

**Background Report
Proposed Water Exchange
ODFW Oxbow Hatchery/City of Cascade Locks
August 23, 2013**



Proposed Action

Nestle Waters North America (NWNA) is exploring the feasibility of setting up a water bottling operation in Cascade Locks and wants to secure 225 gallons per minute of spring water from the Oregon Department of Fish and Wildlife's Oxbow Fish Hatchery. The City of Cascade Locks and Oregon Economic & Community Development Department have asked ODFW to cooperate in a feasibility study to investigate trading a small amount of spring water at the hatchery for an equal amount of city-owned well water.

Background

In January of 2009, ODFW was approached by a consortium including NWNA, the City of Cascade Locks and the Oregon Business Development Department regarding the possibility of allowing the use of spring water from Oxbow Springs for supplying a bottled water plant in Cascade Locks.

The plant is expected to use no more than 0.5 CFS (225 gallons per minute) of spring water. The proposed plant would be approximately 250,000 square feet and cost approximately \$50 million to construct. Up to 50 jobs are expected to be created. The city and the state are interested in this project from an economic development standpoint. ODFW is interested in the project because it would increase the water supply to the hatchery during the summer and fall months which would improve our ability to raise fish at the hatchery. Additionally, it would provide an alternate source of water for the hatchery if the spring source were to be compromised.

ODFW has a water right of 10 CFS for hatchery use from which it is considering dedicating five percent (0.5 CFS) for the exchange. ODFW has agreed to cooperate in the process, with the understanding that the department must safeguard its water sources, fish rearing capabilities and maintain beneficial stream flows and water quality for fish in Little Herman Creek.

Nestle Water North America (NWNA) installed monitoring equipment on site and has been testing the water. All monitoring data to this point has indicated the spring water is of very high quality and satisfactory for use as a drinking water source. ODFW wanted to confirm that the city's well water was of suitable quality for rearing fish. ODFW's pathology department tested the well water for a year, and concluded in February 2011 that the water is of sufficient quality to rear fish. In response to concerns raised by the Association of Northwest Steelheaders and Trout Unlimited, a temperature study conducted by Cramer Fish Sciences in the summer of 2010 concluded the project will result in no negative effect on the cold water refuge for salmonids at the mouth of Herman Creek.

Intergovernmental Agreement

An intergovernmental agreement was signed between the City of Cascade Locks and ODFW on June 22, 2009. It is an agreement to work together and there are no commitments regarding the outcome. NWNA is not a partner in the agreement.

Representatives of the various organizations involved in the proposals met with the Governor's Regional Solutions Team in Cascade Locks on Nov. 29, 2011 to go over the status of the project. The City of Cascade Locks is still interested in the project and the jobs it would create. NWNA is still committed to moving forward with the project. However, economic conditions may have influenced the implementation timing of any potential project.

Water Exchange Proposal

A water exchange agreement is being investigated. No agreement has been made and probably will not until all protests have been resolved. Under any agreement, ODFW would retain ownership of its water rights. The proposal is a water exchange; the water right holder in an exchange does not give up its control of the water right.

The water exchange would be between the City of Cascade Locks and ODFW. Cascade Locks would then supply the water to NWNA. ODFW's intent with any exchange agreement with the city would give ODFW an equal or greater volume of water than ODFW gives the city. The volume will be calculated on an annual basis, allowing ODFW to deliver water to the city year around with the same volume of water going to the hatchery during the drier months, and, in turn, back into Little Herman Creek, when it will be most beneficial.

From the outset, ODFW has been working to keep the priorities of the hatchery and the state's fisheries resources in the forefront in this possible exchange evaluation. ODFW is optimistic that a workable solution is possible but has made no promises to that effect. ODFW has also made it clear that in the event the project moves forward, any infrastructure needed to affect the transfer will be provided at no cost to the department.

Current Status

ODFW is currently involved in three protests on its Oxbow Hatchery water right:

- Forfeiture (cancelation) Proceedings – BARK and Food and Water Watch filed for partial cancelation of the Oxbow Hatchery's water right. The contested case hearing for the partial cancelation proceeding will occur on October 15th and 16th with the administrative judge providing a ruling after that.
- Protest of transfers - also brought by BARK and Food and Water Watch. On hold until the forfeiture challenge is resolved because you need to have a valid water right for a transfer.
- Protest of the Exchange – also brought by BARK and Food and Water Watch on hold until the forfeiture and transfer processes are resolved in ODFW's favor.

Since the formal protests have been filed the following actions have or will be taken:

- ODFW and OWRD met with the forfeiture proponents to determine if a settlement was possible or whether they were willing to drop some or all of the contested items. This did not result in any agreements with the parties and the formal legal process began.
- OWRD submitted the legal actions as a contested case to the Office of Administrative Hearings
- The contested case hearing on the forfeiture (partial cancelation) process began (with briefs, rulings and hearing).
- The Administrative Law Judge denied all motions for Summary Determination in June 2013 and the parties have begun preparing for the contested case hearing.
- The forfeiture proponents offered a proposed settlement where they would withdraw their challenges to the hatcheries water right if ODFW would withdraw the exchange and commit to never exchange the Oxbow Spring water in the future.
- ODFW has not responded to the proposed settlement.
- Once the contested case hearing is completed the Administrative Law Judge will make a set of rulings.
- If either side objected to the Administrative Law Judge's ruling, they could appeal the decision to the Oregon Water Resources Commission.
- The next step would be to ask for a review from the Oregon Court of Appeals, and, ultimately, the Oregon Supreme Court

The contested case hearing processes will likely be completed by the end of the year. Continuing the process through to the Water Resources Commission and Oregon Court of Appeals may take an additional year or two. Most of the agency work would be involved in building the record during the contested case phase. The commission and appeals court would limit their review to the record that was built during the contested case.

The proposed exchange – ODFW split its application for water transfers into two pieces – .5 CFS and 9.5 CFS – to facilitate the proposed exchange with the City of Cascade Locks. The city is interested in receiving spring water, not water from Little Herman Creek, and the .5 CFS point of diversion at Oxbow Springs will give ODFW the ability to designate that source for the exchange specifically should the department opt to go forward with the exchange. The proposed exchange has a full public process review whereas the proposed transfers have a more limited public process. The public comment period for all these actions is over. During the public comment period, OWRD received more than 5,000 comments.

ODFW has not yet proposed or discussed conditions with the City of Cascade Locks for the water exchange. Once the legal issues have been resolved and if ODFW prevailed and could move forward with the exchange, ODFW would begin discussing compensation and conditions for the exchange with the city.

Benefits of Exchange as seen by ODFW

Currently, the hatchery is limited by spring output in the summer and fall months. ODFW's intent is to provide an amount of water to Cascade Locks year around. In turn,

ODFW will ask to receive water from Cascade Locks between June and December when the springs produce their lowest flows.

- Oxbow's spring flow is lowest in summer and fall,
- ODFW would ask for its annual volume to be provide June through December,
- Would increase water available to hatchery during low flow period,
- Which would provide more flexibility in how the hatchery is operated,
- Provides water redundancy by having access to city groundwater, and
- Would provide additional cold water to Little Herman and Herman Creek during the low flow period.

Potential benefits to ODFW include access to a larger water supply which could be used to increase fish production; additional flows that can be used to augment hatchery outflows into Little Herman Creek during the summer months when flows are low and temperatures elevated; and the stability of a back-up water supply that could be tapped in the event of any failure of the primary water system.

ODFW will only go through with the exchange if it is beneficial for fish. The department is also proceeding under the assumption that the Oregon Business Development Department and the Regional Solutions Team's interest in seeing the project move forward accurately reflect the State's interests. It has been clear from the beginning of this project that there is significant opposition in some quarters. Several organizations, including BARK and Food and Water Watch, have declared their opposition. Most of the opposition to the project appears to be more generally reflective of concerns about the use of bottled water generally and over the perception of NWNNA specifically, and to date has not been focused on site-specific issues.

Summary

- ODFW will not proceed if we conclude that the exchange would negatively impact:
 - Oxbow Springs,
 - Our ability to operate the hatchery, or
 - Cause other ecological problems.
- ODFW is currently in the first of three legal proceedings on the Oxbow hatchery's water right.
- ODFW has not yet agreed on the exchange nor negotiated any agreement for the exchange.
- Any agreements on the actual exchange will come after all legal proceedings have been resolved.