Clackamas Project as provided under ORS 543A.300 *et seq*, or to change the type of use from hydroelectric prior to adjudication of the SWR, PGE shall first assign to ODFW a portion of SWR 388 equal to the amounts currently protected under Instream Water Right 59491. The assignment shall be filed prior to or simultaneously with commencement of the decommissioning or change of use.
8. In consideration of this certificate and of the benefits and advantages accruing hereunder to the certificate holders, it is expressly agreed by the certificate holders that the Project, Project area, and Project works located within the State of Oregon as designated and described above whether or not upon the lands of the United States, shall be subject to all provisions, terms and conditions of this certificate. Should the certificate holder be prevented from compliance with any provisions of this certificate or of ORS 543 by the operation of any valid Federal law, or the lawful order, rule or regulation of any federal governmental agency exercising exclusive jurisdiction in the premises, or by *force majeure* as described in the Settlement Agreement, it shall not be deemed to be in default or under liability to the Water Resources Department for failure to perform the same during the period of such disability.
9. The right to the use of the water for the above purpose is restricted to beneficial use without waste on the lands or place of use described
10. This certificate is effective as of the date of its issuance and will terminate simultaneously with the FERC license for the Project unless extended by the Department pursuant to ORS 543A.150 in connection with subsequent reauthorization of the Project,

19. Annual Fees: An annual license fee of \$0.405 per theoretical horse power (THP) for 278,487 THP shall be paid on or before January 1 of each calendar year with adjustments for cost of living as provided in ORS 543.078 and ORS 543.085. Should the terms and conditions of this water right certificate be extended or reauthorized at its expiration, the certificate holder shall pay such annual fees as the Director or its successor having jurisdiction in the matter at the time shall fix.

20. Construction, Operations and Maintenance: The certificate holders shall construct any additions or modifications to the Project according to maps, plans, and specifications filed with and approved by the FERC.

Operations of the Project, so far as they affect the use, storage, and discharge from storage of waters affected by the water right certificate, shall at all times be controlled by such reasonable rules as the Water Resources Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes. The certificate holders shall release water from the Project reservoirs at such rate in cfs, or such volume in acre-feet per specified period of time, as the Water Resources Commission may prescribe. (ORS 543.300(3))

The certificate holder shall maintain the Project, and each part thereof, in good order and repair and in efficient operation, for the development and transmission of electricity to its reasonable capacity; shall make all necessary renewals and replacements as required; and shall maintain and operate the Project, and all parts thereof, conformably to applicable FERC rules. (ORS 543.300(4))

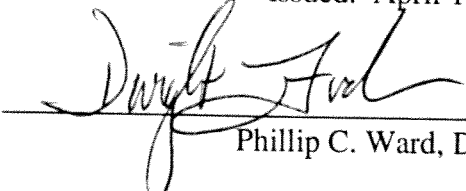
PGE shall construct, operate, and maintain minimum flow turbines downstream of Timothy Lake Dam, Lake Harriet Dam at Crack-in-the-Ground, North Fork Dam, and Faraday Diversion Dam as approved under amendments #1 and #2 onfile with the Department and as approved in FERC docket p-2195-088.

The Director finds that the proposed use of water described by this certificate, as conditioned, will not impair or be detrimental to the public interest and is well adapted to the development and utilization of the water power involved.

This Certificate supersedes Water Right Certificate number 86764 and includes amendments #1 and #2 to the Clackamas River Hydroelectric Project.

WITNESS the signature of the Water Resources Director,

Issued: April 10, 2014

  
Phillip C. Ward, Director

Recorded in State Record of Water Right Certificates numbered 89174

total theoretical horsepower for the Oak Grove Development is 60,250 THP ( $602.5 \text{ cfs} * 880 \text{ feet of head} / 8.8$ ). One new 1 MW turbine will be installed at Crack-in-the-Ground to act as an energy dissipater for the instream flows of 65 to 150 cfs with 97 feet of head. Total theoretical horsepower for the small turbine is 1653 THP ( $150 \text{ cfs} * 97 \text{ feet of head} / 8.8$ ).

### **North Fork Development**

The North Fork Development is the uppermost of three developments on the Clackamas River. The North Fork Dam is located on North Fork Reservoir with an approximate gross storage capacity of 18,630 acre-feet. The dam is 207 feet high, 676 feet long and 8 feet wide at the crest. Two penstock intake gates are located on the upstream face of the dam. These direct flow to the two 14-foot-diameter penstocks, which extend horizontally through the dam to the two Francis-type turbine generator units within the North Fork Powerhouse. The maximum plant output is at about 130 feet of head. The hydraulic capacity of the plant is 6054 cfs. The total theoretical horsepower for the North Fork Development is 89,434 THP ( $6054 \text{ cfs} * 130 \text{ feet of head} / 8.8$ ). One new turbine 0.135 MW will be installed to utilize 25 to 35 cfs of return flows from the downstream migrant floating surface collector and the adult fish trapping facility. Total theoretical horsepower is 238 THP ( $35 \text{ cfs} * 60 \text{ feet of head} / 8.8$ ).

### **Faraday Development**

The Faraday Development has an output of 35.92 MW. Water releases from North Fork Dam flow down the Clackamas River approximately 1.6 miles to the Faraday Diversion Dam, which impounds a reservoir with a gross storage capacity of approximately 1,200 acre-feet. The diversion dam is 55 feet high and 407 feet in length. A gated intake diverts part of the river flow through a 1/2-mile-long, 23-foot-diameter tunnel and a 0.75 mile-long canal into Faraday Lake, the forebay for the Faraday Powerhouse. The dam at the lake is 33 feet high and 1200 feet long. Faraday Lake has a storage capacity of approximately 430 acre-feet. A concrete intake structure and an emergency spillway are located at the downstream end of the forebay. Intake gates are provided for each of the six penstocks serving the six turbine-generator units. Five 8-foot-diameter riveted steel penstocks lead to the original five-unit powerhouse to operate the five horizontal Francis-type turbines. The hydraulic capacity of these five units is 2370 cfs under a head of 130 feet. A sixth 14-foot-diameter welded steel penstock leads to the newer semi-outdoor portion of the powerhouse to operate a vertical Francis-type turbine. The hydraulic capacity of the 6th Unit is 3334 cfs, also under a head of 130 feet. The Faraday powerhouse discharge joins flow in the bypass reach below the Faraday Diversion Dam. The total theoretical horsepower at Faraday is 84,253 THP ( $5704 \text{ cfs} * 130 \text{ feet of head} / 8.8$ ). One new turbine 0.85 MW will be installed to utilize 225 cfs of attraction water flows for the fish ladder at the Faraday Diversion dam. Total theoretical horsepower is 1278 THP ( $225 \text{ cfs} * 50 \text{ feet of head} / 8.8$ ).