

# Creek provides important habitat for many species of fish

FISH from Page 1

the area looked to pumping groundwater into Bertrand Creek as an attempt to demonstrate on a modest scale something helpful and practical.

"A number of us understand this is not an issue we can hide from," said Whatcom County raspberry grower Marty Maberry. "I see this potentially as the biggest issue agriculture has to fix."

The idea was simple: Take water from the aquifer at the end of irrigation season and pump it several hundred feet to Bertrand Creek to help fish survive low stream flows in late summer and early fall. The groundwater would eventually have percolated into the stream, but by then winter rain would have increased stream flows anyway.

It made sense to the farmers to reallocate the water this way. But it wasn't easy.

## Roadblocks

"We ran into roadblocks every step of the way," Maberry said. "It took a long time to do something that should have been done in five minutes."

Washington produces more red raspberries for processing than any other state. Most of those berries are grown around Lynden. Bertrand Creek, a rain-fed stream whose source is in Canada and flows into the Nooksack River, has provided irrigation water to area farmers.

The creek also provides important habitat for many species of fish, according to the Washington Department of Fish and Wildlife, including chinook salmon and steelhead trout, which are on the federal endangered species list.

Three decades ago, over farmers' opposition, Ecology officials set minimum flows for the Nooksack and its tributaries, including Bertrand Creek. The Hirst decision was based on protecting those flows in the Nooksack Basin.

Even before then, farmers along the creek had been transferring their water rights so they could obtain water from the aquifer instead of from the stream.

"It wasn't sustainable to continue pumping out of the creek," said potato seed farmer Greg Ebe.

Last fall's pumping of groundwater into the creek was the next step in increasing its flows.

The Bertrand Watershed Improvement District, an irrigation district, obtained a permit from Ecology to temporarily transfer groundwater directly to the creek. Ecology also provided \$65,000 for the project.

The Lummi tribe objected to the water-rights transfer, stating in a letter to Ecology that all withdrawals from the watershed could hurt the tribe's rights. The Nooksack



Hydrogeologist Chuck Lindsay talks about raising Bertrand Creek in a video made by Whatcom Family Farmers.

Courtesy of Whatcom Family Farmers



Whatcom County, Wash., raspberry grower Marty Maberry walks past a ramp Oct. 18 delivering groundwater to Bertrand Creek. "We ran into roadblocks every step of the way," he says.

Don Jenkins/Capital Press



Bertrand Creek flows through Whatcom County in northwest Washington. Farmers pumped groundwater into the low-running stream to help fish.

Don Jenkins/Capital Press

tribe didn't comment on the application. Neither tribe responded to requests for comments for this article.

Ecology's Bell-ingam-based watermaster, Kasey Cykler, said the agency made sure the watershed improvement district informed the tribes, Whatcom County and the Washington Department of Fish and Wildlife about its plan.

"Ecology's goal was to ensure widespread support of the (watershed improvement district's) project, which we believe they received from the tribes, WDFW and the county," she said in an email.

Maberry said farmers are mindful of the tribe's treaty rights. "It's something we need to take seriously, and we do take their claims seriously," he said.

The project was also complicated by the state Supreme Court's so-called Foster decision, which was handed down Oct. 8, 2015. The 6-3 ruling

struck down a plan to give the city of Yelm in Thurston County more water, without hurting fish.

Ecology and tribes agreed that the plan, which took 20 years to write and included retiring water rights and improving habitat, would actually benefit fish. The court, however, said no mitigation plan could justify lowering streams and rivers below state-set minimums, even for a month or two a year.

The minimum stream flows, according to the court, are water rights and protected by the principle "first in time, first in right."

The decision can be seen as an affirmation of Western water law and protective of senior water rights, including agricultural water rights.

The ruling, however, limits ways that water can be redistributed, even in cases where there's widespread support, including from senior water-right holders.

"You lose on all sides when you can't do water-right transfers," Washington Farm Bureau associate director of government relations Evan Sheffels said. "It gets in the way of a lot of market solutions."

The Foster decision threatened the Bertrand Creek plan because the timing of the creek's flows would be changed.

"The Foster decision makes projects like these much more difficult for Ecology to approve," Cykler said.

Maberry said the decision could keep farmers from doing more for streams.

"Foster is a bad legal decision, and it hinders the ability to do good things," he said.

Ecology decided the Bertrand Creek project was OK. The wells are not far from the creek, so the timing of flows may not be changed too much, though Ecology will be watching, Cykler said.

## Creek rises

As the irrigation season wound down, water from three wells on Maberry's farm was pumped into the creek.

There was a question about whether the water would actually increase the creek flow, or just soak into the surrounding ground.

The experiment began Sept. 13. Shortly after noon, 1.1 cubic feet per second began flowing from the wells into the creek.

Two miles downstream, the creek was running at 7.2 cubic feet per second, according to Ecology's gauge. By the next day, the creek was at 8.2 cubic feet per second. Lynden received no rain during that time, according to Washington State University weather records.

The creek was still short of the 13 cubic feet per second it needed to meet the minimum-flow standards, but the

project worked as intended.

"I would say we made a significant impact," said Chuck Lindsay, the watershed improvement district's consulting hydrogeologist. "One of the reasons I liked this project so much is that we were actually doing something."

The plan was to pump groundwater into the creek until Nov. 15. But a month after the experiment began, an Oct. 18 storm dumped almost 2 inches of rain on the area. By the next day, the creek was running at 437 cubic feet per second.

The experiment in putting water into the creek ended early because there was too much water in the creek.

Maberry said the test was just a start, a pilot project, and that he hopes Ecology will allow more projects like it.

"The farmers are the only ones actually doing anything," he said.

## 9th Circuit upheld the lawsuit's dismissal

RIGHTS from Page 1

"This would set prior appropriations doctrine on its head," Glick said.

If the environmental groups had prevailed, this legal theory would apply only to irrigators who withdraw water from federal land. However, the federal government owns a tremendous amount of property in Oregon, he said.

Ultimately, though, the environmental plaintiffs were unsuccessful.

U.S. District Judge Ann Aiken disagreed that the Forest Service's analysis was insufficient and dismissed the case.

In August, the 9th U.S. Circuit Court of Appeals upheld her ruling and the plaintiffs didn't challenge the decision before the U.S. Supreme Court by a mid-November deadline.

Nonetheless, the environmental groups' legal theory demonstrates how Oregon instream water rights can be "weaponized" in federal litigation, said Glick.

The 9th Circuit upheld the lawsuit's dismissal in an unpublished memorandum, which means it doesn't have precedential value, he said.

"It could be tried in some other context," Glick said of the legal theory.

Paul Dewey, executive director of Central Oregon Landwatch, said the lawsuit's goal wasn't to change Oregon water law regarding instream water rights.

Rather, the plaintiffs simply used the minimum flow levels in Oregon's instream water right certificates as evidence in the case, Dewey said.

"It's an evidentiary issue for a federal court to determine a minimum instream standard," he said.

The plaintiffs could have cited another document as evidence of minimum flow requirements, Dewey said, adding that people concerned about the lawsuit may have an ulterior motive.

"This seems like an agenda to undermine the instream water law," he said.

## Short-term rentals of farm dwellings are increasing

SOLAR from Page 1

Oregon lawmakers have allowed Tillamook County to require wetland developments to obtain conditional use permits, whereas conversion of farmland to wetlands is allowed outright elsewhere in the state.

As part of this pilot project, the county may also devise a system to steer wetland development toward certain areas while preserving farmland elsewhere.

Representatives of the agricultural and environmental communities appear to be rethinking their original approach to the problem, said Johnson.

The initial idea was to create a map of areas where wetland development is appropriate, but that concept appears to be falling out of favor, he said.

Tillamook County has some of the best grazing land in the state, so it's difficult to prioritize certain areas over others, Johnson said.

"It's just not that clear-cut," he said.

Instead, stakeholders are moving toward a checklist

of factors that would help determine whether a site is appropriate for wetland development on a case-by-case basis, Johnson said.

A potential electrical transmission line in Tillamook County is also worrisome to dairy farmers whose properties it may traverse, he said.

Stray voltage of electricity can be damaging to cattle health, but dairies are also concerned about impediments to aerial spraying and "big gun" field applications of manure, he said.

Short-term rentals of homes through popular online websites such as Airbnb are often blamed for aggravating housing shortages in cities, but the issue is cropping up on farmland as well.

Popular Oregon tourist destinations such as the Hood River Valley and Sauvie Island are increasingly seeing farm dwellings devoted to short-term rentals, Johnson said.

Arguably, such rentals deviate from the approved use of farm dwellings, which are meant to provide

housing to farmers and farm workers, not tourists, he said.

While such rentals may encourage agritourism, growers worry about the "tail wagging the dog" — a situation where surrounding agriculture basically provides an excuse for rentals, Johnson said.

The issue has gained enough prominence that it's likely to spur legislation in 2018 or 2019, he said.

In other board business: • A year since a state audit criticized the Oregon Department of Agriculture's backlog of food safety inspections, the agency has reported a major reduction in those overdue inspections.

The backlog has been cut from 2,841 overdue inspections to 739, in part due to an electronic inspection timing system and a reduction of ODA staff time dedicated to federal regulations, according to Alexis Taylor, the agency's director.

• The board has recommended five farmers to serve on the 12-member commission of the Oregon Agri-

cultural Heritage Program, which is aimed at preserving farmland with easements:

• Doug Krahmer, a blueberry farmer with several operations in Western and Central Oregon.

• Woody Wolfe, a farmer and rancher in Willowa County who has established two easements.

• Ken Bailey, a farmer who manages 2,500 acres of fruit orchards in the Columbia Gorge.

• Chad Allen, a dairy farmer from Tillamook County who serves on the Oregon Dairy Farmers Association board.

• Lois Loop, a retired USDA employee who produces grass seed, small grains and clover in Polk County, will serve in a position specializing in agricultural water.

The commission's remaining seven members will be chosen by Oregon State University, the Oregon Fish and Wildlife Commission, the Land Conservation and Development Commission and the Oregon Watershed Enhancement Board.