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October 29, 2010

Phillip C. Ward
Director
Attn: Transfer Section
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301

Re: Water Rights Exchange Application No. T-11109

Dear Mr. Ward:

Food & Water Watch, Bark, The Freshwater Trust, Native Fish Society, Oregon Council Trout Unlimited, and Oregon Sierra Club hereby submit the following comments regarding the above referenced application. We request that the Oregon Water Resources Department and the Water Resources Commission (collectively "OWRD") deny the permit application for a water right exchange between the Oregon Department of Fish and Wildlife ("ODFW") and the City of Cascade Locks ("City").

The exchange should be denied because the City is attempting to exchange a supplemental water right, which is prohibited by statute. The exchange would also sanction a non-beneficial use of Oregon's water; result in a prohibited enlargement of ODFW's water right; harm water quality, legally-protected fish and associated habitat; and potentially reduce the quantity of water in the aquifer. Finally, it will violate the Public Trust Doctrine and OWRD's responsibility to manage Oregon's publicly-owned water in the public's interest, for the good of all Oregonians.

COMMENTS

According to its application, ODFW is seeking to Exchange 0.5 cfs of its certificated surface water right No. 24625 for well water from the City (certificate No. 41302). In addition, ODFW is seeking a Transfer of the point of diversion ("POD") for its certificated water right No. 24625 to divert water from two springs. These permit applications (No. T-11108 and T-11109) are integrally related and are two essential components of an overall scheme to secure water for future for-profit bottling of Oregon's water by Nestlé Waters North America ("Nestlé"). The applications should not be piece-mealed into distinct administrative reviews. Decisions on what amounts to a linked and comprehensive scheme should be considered jointly. To do otherwise would be arbitrary and capricious decision-making.[1]

There is no dispute that these two applications now before OWRD, and the specific water associated with them, are critical pieces of Nestlé's desire to construct a water bottling operation

[1] Oregon Administrative Procedures Act, ORS §§ 183.480 and 183.482.

in the Cascade Locks area. Indeed, a letter from the City, cc'd to Nestlé, is included in this exchange application. Nestlé has indicated its intent in its "Nestlé Waters North America Cascade Locks Project" document found on its website and in the media.[2] Nestlé is also holding multiple public events in Cascade Locks promoting its plans to bottle water from Cascade Locks.[3] It is absolutely essential that OWRD consider this as pertinent information when making its decision with regard to this application.

Pursuant to Oregon Administrative Rule 690-380-2260(3), we submit comments and request that the OWRD deny the application on grounds that the exchange is inconsistent with Oregon law and will have adverse impacts as described below.

The City's Water Right is a Supplemental Right and Cannot be Exchanged

A "'[s]upplemental water right or permit' means an additional appropriation of water to make up a deficiency in supply from an existing water right."[4] Under the Oregon Water Code, the transfer of a supplemental right is allowed for a change of use or place of use or point of diversion, but exchanges are expressly prohibited.[5]

According to the original permit application filed by the City, the water right it seeks to exchange with ODFW is a supplemental water right of the city.[6] It is supplemental to the water supply from Dry Creek. Because it is a supplemental water right, OWRD must deny this application.

This Exchange is Inconsistent with Beneficial Use

Water exchanges are subject to the requirement of putting water to beneficial use.[7] The State of Oregon has outlined uses that are considered beneficial.[8] In the Columbia River Basin, those

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[2] *See:*
- Nestlé Waters North America, "Nestlé Waters North America Cascade Locks Project," http://www.nestlewaterspnw.com/projectOverview.aspx (last visited October 6, 2010).
- Scott Learn, *Bid by Nestle to tap into Cascade Locks spring water open for public comment*, THE OREGONIAN, Sept. 2, 2010, *available at* http://www.oregonlive.com/environment/index.ssf/2010/09/nestle_bid_to_tap_into_cascade.html.

[3] For example, Nestlé presented at a town meeting in March 2010. MIG, Inc., Cascade Locks Town Hall Meeting March 11, 2010 Meeting Summary, *available at* http://www.nestlewaterspnw.com/documents/CL%20March%20Meeting%20Summary_FINAL.PDF. They also held office hours in August 2010. Nestlé Waters North America, *Cascade Locks: Project Updates*, http://projectupdates.nestlewaterspnw.com/ (last visited October 13, 2010).

[4] ORS § 540.505(2).

[5] Or. Admin. R. § 690-380-2250(3) "The Department may approve the transfer of a supplemental water right or permit in accordance with ORS § 540.520 and 540.530. The Department shall not approve the transfer of a supplemental water right or permit if the transfer would result in injury or enlargement." The cited ORS sections only apply to change of use, place of use or point of diversion.

[6] Application for a permit to Appropriate Ground Waters of the State of Oregon, permit number G-4528.

[7] ORS § 540.539.

[8] ORS §536.300(1); Oregon Dept. of Envtl. Quality, *Beneficial Uses of Oregon's Waters*, http://www.deq.state.or.us/wq/standards/uses.htm (last visited October 6, 2010).

uses are further restricted through the Columbia River Basin Program to protect this valuable resource.[9] The waters in the system can only be appropriated for limited uses, and any use is limited to staying inside the State of Oregon.[10]

This proposed exchange of water is designed to benefit Nestlé since the exchange would directly facilitate the opening of a Nestlé bottling plant to bottle Oxbow Spring water. Such a plant would not be possible without the exchange. Bottling water from the Columbia River Basin is not listed as one of the highest uses of the water.[11] Nor is it a beneficial use under the Oregon Water Code. In fact, it is in direct conflict with the proposition in the Oregon Administrative Rules that

> "attainment of an integrated and coordinated program for the benefit of the state as a whole will be furthered through utilization of the aforementioned waters *only for* domestic, livestock, municipal, mining, industrial, agricultural use, irrigation, recreation, power development, pollution abatement, wildlife and fish life uses, and the 30 million acre-feet annually of natural flows of the Columbia River are hereby so classified and reserved for exclusive use within the State of Oregon."[12]

Bottled water is not listed as an allowed use within the Basin, and an operation that bottles water for profit and export outside of Oregon runs contrary to the above legal language. This is not the type of use that was contemplated by the Oregon Water Code, and it should be prohibited as a non-beneficial use of Oregon's waters.

The Proposed Exchange Will Adversely Affect the Public Interest

The proposed exchange would adversely affect the public interest as determined under ORS 537.170 (8).[13] While OWRD should presume a proposed use will not impair or be detrimental to the public interest, the presumption is rebuttable.[14] This presumption

> "may be overcome by a preponderance of evidence that either: (a) One or more of the criteria for establishing the presumption are not satisfied; or (b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest under subsection (6) of this section or in a finding of the department that shows: (A) The specific public interest under ORS 537.170 (8) that would be impaired or detrimentally affected; and (B) Specifically how the identified public interest would be impaired or detrimentally affected."[15]

[9] Or. Admin. Rule § 690-519-0000.
[10] Or. Admin. Rule § 690-519-0000.
[11] ORS § 537.170 (8)(a) (defining highest uses for the public interest standard).
[12] Or. Admin. Rule § 690-519-0000 (emphasis added).
[13] ORS § 540.537(1)(c) (2009); *see* ORS § 537.170 (8).
[14] ORS § 537.153(2).
[15] ORS § 537.153(2).

Upon weighing the preponderance of the evidence, ORWD should find that sufficient evidence exists to more than adequately rebut this presumption.

1. OWRD is Not Conserving the Highest Use of Water

a. Municipal Water Supply

Under Oregon law and its public interest analysis, OWRD must consider the conservation of the "highest use" of water, and municipal water supply is one of the uses listed.[16] If the application were approved, the exchange would harm the municipal water supply of the City in several ways. While the City holds many water rights, its surface water right cannot currently be used for municipal supply because the water fails to meet the standards required under the Safe Drinking Water Act, 42 U.S.C. § 300f *et. seq*.[17] As such, the City relies on groundwater to meet its needs, including the water in the proposed exchange. If the exchange goes through and the proposed Nestlé bottling facility is constructed,[18] there could be a decrease in the amount of potable water available for municipal use by the citizens of the City.

In addition, this exchange will allow ODFW to increase its water use and will result in a net decrease for the City. The application specifically states that ODFW lacks sufficient water in the summer months to fulfill its needs at the hatchery – which is why it is seeking the exchange.[19] As such, the City will be giving up its right to consistent well water in exchange for water from a spring that does not always provide an adequate flow.

The City's wells in this aquifer are shallow. If these wells are overdrawn due to increased pumping by ODFW at the hatchery or by Nestlé's operations, there is the very real risk that Columbia River water could contaminate the aquifer, contaminating all of the City's available drinking water.[20]

b. Protection of Commercial, Game, and Treaty Fishing Rights

Another "highest use" in OWRD's statutorily required public interest analysis is "protection of commercial and game fishing and wildlife."[21] Sufficient evidence exists that the exchange will

[16] ORS § 537.170 (8)(a).
[17] City of Cascade Locks, Memorandum to Mayor and City Council Members, from Bruce Bilodeau, Public Works Director and Bernard Seeger, City Administrator, Subject: Water Utility Overview (Nov. 17, 2007).
[18] Nestlé Waters North America, "Nestlé Waters North America Cascade Locks Project," http://www.nestlewaterspnw.com/projectOverview.aspx (last visited October 6, 2010); Scott Learn, *Bid by Nestle to tap into Cascade Locks spring water open for public comment*, THE OREGONIAN Sept. 2, 2010, *available at* http://www.oregonlive.com/environment/index.ssf/2010/09/nestle_bid_to_tap_into_cascade.html.
[19] ODFW, Application for Water Right Exchange, Part 4 of 4: Purpose of the Proposed Exchange of Water, filed August 27, 2010. The listed purpose is to "provide an increase in water amounts during those months [April, May, June, July, August, September, October, November], allowing increased production" at the hatchery.
[20] *See* William Alley, et. al., USGS, *Sustainability of Ground-Water Resources*, U.S. Geological Survey Circular 1186 (Denver, 1999). *Available at* http://pubs.usgs.gov/circ/circ1186/index.html.
[21] ORS § 537.170 (8)(a).

likely cause detrimental temperature and habitat conditions in Little Herman Creek and the Columbia River as well as impede fish recovery. These impacts would be harmful to commercial, game fish and wildlife. If OWRD were to approve this exchange, it would harm the public's interest in these resources.

Some native fish, including salmon and steelhead listed under the Endangered Species Act ("ESA") and present in the Columbia River, need cold water in order to survive.[22] Currently, ODFW uses spring water for its hatchery operations, which flows into Herman Creek and ultimately into the Columbia River.[23] This spring water is cool and, upon entering the Columbia, acts as a thermal refuge for salmon.[24] Cold water from a thermal refuge helps adult salmonids during upriver migration and upon arrival to pre-spawn holding, can increase the carrying capacity of juveniles in thermally compromised streams, and can allow the presence of salmonids in otherwise inhospitable habitats.[25] In addition, spring-fed, cool water flows are especially important to Chum salmon where this water flows into mainstem areas on the Columbia River.[26]

If the proposed exchange occurs, the City's well water would instead be used to support the nearby hatchery. As a result, millions of gallons of the City's well water would be released into Little Herman Creek and ultimately into the Columbia River.

The City's well water is warmer during summer months than the water currently used at the hatchery.[27] It is well understood that warmer water has a negative impact on cold-water species such as the ESA-listed salmon and steelhead that exist in the area affected by the proposed exchange. In this case, the warmer water could damage the current thermal refuge in the Columbia River, which biologists report is used by tens of thousands of ESA-listed salmon and steelhead during the hottest days of the year.[28] While the specific temperature changes and specific impacts on native fish may not be fully understood in the specific area at issue in these applications, the nature of the proposal (swapping cooler water for warmer water) makes an

[22] *See, e.g.*, Thomas M. Goniea, et. al., *Behavioral Thermoregulation and Slowed Migration by Adult Fall Chinook Salmon in Response to High Columbia River Water Temperatures*, 135 TRANSACTIONS OF THE AMERICAN FISHERIES SOCIETY 408-419 (2006); Brett High, *Temporary Staging of Columbia River Summer Steelhead in Coolwater Areas and Its Effect on Migration Rates* 135 TRANSACTIONS OF THE AMERICAN FISHERIES SOCIETY 519-528 (2006).
[23] ODFW, Application for Water Rights Transfer, Part 4 of 4: Description of Water Delivery System, filed August 27, 2010.
[24] Goniea, *supra* note 22; High, *supra* note 22.
[25] Joshua Strange, Yurok Tribal Fisheries Program, *Salmonid Use of Thermal Refuges in the Klamath River: 2009 Annual Monitoring Results* 2 (April 2010), *available at* http://www.yuroktribe.org/departments/fisheries/documents/Thermal_Refugia_FINAL_Technical_Memo_2009_YTFP.pdf; *see also supra* note 22.
[26] Lower Columbia River Conservation and Recovery Plan for Oregon Populations of Salmon and Steelhead, 19, 141-42, (August 6, 2010), *available at* http://www.dfw.state.or.us/fish/CRP/docs/lower-columbia/OR_LCR_Plan%20-%20Aug_6_2010_Final.pdf.
[27] The water temperature of the City's well water is up to 6°F warmer, depending on the season. *See, e.g.*, Cramer Fish Sciences for Nestlé Waters North America, *Herman Creek Cove Temperature Characterization Study Plan for Summer 2010* 2 (July 2010), *available at* http://www.nestlewaterspnw.com/documents/HermanCreekStudyPlan.pdf.
[28] In one study, scientists monitored 2900 steelhead over three years and noted that 61% used the thermal refuge. High, *supra* note 22. In another study, scientists studied 2100 fall Chinook salmon. Goniea, *supra* note 22.

increase in water temperature very likely in important areas of ESA-listed native fish habitat. In addition, the changes in flows reaching Little Herman Creek and the Columbia (as referenced in the POD Transfer application 11108), as well as the timing and volume of flows (as referenced in water transfer application 11109), could also result in negative impacts.

Further, current science has established that hatchery operations, such as the one that forms the basis of ODFW's justification for this exchange, present a significant threat to the recovery of ESA-listed fish.[29] As the Oregon agency responsible for salmonid protection and recovery under the ESA, and for managing the long-term health of Oregon's native fish, ODFW has a legal obligation to demonstrate the proposed applications will not detrimentally impact habitat upon which native wild fish depend or detract from the recovery of native fish. Here, ODFW has not demonstrated either. The proposed applications, if approved, are likely to result in harm to water quality, fish habitat, and native fish. And given that support for hatchery operations forms the basis of ODFW's justification for the exchange and is the intended use of exchanged water, the exchange is likely to impede ESA-listed fish recovery by facilitating adverse hatchery impacts.

Aside from the evidence that hatchery operations impede native fish recovery, significant sport and commercial fishing activities in the area target hatchery fish. Changes in cold-water refugia and the timing, temperature, and volume of tributary and spring-fed flows into the Columbia—as mentioned above—are habitat modifications likely to adversely impact fishing operations by altering the presence, quantity, and health of fish that otherwise use the area. In addition, as discussed in greater detail *infra*, the tests being conducted on the proposed use of well water for hatchery fish are inadequate to protect hatchery fish, especially endangered species like sockeye salmon. In order to proceed, the impacts of the exchange on all of the hatchery fish must be understood in order to protect fishing in Oregon.

Treaty rights held by tribes and tribal members should also be considered when contemplating the impacts on wildlife and on fishing. "The Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakima Indian Nation have reserved rights to harvest anadromous fish that were guaranteed in 1855 treaties with the United States."[30] In addition, at least one member of the Confederated Tribes of the Umatilla Reservation has a fishing right at the mouth of Herman Creek.[31].[32] OWRD must carefully consider the impacts this exchange would have on those rights and should not approve an application that would diminish this right. In addition, OWRD should consult with Columbia River Treaty Tribes before moving forward with this proposed exchange.

In sum, the proponent of this exchange has not advanced a justification for this exchange that

[29] NOAA's Marine Fisheries Service Northwest Regional Office, "Draft Environmental Impact Statement to Inform Columbia River Basin Hatchery Operations and the funding of Mitchell Act Hatchery Programs (August 2010)" *available at* http://www.nwr.noaa.gov/Salmon-Harvest-Hatcheries/Hatcheries/MA-EIS.cfm and http://www.nwr.noaa.gov/Salmon-Harvest-Hatcheries/Hatcheries/upload/MA-DEIS-exsum.pdf
[30] http://www.critfc.org/text/tribes.html
[31] Testimony from Ralph Jones at Nestle's town hall meeting in Cascade Locks, OR, 3/11/10
[32] Or. Admin. Rule § 635-041-0005 (12)

satisfies the public interest review, "highest use" standard of protecting Oregon's fish. OWRD, as the reviewing agency of these applications, has an obligation to ensure ODFW, as the proponent of the exchange, satisfies this standard. In addition, OWRD, as the State's lead agency with respect to water management and as an executive agency with its own responsibilities under the Oregon Plan for Salmon and Watersheds, also has an obligation to protect and recover these fish.[33] Until the above concerns have been addressed, OWRD should not approve the exchange because it could adversely impact wildlife, including ESA-listed fish.

2. OWRD is Not Protecting Water Available for Beneficial Use

This exchange would injure the "amount of waters available for appropriation for beneficial use."[34] The amount of water available would be reduced because of enlargement of ODFW's water right as discussed below, and through the drawdown of the aquifer that is likely to occur as more water from this system is used. Other beneficial uses, including any instream flow rights, would be harmed.

3. OWRD is Supporting a Wasteful, Uneconomical, Impractical or Unreasonable Use of Water

OWRD public interest analysis must also consider "[t]he prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved."[35] This exchange *is* wasteful, uneconomic, impracticable and/or unreasonable for several reasons. First, as discussed above, it could harm the City's municipal water usage, as well as fish protection and recovery, fishing, and habitat quality. Second, because of their detrimental impact on ESA-listed fish recovery, funding for hatcheries is likely to decline in the future.[36] The future, long-term economic viability of ODFW's intended use of exchanged water is unstable at best, making the proposed exchange uneconomical and potentially wasteful.

The exchange would allow the construction of a large bottling plant at a time when there is no shortage of bottled water in Oregon or elsewhere, which amounts to a giveaway of the public's water for unjustified private profit. Oregon's publicly owned water would be withdrawn from an Oregon aquifer, bottled, and shipped elsewhere based on a justification driven by private profit rather than a compelling public benefit or need for such. In essence, this amounts to a wasteful and uneconomic use of public water that would otherwise be available for beneficial uses, since its sale would enrich a non-local corporation while depriving local residents and the environment of their public water resource.

Finally, the availability of water for appropriation in the Columbia River Basin is limited, and new applications for permits must meet stricter criteria to determine whether they are consistent

[33] Oregon Endangered Species Act, ORS §§ 496.171 to 496.192 and 498.026 (2009); State of Oregon, Oregon Plan for Salmon and Watersheds, http://www.oregon-plan.org/OPSW/coopagencies/coop.shtml (last visited October 13, 2010).
[34] ORS § 537.170 (8)(d).
[35] ORS § 537.170 (8)(d).
[36] NOAA's Marine Fisheries Service Northwest Regional Office, *supra* note 29.

with current and future in-basin needs including protection and recovery of ESA-listed fish and long-term human consumption.[37] This exchange is for 0.5 cfs, which is about 117,000 gallons per year. Removing and exporting this quantity of water from an already limited basin is wasteful and unreasonable given the existing fish protection and recovery needs as well as future human consumption needs within Oregon.

The Exchange will Result in Enlargement of ODFW's Water Right

A transfer of water cannot take place if enlargement of the original water right will occur.[38] This exchange, alone or in combination with Transfer application T-11108, will result in enlargement of ODFW's water right.

"An owner of a surface water use subject to transfer may apply for a transfer of the point of diversion to allow the appropriation of ground water."[39] The Water Resources Commission may approve the application if it "will not result in enlargement of the original water right or in injury to other water right holders."[40] In this instance, the Exchange, alone or in combination with POD Transfer application T-11108, will result in enlargement and should not be approved.

Enlargement "means an expansion of a water right and includes, but is not limited to:
(a) Using a greater rate or duty of water per acre than currently allowed under a right . . .
(d) Diverting more water at the new point of diversion or appropriation than is legally available to that right at the original point of diversion or appropriation."[41]

Because ODFW is requesting a change in POD to facilitate this water rights exchange with the City, these permits must be considered together. Yet if the change in POD is approved and this exchange is approved, ODFW will be able to use more water at the new source than what is legally and naturally available from its original source of spring water during the summer months. In its application for the exchange, ODFW states that a driving reason for the exchange is to "provide an increase in water amounts during those [summer] months, allowing increased production."[42] However, an increase in water would be an enlargement of ODFW's water right and is prohibited under the Oregon Water Code.

OWRD Should Deny the Application Because Insufficient Information Exists on Water Quantity and Quality.

1. Uncertainty on How Much Water is Available in the Aquifer

[37] Or. Admin. R. §§ 690-033-0115 to 690-033-0140. *See also* Or. Admin R. §§ 690-519-0000, et. seq.
[38] Or. Admin. R. § 690-380-4010(2)(c).
[39] ORS § 540.531 (1).
[40] ORS 540.531 (2)(B).
[41] Or. Admin. R. § 690-380-0100(2).
[42] ODFW, Application for Water Right Exchange, Part 4 of 4: Purpose of the Proposed Exchange of Water, filed August 27, 2010. The listed purpose is to "provide an increase in water amounts during those months [April, May, June, July, August, September, October, November], allowing increased production" at the hatchery.

The water exchange application must be denied if OWRD finds that "[a] sufficient quantity of water would not be available to replace the water to be used under the exchange."[43] In this instance, the spring water from ODFW is often not available in sufficient quantities in the summer months. This is why ODFW wants to make the exchange with the City.[44] However, a sufficient amount of replacement water may not be available at all times for the City, and the City may be harmed as a result.

In addition, there is insufficient data regarding flows at Herman Creek, Oxbow Springs and the aquifer feeding the City of Cascade Locks' wells. Without this information, OWRD cannot make a determination as to whether there is sufficient water available for the exchange. Unless and until an adequate understanding of the hydrology of the system exists, approval of the exchange would be premature and irresponsible.

Similarly, it would be inappropriate to approve the exchange unless the effects of the increased withdrawals, both from the increased use of water by ODFW and by the proposed bottling facility, are known. The proposed bottling plant will be located on the banks of the Columbia River, and it is possible that extra stress on the hydrologic system will cause a drop in the water table, leading to intrusion of Columbia River water.[45] This is not an acceptable risk.

Finally, climate change and its impacts must be considered when looking at the availability of water in the future.[46] Climate change will result in drier summers in the basin and wetter winters. In addition, the climate in the Northwest will be tolerable compared to many other parts of the country. The region is expected to increase in population, which will mean additional strains on our municipal drinking water systems, while the region simultaneously experiences expected changes in regional water patterns from climate change.[47] These impacts should be considered by OWRD when making decisions that affect the allocation of water in the Columbia River Basin.

2. Insufficient Information Exists on the Effects of Well Water on Hatchery Fish

For this exchange to occur, ODFW has said the well water from Cascade Locks must be safe for the hatchery fish.[48] However, right now, there is insufficient information to make this

[43] ORS § 540.537(1)(d).
[44] ODFW, Application for Water Right Exchange, *supra* note 40, part 4 of 4.
[45] *See* William Alley, et. al., USGS, *Sustainability of Ground-Water Resources*, U.S. Geological Survey Circular 1186 (Denver, 1999). *Available at* http://pubs.usgs.gov/circ/circ1186/index.html.
[46] *See, e.g.*, Tim Barnett, *The Effects of Climate Change on Water Resources in the West: Introduction and Overview*, 62 CLIMATIC CHANGE 1 (2004); Alan F. Hamlet, et. al., *Effects of Climate Change on the Columbia River Basin's Water Resources* (Nov. 2005), http://www.paleolands.org/pdf/ClmtChngColumbBasn.pdf; JEFFREY T. PAYNE, et. al., *Mitigating the Effects of Climate Change on the Water Resources of the Columbia River Basin*, 62 CLIMATIC CHANGE 233–256 (2004).
[47] *See, e.g.*, Jeremy Lang, *Look out, Oregon, for a global warming land rush*, THE OREGONIAN, Oct. 5, 2008 (updated Oct. 7, 2008), *available at* http://www.oregonlive.com/environment/index.ssf/2008/10/look_out_oregon_for_a_global_w.html.
[48] Scott Learn, *Bid by Nestle to tap into Cascade Locks spring water open for public comment*, THE OREGONIAN Sept. 2, 2010, *available at*

determination. The study being conducted will not be completed until March 2011.[49] It would be premature for OWRD to approve the exchange before the test results are available.

How the studies are being conducted raises another set of concerns. First, the studies are being conducted on non-anadromous rainbow trout, rather than the many species of anadromous fish that will be raised in the hatchery[50] – including the endangered Sockeye salmon.[51] Studies conducted on rainbow trout should not be considered fully applicable to the anadromous fish ODFW rears at its hatchery. Thus, before moving forward with this application, OWRD must have appropriate, comprehensive data that examines the impacts of this project upon the actual fish species that will be raised in the hatchery. This is of particular concern since Oxbow Hatchery is primarily responsible for recovery of Sockeye salmon populations. The Sockeye thrive in the cold spring water the hatchery currently uses and it would be reckless to use the warmer ground water on this species of fish without further testing.

Second, although the tests of the use of this water are being conducted by ODFW, Nestlé is funding the study.[52] This financing presents a clear conflict of interest. It is problematic that the entirety of the studies on fish impacts, as well as water quality and quantity, are being funded by third party entities who are not listed on the applications and who will directly benefit from the exchange. OWRD or an independent third party should assess all the potential impacts of this exchange, the new point of diversion, and the proposed water bottling plant connected to it.

In addition, because ODFW stands to directly benefit from the water exchange, OWRD should look more closely at the studies being conducted.

The Exchange Undermines OWRD's Responsibility to Ensure Long-Term Water Sustainability in Oregon

A 1989 ODFW study shows that flows at Oxbow Springs have dropped as low as 300 gallons per minute (or approximately 0.5 cfs).[53] Before approving this water exchange, OWRD should consider the impacts of this exchange, which would allow a consumptive use of 0.5 cfs from those same springs during such low flow periods.

It is clear that if OWRD approves the POD transfer and the water exchange application, OWRD will facilitate the bottling of Oregon's limited spring water resources. This exchange, in concert

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http://www.oregonlive.com/environment/index.ssf/2010/09/nestle_bid_to_tap_into_cascade.html.
[49] *Id.*
[50] Intergovernmental Agreement for Water Rights Exchange Evaluation between the City of Cascade Locks and the State of Oregon, by and through ODFW, June 22, 2009.
[51] ODFW, Oxbow Hatchery Operations Plan 2010, *available at* http://www.dfw.state.or.us/fish/HOP/Oxbow%20HOP.pdf
[52] Intergovernmental Agreement for Water Rights Exchange Evaluation between the City of Cascade Locks and the State of Oregon, by and through ODFW, June 22, 2009.
[53] Timothy R. Walters, Oregon Department of Fish and Wildlife, Information Reports Number 89-3: Use of Production Potential at 25 Inland Fish Propagation Facilities Operated by the Oregon Department of Fish and Wildlife, April 1989, at 35.

with a POD transfer, will allow the City to sell its water to Nestlé. By transferring a public resource – water – to a private entity, OWRD violates its mission to "restore and protect streamflows and watersheds in order to ensure the long-term sustainability of Oregon's ecosystems, economy, and quality of life,"[54] the public interest decision-making requirement of ORS 537.153(2), and its responsibility under the Public Trust Doctrine.[55] The basis for this statement is rooted in the fact that this exchange may ultimately harm the ability of the City to provide water for its citizens. It may also harm critical salmon and steelhead recovery under the ESA and Oregon Plan.

It is unclear how long Nestlé plans to operate this facility and whether there will be a sufficient quantity of water to sustain the population of Cascade Locks, or to sustain the flows at Oxbow Springs. If OWRD approves the exchange without an extensive understanding of the future needs of Cascade Locks and the quantity of water that will be available in the future, it risks creating a future shortfall and jeopardizing the long-term sustainability of the water resources of the City of Cascade Locks. This would be the case regardless of the conduct of the company in question; however, Nestlé's poor track record on environmental, labor and community relations in the United States and abroad further deepens our concern over the impact of this exchange on the future water availability in Cascade Locks.[56]

Conclusion

The State's approval of a water exchange that would lead to a massive consumptive use of water would be a wasteful and potentially unsustainable use of this public resource. We are deeply concerned with this application and do not believe that it merits approval by OWRD. We strongly urge OWRD to reject Water Rights Exchange Application No. T-11109.

Sincerely,

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[54] Oregon Water Resources Department, *About Us*, http://www.oregon.gov/OWRD/about_us.shtml (May, 2007) (last visited October 13, 2010).

[55] Under this doctrine, the state holds resources including water, in trust for its citizens. By giving away this water, the state is violating this basic principle. *See Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 455 (1892); *Geer v. Connecticut*, 161 U.S. 519, 525-29 (1896) (detailing ancient and English common law principles of sovereign trust ownership of air, water, sea, shores, and wildlife); *National Audubon Soc'y v. Superior Court (Mono Lake)*, 658 P.2d 709, 724 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983).

[56] *See* FOOD AND WATER WATCH. ALL BOTTLED UP: NESTLÉ'S PURSUIT OF COMMUNITY WATER (January 2009).

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