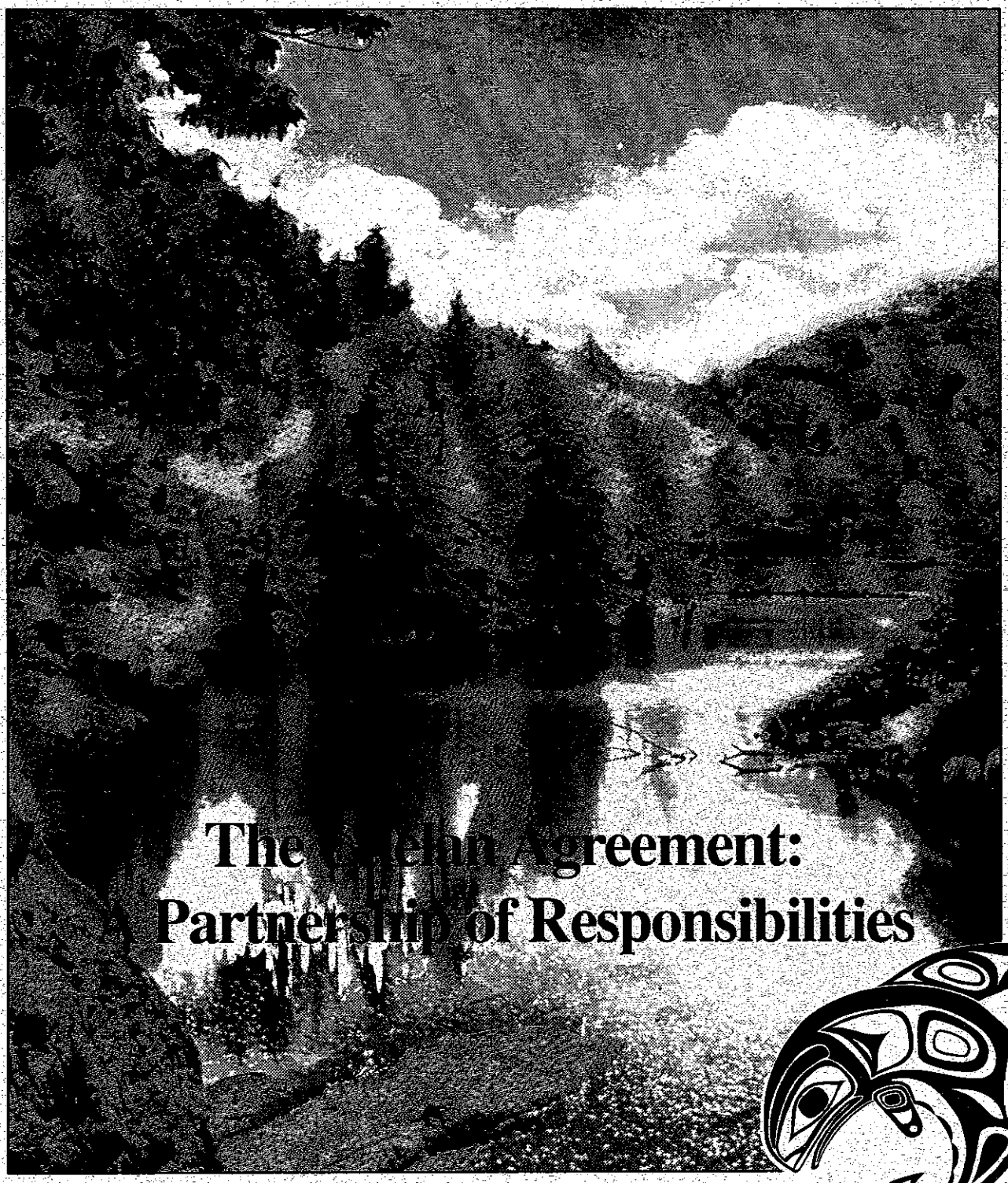
Jacuia Brown

COMPREHENSIVE WATER RESOURCES PLANNING



The Boldt Agreement: A Partnership of Responsibilities

Produced by the Northwest Indian Fisheries Commission
On Behalf of The Indian Tribes of Washington State

"It seems impossible for there to be a water crisis in Washington State, but there is one.

All living things utterly depend on water for their survival.

The Chelan Agreement represents hope.

This cooperative water resources management process is a single strand ...upon which hangs the future of Washington's water supply..."

Presenting
The Chelan Agreement

COMPREHENSIVE WATER RESOURCES PLANNING

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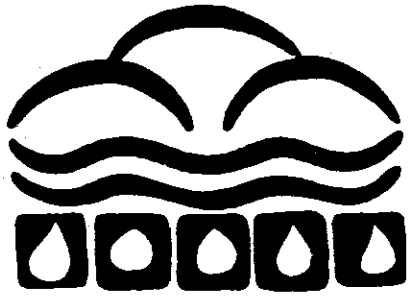


Introducing The Chelan Agreement

For many years, the Indian has had to endure the devastation of natural resources on which we have always depended for our sustenance, our culture...our very life. We have seen water, the blood of the Earth, treated as a sewer. We have seen rivers dry up, great dams constructed across salmon channels, and poison poured into creeks and streams.

It seems impossible for there to be a water crisis in Washington State, but there is one. All living things utterly depend on water for their survival, yet clean water is already in short supply. With hundreds of thousands of new people expected to arrive in the Puget Sound region in the next few decades, and a greatly overallocated resource problem in Eastern Washington, the availability of adequate water supplies is in serious jeopardy. If our precious water resource is to be saved, we must go to work to save it--all of us--now.

We must get out of the courtroom and into the field. We must stop fighting over dwindling resources, recognize that we have common enemies and join efforts to find common solutions. The enemies are waste and pollution. The solution is cooperative resource management. If we can apply the same energy to a team effort to protect natural resources that we have to fighting over them, there is hope for future generations.

> ***"If we can apply the same energy to a team effort to protect natural resources that we have to fighting over them, there is hope for future generations..."***

That is what this proposal presents to you...hope. The cooperative water resource management process is a single strand upon which hangs the future of Washington's water supply. The plan presented to you in this publication was produced by a broad coalition of Indians and non-Indians, government officials and recreationists, business representatives and environmentalists, farmers, ranchers and fishermen. It describes a process that we all believe will provide a standard by which success in water management will be measured nationwide.

We hope you will agree and that you will endorse the effort with your voice, energy and funding support.

If we can ever answer any additional questions regarding this process, or its connection to the "big picture", please contact the Northwest Indian Fisheries Commission at 6730 Martin Way E., Olympia, WA. 98506, Phone (206) 438-1180.

Executive Summary

The planning and allocation of water resources in western states over the past century has consisted primarily of the granting of permits in response to requests from individuals and groups desiring to utilize this precious resource.

But the realization that water is a finite resource and that competitive demands for it easily exceed its availability have increased the complexity of decisions.

Water resource planning and use are at a critical stage in Washington State. New factors are forcing the state to adjust its policies to accommodate change while protecting existing water rights from earlier eras. Conflict and uncertainty over the future of the water resource have been the norm, and have been played out in courtrooms and legislative hearings with no clear solutions in sight.

The Interim Team met frequently over the summer of 1990 and determined that whatever planning approaches were presented at the fall retreat must meet these criteria:

* ***Safeguard existing state and federally-protected water rights;***
* ***Assure the availability of water for human needs of today and future generations;***
* ***Protect, enhance and restore fish and wildlife resources and their habitats;***
* ***Protect aesthetic and recreational qualities provided by water;***
* ***Protect the values of all interests around the table and yet somehow succeed where other efforts had ended in gridlock or litigation.***

Growing out of an era in which cooperative management between the tribes, state and other entities resulted in creative solutions to long term problems is the concept of cooperative comprehensive water resource planning.

Rosario Retreat

In May, 1990, a water resource planning retreat was held at Rosario Resort in the San Juan Islands. It was attended by 175 leaders, representing a great variety of constituencies, including state and tribal, as well as local government representatives and many others. As a result of three days of discussion and negotiation, the group agreed that cooperative water resource planning is the mutually desirable approach to solving the complex set of issues surrounding decisions on water. The large group created an "Interim Team", consisting of representatives from each of seven caucuses (Appendix C), and directed this team to develop framework options for a cooperative planning process, to be considered at a follow up large fall retreat.

The Interim Team developed four process alternatives (Appendix D). The "Pack Forest" Alternative received the "most consensus" from the Interim Team.

The Lake Chelan Retreat

The fall retreat was held at Lake Chelan November 8-10. Top ranking officials of tribal, state and local government interacted with representatives of agriculture, business, environmental organizations, recreation, hydropower, commercial fishing and other water-related interests in plenary sessions, caucuses, mixed groups and one-on-one meetings and discussions. Over 200 officials attended day and night sessions. Many facets of the issue were discussed. Every opportunity was

pursued to explore the pros and cons of various approaches. The result was a far-reaching water agreement named the "Chelan Agreement."

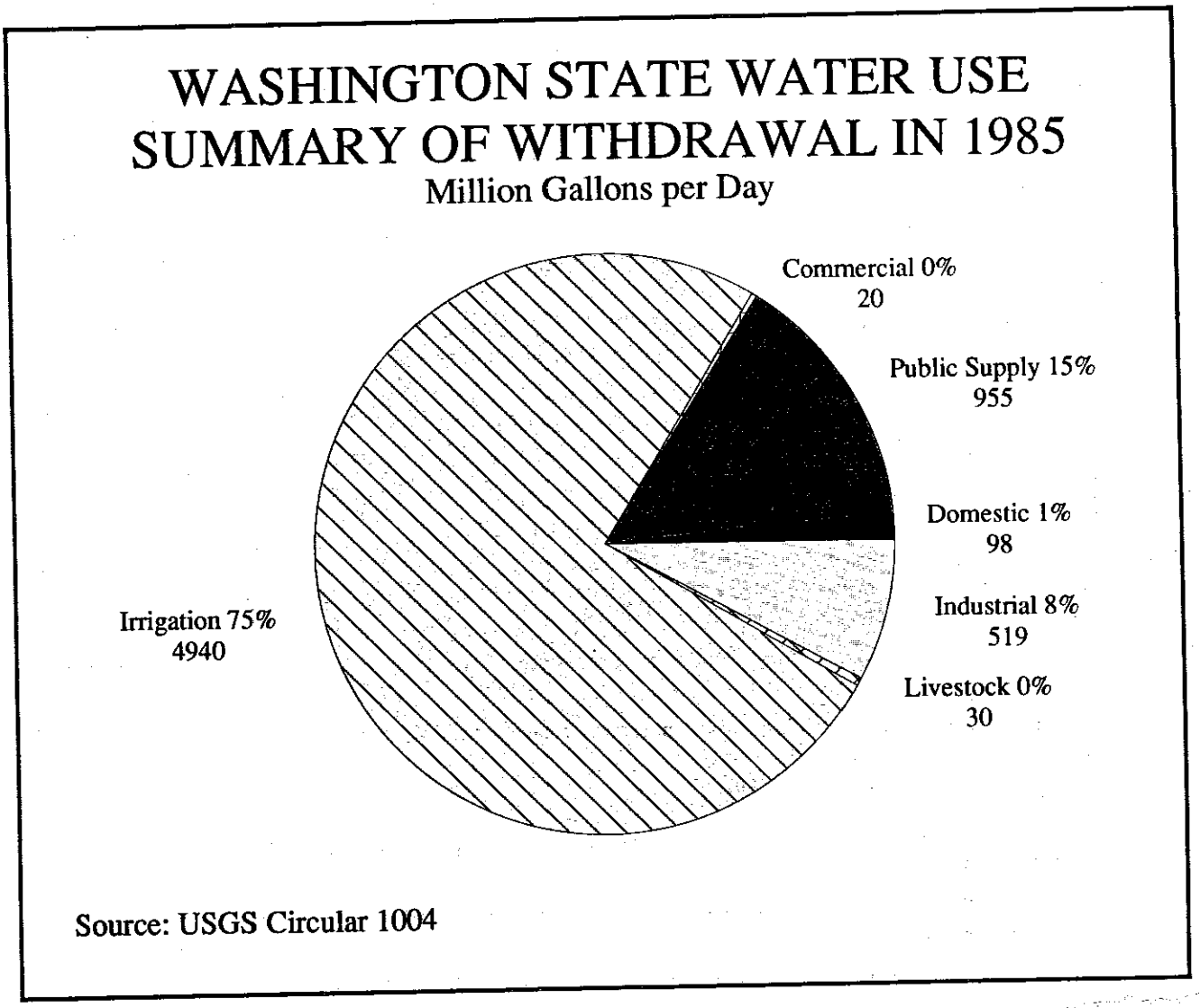
Basic Goals of The Chelan Agreement

The Chelan Agreement was a far-reaching and comprehensive cooperative water resource management plan produced by the participants of the Lake Chelan Retreat. (Appendix A).

The basic goals and principles of the Chelan Agreement are:

* Water is to be managed by hydrologic unit;
* Water needs are to be met first from the resources within that unit;
* Actions will be guided by the tribes' general long-term policy objective to achieve an overall net gain of the pro ductive capacity of fish and wildlife habitats;
* Accommodate growth in a manner that protects the unique environment of the state.

The process is not intended to formally determine or resolve legal disputes. Neither is it intended to be the only option for water management in the state. The process does provide an historic opportunity to promote ongoing cooperation in water management planning, and thus minimize conflict.



Chronology

1850's: The U.S. government negotiated treaties with the tribes within Washington State.

1863: Law enacted provided that owners of land abutting a stream or lake possessed correlative rights to make reasonable use of the waters.

1905: U.S. Supreme Court first affirmed Indian treaty fishing rights in 1905 in U.S. v. Winans.

1908: U.S. Supreme Court established the so-called Winters Doctrine which recognized the reserved water rights of Indian tribes.

1917: State enacted Water Code which established appropriation as exclusive means of establishing new rights to surface water.

1945: State Ground Water Code passed extending the appropriate system to ground water.

1967: The Minimum Water Flows and Levels Act was passed to provide a more formal process to protect instream flows.

1967: A law established the Department of Water Resources which was later incorporated into the Department of Ecology.

1971: The Water Resources Act of 1971 provided that "perennial rivers and streams of the state shall be retained with base flows necessary to provide for the preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values."

1974: U.S. Supreme Court determined that the treaty Indian tribes were entitled to the opportunity to take up to half the harvestable salmon and steelhead in Washington State.

1976: Department of Ecology adopted the Water Resources Management Program regulation which provides guidelines for the instream flow and water allocation activities authorized by the Water Resources Act of 1971.

1982: Federal District Court ruled in favor of the tribes that the treaties implicitly incorporate the right to have fish habitat protected from environmental degradation.

1985: Kittitas Reclamation District v. Sunnyside Valley Irrigation District, the Ninth Circuit Court affirmed a district court order requiring emergency measures to protect chinook salmon, including increased water flows in the Yakima River.

1985: Department of Ecology (DOE) attempted to set instream flow requirements for streams along the western shore of Hood Canal, the "Skokomish/Dosewallips water resource inventory area."

The state Ecological Commission overturned the flow-setting regulation as not protective enough of instream values. DOE Subsequently reviewed its entire program and drafted a programmatic environmental impact statement on alternatives for an instream flow and water allocation program and chose a preferred alternative.

1987: The tribes, the state, representative of the timber industry and representative of environmental groups negotiated solutions to environmental problems involving fish habitat developed the Timber/Fish/Wildlife Agreement.

1988: Legislature passed two water-related bills – the first establishing the Water Use Efficiency Committee and Study; and the second enacting a moratorium on the implementation of the preferred alternative. The latter bill also established the Joint Select Committee on Water Resource Policy.

1989: The Joint Select Committee on Water Policy concluded that the laws and policies regarding water resources are inconsistent.

The Joint Select Committee identified instream resource protection and water resource planning as the two highest priorities for legislative action.

Governor organized a sub-cabinet on Water Policy.

1990: Joint Select Committee drafted legislation which was enacted during the 1990 legislative session calling for a co-operative approach.

1990: The state, together with the tribes and local government entities, began a common effort to hold a water resources planning retreat at Rosario.

1990: More than 200 officials met at Lake Chelan and developed the Chelan Agreement.

The Chelan Agreement, An Outline of Shared Responsibilities

1.. Preamble

This agreement provides a framework for cooperative water resource management.

2. Goals and Principles

*Recognizes water is a finite resource, and that:

*Water management decisions will be made by hydrologic unit or regional planning areas

*Reduce conflict through local planning first

*Recognizes need to protect and increase fish and wildlife habitat as identified in state/tribal MOU

*Process is voluntarily developed to cooperatively plan water resource management

*Participants are fully committed to the planning process in this agreement

*Planning Guidance

*Guidance provided by this agreement, the state/tribal Memorandum of Understanding on the environment, caucus perspectives and the fundamentals of policies in the Water Resources Act of 1971.

*This process does not "allocate" water, but implementation of plans developed through this cooperative process should result in the identification of quantities of water available for specific purposes. Because of its cooperative nature, the results of this planning process will maximize the net benefits to the citizens of the state.

3. Water Resources Forum

*Same number of representatives as Interim Team/Caucuses select own representative

*General Functions: Shape state policy, clarify terms/policies, recommend statutory changes, provide guidance, serve as "reality check", continue cooperative process, serve as "think tank", develop criteria for selection of pilot projects, monitor and recommend changes to pilot planning process, make interim modifications, reconvene "Chelan" type plenary body if needed, help make shift from pilots to systemic planning, provide support to regional planning process.

*Decision making: By consensus. Make recommendations to the Department of Ecology. Items for considerations to come from Forum's own initiative, agency requests, other requests for guidance. Forum's charge is issues of statewide significance, not day-to-day issues.

*Review: Forum to report on pilot program by Dec. 31, 1992/ submit final report to Legislature to review pilots and effectiveness of process. Interim Team serves as Forum until Forum convened.

4. Pilot Planning Process

*To initiate Water Resource Planning: Process to be triggered by petition or any of four government entities. Ecology, in consultation with Forum, to name at least two regions for pilots over next three years. Regional Level Participation: Petitioner may direct request to initiate planning process to city, county, tribe or Ecology. Entities consult with other governmental bodies, conduct public outreach process.

*Scoping process set during which participants and coordinating entity will be selected. Participation opportunity must be extended to state, local and tribal governments, as well as agricultural, environmental, fisheries recreation and business.

*Policy disputes to be resolved through mediation. Forum may provide assistance. Technical disputes may be resolved through use of technical team or outside expert.

*Boundaries will be selected in scoping process and submitted to Ecology for approval. (Any water resource planning within exterior boundary of Indian reservations can only be done by mutual agreement of the affected tribe and the state.) For two pilots, Ecology will select regions, based on recommendations of FORUM, which will develop checklist for determination of planning boundaries, based on hydrology and fisheries management considerations, similar out stream uses, land use patterns, water supply linkages and manageability of the process.

*Regional planning efforts need to recognize the existence and relationships of other planning activities, avoid duplication and develop a water resource plan that integrates water quality, remains compatible with local land use planning and permit processes, considers linkages on and off Indian reservations (legally distinct units with different bodies of applicable laws), and considers other federal, state and local programs, e.g., Pacific Salmon Treaty, Watershed Planning, Land Use Plans.

*Regional Planning Group will complete scoping process by determining list of participants, workplan, public education elements, identification of resources needed; determination of elements to be addressed in plan; and description of relationship to other planning processes.

*Ecology will review scoping document.

*Regional Planning Group will construct a plan addressing elements identified in scoping process. Must be consistent with state and federal laws, and be integrated into the SEPA process. Each caucus to have one vote. Planning group will operate by consensus whenever possible. When consensus is not possible, Ecology will assume lead role in assuring that the plan is completed.

*Ecology will review completed plans consistent with Administrative Procedures Act and SEPA, giving substantial weight to meeting fundamentals of Water Resources Policy Act of 1971. State shall approve or remand plan within 90 days. Petitions may be presented on process grounds. Extension may be recommended by Forum. Ecology may not change plan.

*No appeals permitted during planning process. Appeals processes available to challenge completed plans will be those available under current law.

*Once plan is completed, Ecology will prepare implementing regulations. Local governments will prepare any needed ordinances. Once adopted, regulations will be binding.

*The Chelan Agreement is intended to be applied to all regions of the state in need of water resource planning and will be implemented in at least two regions in next three years.

*Participants in Chelan process recognize their primary objective as cooperative planning, but also that the broad goals of this effort should be integrated by Ecology into its ongoing water management activities. Also, local governments recognize that their ongoing land use or water resource activities could be affected by this process. The cooperative nature of the agreement encourages resolution of disputes through mediation.

5. Organized Response to Critical Situation Which Require Action Now

*Agreement establishes criteria for dealing with critical water-related situations in watersheds other than pilot project areas. Take advantage of existing laws and government structures and is explicitly intended to provide notification of actions which may have an impact on the resource.

*State, tribal or local government can evaluate proposed actions which might impact the resource. Under this process, basins or WRIAs can be classified as: a Critical resource impact, in which the water resource is designated as over-appropriated (would likely result in delay or denial of activities that might harm the resource); b. Probable resource impact, in which the water resource is in need of further evaluation; or c. Possible resource impact, in which the water resource is designated as generally permissible for development (however, further planning and study may be required).

*When a proposed action requires further evaluation, a number of tools may be applied to the decision, ranging from targeted conservation to moratoriums.

6. Water Resources Planning and Growth Management

The Chelan Plan recommends that HB 2929 be amended to include a water resource component, that: requires local planning efforts to recognize water availability as key growth factors; assures local governments with permitting processes affected by water availability or quality will receive first access to funding for technical data analysis; and that develops an intergovernmental agreement similar to the Centennial Accord between local and tribal governments.

7. Data Management

*Recognizes importance of data to water management, supports continuing efforts of Data Management Task Force and commencement of pilot planning process.

8. Conservation

*Recommends establishment of a task force to consider: a. Removing impediments to conservation; b. Providing incentives to promote conservation; c. Provide funds for incentives; d. Determine how program fits in Ecology's compliance effort; e. Determine relationship of conservation to waste of water; f. Remove impediments such as taxation on water use. Task Force should draft appropriate Ecology legislation on consensus basis, if possible. If not possible, any task force participant can introduce legislation. Task force to complete its effort by January 31, 1991, and be prepared to brief legislative committees prior to that date.

9. Information and Education

*Supports building a framework for an ongoing information process.

*Recommends development of an information strategy, to be reviewed by the Forum. The strategy will use existing information processes, integrate with and possibly delegate to the Environmental Education Council established through the Environment 2010 Executive Order.

10. Funding Requirements and Strategies

11. Statewide Guidance

*Guidelines should be established to speak to actual outcomes sought in plans. It is accepted that the 1971 Act and the state/tribal Memorandum of Understanding on the environment are starting points, but need clarification.

*Guidelines must be established before pilots begin. An Interim Team/Forum responsibility.

*Guidelines in place for duration of pilots and reviewed at end of projects. Applicable to all water resource planning in the state.

Conclusion

The Chelan Agreement is unique in that it is a recognition of sustainability of tribal, local, state and federal goals. It is a new partnership of responsibilities, never before put together in resource issues. The agreement requires the development of comprehensive goals of achieving instream flows needed to provide an overall gain of fish and wildlife habitats, conservation/re-use related to out-of-stream uses and land use needed to achieve full capacity of fish and wildlife resources as well as groundwater supplies, potable water and watersheds, water quality, as well as ensurance of on-reservation management/individual tribal sovereignty. These goals are necessary to comply with the intent of federal judicial and congressional laws. They also comply with the intent of United States treaties and they are good public policy in light of issues being addressed under the Endangered Species Act.

Historical/Contemporary Overview

History of Water Resource Development in Washington

The first human occupants of this land that is now Washington State were Indians. The rivers and marine waters provided abundant sustenance. Indians have always known their survival depends on clean water and thus they lived in harmony with nature. Their lives have been dedicated to the protection of natural ecosystems. Coastal and Columbia River Indians have always relied heavily on fish. Because salmon are funneled into rivers and streams in large numbers and are vulnerable to capture, they provided a mainstay in the diet of tribes, and formed a basis of unique cultural, economic and religious practices of native peoples. Rivers and marine waterways also provided convenient transportation avenues, recreation and environmental values.

"Few of Washington's major rivers remain in pristine condition..."

Euro-American exploration of the northwest also depended upon rivers for transportation. The Lewis and Clark expedition traveled up the Missouri and down the Snake and Columbia rivers to reach the Pacific Ocean. Trappers in search of furs followed the waterways west. Euro-American settlement of what is now Washington State began in earnest in the middle part of the 19th Century. Settlements that would become Seattle, Tacoma, Olympia, Port Townsend, Walla Walla, and Spokane and others all were located on or near water. Water was necessary for transportation, domestic supply, and power.

Photo courtesy of Special Collections Division, University of Washington Libraries. Negative #426.

The earliest irrigation in Washington is believed to have occurred prior to 1820 in present day Walla Walla. Irrigation development of the Yakima basin began in the 1850's. A major federal irrigation project in the Yakima basin involving construction of five storage reservoirs was initiated in 1905.

The early settlers of the Olympia area developed a mill at Tumwater Falls on the Deschutes River. As lumber mills and shipping facilities sprang up along Puget Sound, rivers were used to transport logs downstream to the mills.

Hydroelectric power plants began to appear about the turn of the century. The growing cities of Seattle and Tacoma initiated development of large municipal water supply projects on the nearby Cedar and Green rivers in the early 1900's.

Rapid population growth during the two World Wars resulted in increased development of water resources for power, agriculture, industry, and municipal supply. Construction of Rock Island Dam on the Columbia River was begun in 1930. Bonneville Dam, a federal project, was initiated in 1933. The massive Grand Coulee Dam project also began in 1933. Eleven huge dams now span the Columbia River and four dams impound the Lower Snake River in Washington, altering the character of these rivers.

Today, an estimated 1.5 million acres of land are under irrigation in Washington. Large municipal diversions exist on many streams, and hydropower projects exist on many others. Flood control dams and levees have added to the alterations. The historical and continuing utilization of water resources is a cornerstone of Washington's economic development.

This has come at no small environmental price. Few of Washington's major rivers remain in pristine condition. On many streams, large natural populations of anadromous fish have been dramatically reduced, often as a direct consequence of the utilization of the state's water resources. Wildlife, water quality, recreation, aesthetics, and environmental values have also been altered by this development.

In Washington, water management challenges are overlaid by additional complexities. For example, the 1985 U.S./Canada Pacific Salmon Treaty obligations may alter water allocation decisions in the state. Washington's water policies may be further influenced by decisions of the Northwest Power Planning Council, created by Congress in 1980 to assess power, fish, and wildlife needs in the region. The Endangered Species Act may have very profound impacts on the river systems. Federal laws relating to water quality covering such subjects as safe drinking water standards have affected, and will continue to affect, water resource decisions.

Water resource planning and use is at a critical stage in Washington. New factors are forcing the state to adjust its policies to accommodate change while protecting existing water rights created in an earlier era.

Review of Water Law in Washington State

The first Washington territorial law over water, enacted in 1863, provided for use of the English common law riparian doctrine of water rights. Under this doctrine, owners of land abutting a stream or lake possessed correlative rights to make reasonable use of the waters of the stream or lake.

However, the dry nature of most of the West called for the use of a new doctrine of water law which came to be known as the prior appropriation doctrine. The central tenets of this doctrine are "first in time is first in right" and that water must be put to beneficial use. Under this doctrine, it is permissible to remove water from the channel and transport it to nonriparian land for use. Conflicts among users are resolved on the basis of whose use was established first.

Washington became a state in 1889. In 1891, to support the prior appropriation doctrine, the Legislature passed a water right law requiring that prospective water appropriators post a notice at the proposed point of diversion and file a copy at the county records office.

In 1917, the state enacted the State Water Code, which established appropriation as the exclusive means of establishing new rights to surface water. In 1945 the State Ground Water Code was passed, extending the appropriation system to ground water. These codes are still in effect, though they have been amended many times.

"In 1949, the Legislature declared it to be the policy of the state ...that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state..."

Very little regard was given to the needs of fish, wildlife or other resources for instream water flow needs until the 1940's. In 1949, the Legislature declared it to be the policy of the state "...that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state." This legislation, still in effect, provides

or the Director of Wildlife, such permit might result in lowering the flow of water in any stream below the flow necessary to adequately support food and game fish populations in the stream."

As an alternative to denial of the permit, the State Department of Ecology has issued numerous permits conditioned with low flow provisions recommended by Wildlife and Fisheries and tribal governments. Under this authority, approximately 250 streams (nearly all very small) have been closed to further appropriation, and low flow provisions have been applied to individual permits on approximately 250 other streams.

The Minimum Water Flows and Levels Act was enacted in 1967 to provide a more formal process to protect instream flows. Under this act, the Department of Ecology shall, either on its own or when requested by the departments of Fisheries or Wildlife, establish minimum stream flows and lake levels to protect fish, game, birds, other wildlife resources, recreational or aesthetic values, or to preserve water quality. The act sets forth public hearing procedures for the establishment of minimum flows and lake levels, but does not define criteria for the determination of these flows or levels, nor require that the Department of Ecology follow the recommendations of the Departments of Fisheries or Wildlife. Ecology used this authority in 1971 to adopt minimum flows for the Cedar River, a major source of water supply for the Seattle metropolitan area.

The historical and continuing utilization of water resources is a cornerstone of the region's economic development.

Additional water allocation authority is provided by the 1967 law establishing the Department of Water Resources, which was later incorporated into the Department of Ecology. This act requires the department "to develop and maintain a coordinated and comprehensive state water and water resources related development plan, and adopt such policies as are necessary to ensure that the waters of the state are used, conserved and preserved for the best interest of the state." The act also requires inclusion in the plan of a description of development objectives and recommended means of accomplishment, and allows the department to include the plans, programs, reports, research, and studies of other state agencies.

The 1967 Act requires assembly and correlation of information on water supply, power development, irrigation, watersheds, water use, future possibilities of water use and prospective demands for all purposes, and assembly and correlation of state, local, and federal laws, regulations, plans, programs, and policies affecting water, natural resources, and development and uses thereof. It also requires cooperation with federal, state, regional, interstate, and local public and private agencies in planning for drainage, flood control, use, conservation, allocation, and distribution of existing water supplies and development of new projects.

The Water Resources Act of 1971 provides that "perennial rivers and streams of the state shall be retained with base flows necessary to provide for the preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." The Act also provides that "lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict (with these flows or levels) shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served."

The Water Resources Act of 1971 sets forth "fundamentals of state water resource policy... to ensure that waters of the state are protected and fully utilized for the greatest benefit to the people." In addition, it declares a broad range of out-of-stream and instream water uses to be beneficial, requires that the allocation of water among potential uses and users be based generally on the securing of maximum net benefits to the people of the state, and requires that adequate and safe supplies of water be preserved and protected in potable condition to satisfy human domestic needs.

The Act directs the Department of Ecology to develop and implement a state water resources program. It requires rule-making to reserve and set aside waters for future beneficial use, and allows the Department of Ecology to withdraw waters from appropriation while information is being collected. The Act also requires that the Department of Ecology fully inform and involve the public and other agencies, periodically report to the Legislature, and vigorously represent the state's interests before federal and interstate agencies. In addition, it requires compliance with its provisions by all state agencies, local governments, and municipal corporations.

The Department of Ecology adopted the Water Resources Management Program regulation in 1976 to provide guidelines for the instream flow and water allocation activities authorized by the Water Resources Act of 1971. This regulation establishes 62 Water Resource Inventory Areas (WRIAs) as planning units, lists possible basin plan elements, and defines terms.

The Department of Ecology is vested with exclusive authority under state law to establish instream flows and levels on state waters. In establishing such flows, the department is required to consult with and carefully consider the recommendations of the departments of Fisheries, Wildlife and Agriculture, the State Energy Office, and affected Indian tribes. These and other state agencies are not precluded from presenting views on instream flow needs at public hearings or from participating in proceedings of other agencies (federal or state) to present views on stream flow needs. (The Federal Energy Regulatory Commission sets operational minimum flows for many hydropower projects it licenses.)

Tribal Treaty Rights

The United States government negotiated treaties with tribes within Washington State during the 1850's. Each of these treaties provided for reservations and fishing opportunities for tribal members. While Washington State water law was evolving, these tribal treaty rights were being defined by the courts. The U.S. Supreme Court first affirmed Indian treaty fishing rights in 1905 in U.S. v. Winans, and in 1974 determined that the treaty Indian tribes were entitled to the opportunity to take up to half the harvestable salmon and steelhead in Washington State. During this period the United States Supreme Court in 1908 established the so-called Winters Doctrine, U.S. v. Winters, which recognized the reserved water rights of Indian tribes.

These two legal theories which protect tribal water rights are distinct. "Winters" rights in waters are based on the federal government implicitly reserving necessary waters to fulfill the purposes of the land retained by the tribes when they ceded the balance of their territory to the United States. "Winters" rights have a priority date relating to the time the treaties were signed. Treaty reserved rights to fish also carry an implied right to water necessary to protect the fish resource that are harvested in the usual and accustomed areas of the tribes.

Treaties are the "Supreme Law of the Land" and are binding on state action.

Unlike "Winters" rights, implied rights to the water necessary to protect the fishery resource have a priority date of from time immemorial, (U.S. v. Adair, Ninth Circuit Court. 1983). This latter right is currently an issue in Phase II of U.S. v. Washington. In 1982, Federal District Court Judge Orrick ruled in favor of the tribes that the treaties implicitly incorporate the right to have fish habitat protected from environmental degradation. The court found that continued degradation of the fish habitat would render the treaty fishing clause meaningless. Accordingly, it found that the treaty fishing clause imposes on the state (along with the United States and third parties) the duty "to refrain from degrading fish habitat." This portion of Judge Orrick's decision was vacated on procedural grounds by the Ninth Circuit Court of Appeals and remanded to Federal District Court, where it is still before the court.

The tribes signed treaties to reserve rights to water and all dependent natural resources.

Little litigation activity has taken place in Phase II since the environmental issue was remanded to the district court. Rather, the parties agreed to see if there can be negotiated solutions to environmental problems involving fish habitat. As a first initiative, the tribes, the state, representatives of the timber industry, and representatives of environmental groups developed the 1987 Timber/Fish/Wildlife (TFW) Agreement. TFW is an attempt to change timber practices on state and private lands so fish habitat can be protected while still allowing for timber harvest.

Although the Ninth Circuit Court of Appeals avoided deciding Phase II, the Ninth Circuit has dealt with the implied environmental right in a specific circumstance. In Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 1985, the Ninth Circuit Court affirmed a district court order requiring emergency measures to protect chinook salmon, including increased water flows in the Yakima River.

On the water issue in general, the tribes assert that: (1) state water law and administrative process does not adequately protect instream resources, nor water for on-reservation purposes; (2) state water law and administrative procedures fail to recognize the prior and paramount water rights of the Indians that relates back to time immemorial; and (3) that these rights are not subordinate to state law, including water laws.

The productivity of fish habitat has declined over the years. Tribes, along with others, seek to correct that decline. Reserved water rights and treaty fishing rights may provide the legal mechanisms by which the tribes can achieve their goals of improving fish habitat by protection, enhancement, and restoration.

The Memorandum of Understanding on Environmental Protection (Appendix E) between the State of Washington and the tribes is a commitment by both parties to seek cooperative solutions on fish and wildlife habitat issues.

History of Planning for Water Resources

Conflicts and uncertainty over the future of Washington state's water resources have been the norm in the last several decades. These conflicts have been played out in courtrooms, administrative agencies, and the legislature, with no clear winner or end in sight. Continued conflict and uncertainty frustrate planning for the future.

The most recent water resource controversy was brought to the attention of the Legislature in 1985 when the Department of Ecology attempted to set instream flow requirements for streams along the western shore of Hood Canal, the "Skokomish/Dosewallips water resource inventory area." While some interests thought the flow too restrictive of other

uses, the state Ecological Commission overturned the flow-setting regulation as not protective enough of instream values. The Department of Ecology subsequently (through the Instream Flow Advisory Committee) reviewed its entire program, drafted a programmatic environmental impact statement on alternatives for an instream flow and water allocation program, and chose a preferred alternative. The contentious debate over the preferred alternative spurred the legislature to step in.

In 1988, the legislature passed two water-related bills -- the first establishing the Water Use Efficiency Committee and Study; and the second enacting a moratorium on the implementation of the preferred alternative, on the issuance of new surface water permits and on the establishment of new water supply reservations. The latter bill also established the Joint Select Committee on Water Resource Policy to recommend to the full Legislature procedures for allocating water resources of the state. The Joint Select Committee provided a report to the Legislature in January, 1989.

A Joint Select Committee concluded that the laws and policies regarding water resources are inconsistent and not sufficiently clear to guide administrative programs. The fact finder concluded that clear, concise laws are needed to reconcile the policies and set priorities among competing goals. Otherwise, confusion and inconsistencies typically result as administrative officials--who represent various agencies and who change over the years--struggle to interpret and implement the policies. Finally, water statutes enacted in past decades have tended to simply overlay existing laws without sufficient attention to amending inconsistent provisions. This problem is compounded because many of the important terms are not sufficiently defined to provide clear guidance in administering water programs.

"...to meet today's and tomorrow's water supply needs while protecting instream values, a cooperative water resources planning process must be developed."

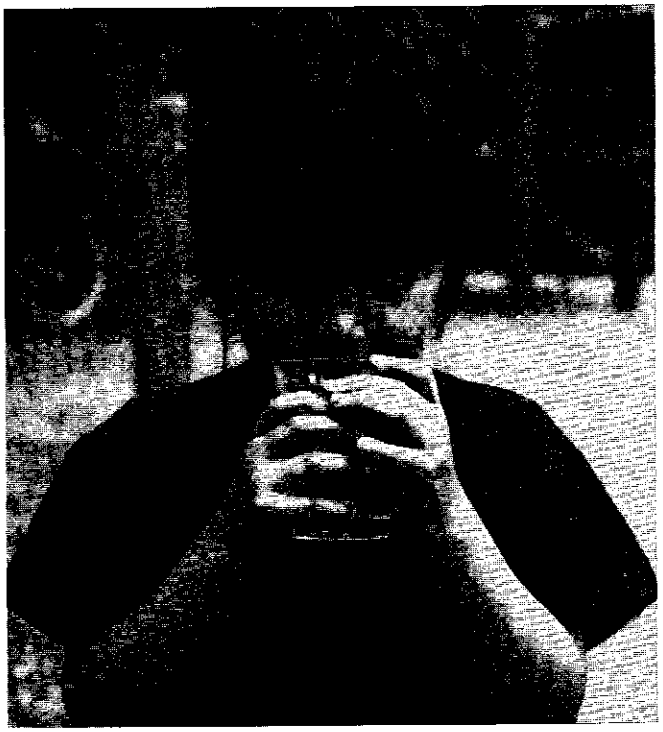
The Joint Select Committee, after studying the report of the independent factfinder, identified instream resource protection and water resource planning as the two issues of highest priority for legislative action. The committee formed public and technical advisory groups to assist in reviewing these issues. At the same time, the governor organized a sub-cabinet on Water Policy. Tribal leaders, perceiving an inability to have their needs adequately addressed through existing legislative and administrative processes, urged that a cooperative government-to-government approach be crafted to deal with statewide water resource planning. These tribal leaders, in conjunction with the state subcabinet on water policy and legislative leaders, met in early 1990 to discuss the potential for developing such a water resource planning process. Based on that meeting, the Joint Select Committee drafted legislation which was enacted during the 1990 legislative session calling for a cooperative approach to water resources planning among interest groups, local governments, tribes, and water users. This legislation also stated that planning should be done on a regional basis with regional boundaries to be drawn and two pilot basins chosen by January 1, 1991. Ecology was also directed to form a data management task force to evaluate data management needs and advise the Joint Select Committee on what would be required to develop an information management plan.

One of the critical elements leading to the emphasis on cooperative planning was the interest of the state and the Indian tribes in cooperatively resolving environmental issues, including water resource issues, relating to their tribes' treaty right to harvest fish.

The two state government efforts, executive and legislative, were combined and the state, together with the tribes, and local government entities began a common effort to hold a water resources planning retreat. More than 175 participants from a broad range of interests met in May 1990 at Rosario to collectively decide whether cooperative water resource planning might be an acceptable and effective way to deal with the complex issues surrounding our decisions on water. The broad range of participants formed seven caucuses, representing the following interests and organizations: state government (including both executive and legislative branches); local government (including both general and special purpose governments); tribal governments; environmentalists; the business community; the agricultural community; and commercial and sports fishing interests, including recreational boaters. All the caucuses at Rosario talked about state water conflicts and how they had led to stalemate and stifled creativity. In the end, the group agreed that in order to meet today's and tomorrow's water supply needs while protecting instream values, a cooperative water resources planning process must be developed. In November, 1990, more than 200 officials met at Lake Chelan and developed the Chelan Agreement.

Water: The Essential Resource

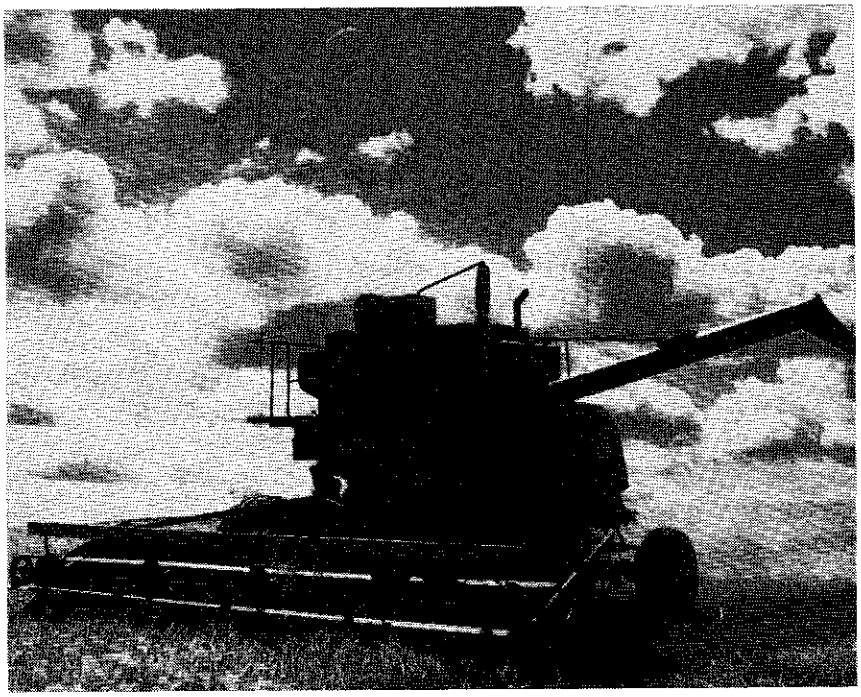
Water is essential to our existence. The futures of the tribes and the non-Indian community are dependent on the care with which we protect our waters and the responsibility with which we use them. As the population and subsequent demands for water increase, everyone must stretch each gallon beyond current uses, and the challenge of preserving water for fish and wildlife habitat becomes more severe. We have a responsibility to future generations to leave them ample high quality water and to otherwise protect their quality of life. Whatever we take, whatever we use, we borrow from them. Today, water resource planning has become so complex that tribal, state and local government and interested non-governmental groups have joined together to develop a new approach to planning the best uses of our limited water resources--a cooperative approach. We refer to it as the Chelan Agreement, a major step forward in water resource management planning.



Basis for Comprehensive Water Resources Planning

Local governments, fishing interests, agricultural and private water users, the environmental community, recreation enthusiasts and others each have a vital interest in the uses of our water resource. State government has an interest in reaching decisions that best meet the needs of these groups. Tribal governments must assure that treaty rights and tribal interests are protected.

For many years, each advocate for a particular use of water has worked to prevail over others in the decision-making process. Through this cooperative process, the Chelan Agreement, all interests have turned their individual focus away from each particular need toward finding more creative means to best meet all needs. Each of the parties has now recognized the legitimacy of the goals and objectives of others.



"Through a cooperative process, all interests have turned their individual focus away from each particular need toward finding more creative means to best meet all needs."

Whether for drinking or farming, water is a resource we will not live without.

Tribal Participation in Water Resource Planning

BASIS FOR COOPERATIVE MANAGEMENT

Tribal governments have a legal right to participate in water management planning for many reasons, not the least of which is that they hold first-use status which they have never relinquished. The U.S. Constitution and the federal trust responsibility clearly protect Indian resource rights (including water rights), a position confirmed by numerous court decisions. Among these is Phase II of U.S. v. Washington, (Boldt Decision,1974, affirmed by the Supreme Court in 1979). The tribal position on this decision is that fish and wildlife habitat protection is inherent in harvest protection. While this

> ***"An Environmental Memorandum of Understanding has been produced jointly by the state and the tribes, which lays out a comprehensive cooperative approach, applicable to a broad range of environmental issues..."***

position has not always been unanimous among non-Indians, the tribes and the state have selected to pursue common related objectives rather than further litigation at this time. An Environmental Memorandum of Understanding has, in fact, been produced jointly by the state and the tribes, which lays out a comprehensive cooperative approach, applicable to a broad range of environmental issues (Appendix E). The Government-to-Government Accord established beween the state and the tribes in 1989 provides a framework for these environmental, as well as economic and social cooperative working relationships.

On-Reservation:

Indian nations ceded millions of acres of territory to the United States government through scores of treaties, which reserved land, water and other rights for future generations. In exchange for these lands, the federal government agreed to protect Indian lands and respect the sovereign rights of the tribal nations to govern their people. Treaties are the "Supreme Law of the Land" under the U.S. Constitution. They remain legally binding contracts that are enforced to this day.

As sovereign nations, the federally recognized Indian tribes have the same rights as any self-governing nation. These rights include enacting laws and programs to protect the environment within their jurisdiction. Tribal government powers can even exceed those of other governments because the tribes manage their lands both as landowner and regulator. As a result, the authority of the tribes regarding environmental matters, can be greater than that of states.

Early federal environmental laws were approached from a federal/state relationship. Under those laws, the role of tribal governments was ignored, or considered to be minor. As a result, uncertainty reigned in the regulatory arena of environmental management on Indian lands, and little federal environmental program assistance was made available to the tribes.

Today, however, the role of the tribes with respect to environmental regulation on tribal lands is becoming clear. Recent Congressional amendments to the Clean Water Act and the Safe Drinking Water Act, for example, provide more precise roles for tribal governments.

EPA also has adopted and begun implementation of its own policy regarding environmental programs on tribal lands. As a result, tribes have the opportunity to develop their own environmental programs with federal financial and technical assistance, under a relationship with the EPA similar to that of the agency and states.

EPA's Indian policy addresses the federal trust responsibility to the tribes and sets a clear policy of implementing federal environmental programs in Indian country through a direct government-to-government relationship. Other aspects of the policy include:

* Recognition by the EPA that tribes are primarily responsible for policy development and implementation of environmental programs on their lands;

* A pledge to remove legal and bureaucratic barriers between the agency and the tribes, facilitate support from other federal agencies as appropriate, and fully consider tribal positions in decisions related to tribal lands;

* A pledge to assist tribes in developing the ability to conduct EPA programs on tribal lands.

While tribes may be treated the same as states in some respects as a result of the amendments to the Clean Water Act and Safe Drinking Water Act, some marked differences remain.

One significant difference is that a tribe must meet a series of conditions before it can be treated as a "state". Accordingly, a tribe must prove it has a functioning governing body (such as a tribal council) with adequate governmental power to conduct substantial governmental duties; that the water resources involved are within its jurisdiction; and that it can be reasonably expected to carry out a program within federal requirements.Other added requirements include an assessment and report on sewage treatment needs, a provision for tribal set-aside of construction grants funds, and an authorization for tribes and states to enter into cooperative agreements.

"Today the role of the tribes with respect to environmental regulation on tribal lands is becoming clear..."

While taxing on limited tribal staffs, particularly those of smaller tribes, many tribal governments have completed or initiated the difficult process of receiving state designation. Tribes in Washington State which have achieved "state" status are the Swinomish, Muckleshoot, Puyallup, Yakima, Colville, Port Gamble S'Klallam, Kalispel, Suquamish, Lummi, Makah, and Lower Elwha Klallam.

Besides the fiduciary responsibility to the tribes regarding water quality and other environmental issues on tribal lands, a legal responsibility also exists.

Two legal theories form the basis of Northwest tribal water rights. These theories, and supporting case law, also form a bridge of the tribal right to adequate, clean water -- both on-reservation and off-reservation.

One is treaty-based rights to quantity and quality of water for the protection of the tribes' right to harvest fish at their usual and accustomed fishing grounds. The other is "Winters" Doctrine rights to quantity and quality of water to fulfill the purpose of the reservation homeland. Although the two legal theories are similar, there are several important distinctions.

"Winters" rights are based on the 1908 U.S. Supreme Court ruling in U.S. v. Winters. Under the case, the court ruled that creation of an Indian reservation meant that not only land, but also a sufficient amount of water to fulfill the purposes of the reservation land, were implicitly reserved by the federal government. "Winters" rights are reserved by the federal government and related to specific lands. They also have a priority date related to the time a treaty was signed.

Unlike "Winters" rights, implied rights to water necessary to protect fishery resources are reserved by Washington tribes, not the federal government, in treaties. These rights are not tied to specific lands, but instead apply to the entire U.S. v. Washington case area. In addition, these rights have a priority date of time immemorial, and are not tied to the date treaties were signed.

Off-Reservation:

From time immemorial, Indians of the Pacific Northwest have depended on salmon for their very existence. Salmon were, and are today, an integral part of every facet of tribal life and culture.

In the 1850s, the United States entered into treaties with Indian tribes located in Washington Territory as part of the settlement of the West. In these treaties, negotiated by Territorial Governor Isaac Stevens, the Indians traded their land interest for the exclusive use of the lands within reservations.

To preserve their culture the tribes reserved certain rights to natural resources that were major components of their culture. Among those rights explicitly reserved by the tribes were:

* The exclusive right to fish within their reservations and rights to fish at "all usual and accustomed fishing places..in common with citizens";
* The right to hunt;
* The right to gather shellfish;
* The right to gather roots and other foods.

The property rights reserved by the tribes are protected under the United States Constitution, which declares that all treaties (including treaties with tribal nations) are "the supreme law of the land"..."and the judges in every state shall be bound thereby..." Treaty rights, as a federal action, thereby supercede state law. State governments, therefore, may not enact legislation that conflicts with the treaty rights of any subjects of a signatory nation.

Provisions of the Stevens Treaties guaranteeing the tribes' reserved rights to fish were soon forgotten, however. An institutional framework of state government and laws evolved to the point that non-Indian settlers were allowed to monopolize the fish resource to the extent of almost total exclusion of the Indians. Federal and state institutions also allowed the urbanization and intensive settlement of the area, the rapid development of dams for electric power, unbridled logging and irrigation, and the pollution of watersheds, which reduced the quality and amount of accessible spawning grounds and rearing habitat for the treaty protected fishery resources.

As a result of the forgotten promises of the federal government, the tribes sought redress and implementation of the treaties through the courts in U.S. v. Washington. Those efforts resulted in a 1974 landmark decision (the "Boldt Decision") that reaffirmed treaty Indian fishing rights and further established the tribes as co-managers of the resource.

"The property rights reserved by the tribes are protected under the United States Constitution, which declares that all treaties (including treaties with tribal nations) are the 'supreme law of the land...' and the judges in every state shall be bound thereby..." Treaty rights, as a federal action, thereby supercede state law...

There were two distinct segments in the U.S. v. Washington litigation: Phase I and Phase II. Phase I involved the determination of the nature and extent of tribal fishery harvest rights. Those basic harvest rights were affirmed by the United States Supreme Court in 1979 and the federal court has retained jurisdiction to fully implement those fishing rights.

The tribes argued in Phase I that the right of taking fish incorporates the right to have treaty fish protected from environmental degradation (U.S. v. Washington, Phase II).

In response to the tribes' claim, the court stated, "the most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken. "In order for salmon to survive, specific environmental conditions must be present: (1) access to and from the sea, (2) an adequate supply of good-quality water, (3) a sufficient amount of suitable gravel for spawning and egg incubation, (4) an ample supply of food, and (5) sufficient shelter. An alteration of any one of these essential requirements will affect the production potential of anadromous fish. Furthermore, the court indicated that "it is undisputed that these conditions have been altered and that human activities have seriously degraded the quality of the fishery habitat."

Over the years, there has been a gradual deterioration and loss of natural fish production habitat in Washington's streams. Although there are many individual factors contributing to this, the general trend toward reduced production habitat is more the result of a combination of activities performed by man -- activities which alter and destroy one or more habitat conditions required for successful fish production. Generally, these factors can be categorized under the broad headings of watershed alteration, such as forestry, water storage dams, industrial developments, stream channel alterations, and residential developments.

In 1980, Judge Orrick ruled in favor of the tribes. Orrick held that the state government must refrain from degrading fish habitat as required by the Stevens Treaties. "Were this trend to continue, the right to take fish would eventually be reduced to the right to dip one's net into the water...and bring it out empty."

Impact and concern of the Orrick decision was far-reaching. In response to Orrick's decision, the Washington State Assistant Attorney General stated, "the ruling could lead to the tribes' having veto power over real estate projects, logging practices, highway construction and the use of pesticides in the western half of the state." The Assistant Attorney General went on to say: "The decision could affect literally everything that touches the environment. The potential for impact on the economy and development and use of resources would be substantially greater under this decision than anything we've seen under the 1974 decision (Phase I). This may address how we continue our forest practices, the use of pesticides, what water may be withdrawn from rivers, where you can build highways and docks, real estate development and shopping centers -- the whole bit."

"In response to the tribes' claim, the court stated, that the most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken..."

Though the case is still pending, Phase II issues and impacts remain. The parties of U.S. v. Washington recognize the potential for litigation of the Phase II issues. The federal government, as trustee for the tribes, is responsible and accountable to ensure the tribes' treaty rights are fully protected.

Despite the potential for litigation of Phase II issues, the tribes, state and others have attempted to resolve disputes cooperatively instead of resorting to the courts. This approach to cooperative problem solving is the basis of natural resource management in Washington today.

Tribal Responsibilities/Budget Proposal

1. General Purposes and Functions Required of Tribes

The funding needs for tribal participation in this process fall under the following categories:

* Forum- The process of developing and maintaining communication, negotiation, direction and implementation of water resource planning is essential. The process establishes a "Forum" comprised of representation of all participants to pursue these objectives.
* Pilot Projects- Cooperative water management test projects to further develop the regional planning process.
* Critical Areas- Efforts in areas identified as having critical need for immediate water management plans.
* Growth Management- Participation in the development of good growth management plans. The tribes have provided an important leadership role in the pursuit of growth management planning efforts to cope with this growth, as well as growth which has already occurred.
* Data Management- Crucial to the success of the program is the ability of the tribes to collect and manage data related to instream flows, allocated uses, etc. on a cooperative basis with other participants.
* Conservation- New and old methods of conserving water must be studied and implemented in this process.
* Public Information and Education- Public support and participation of the process hinges on effective information and education efforts on and off the reservations.
* Statewide guidance- The planning process is a statewide effort and thus requires statewide guidance.
* Compliance/enforcement- Enforcement of existing and proposed laws is a necessary component of effective water resource planning.

Following are more detailed descriptions of process sections which will require funding support.

Tribal Goals and Objectives

2. Implementation Requirements of the Chelan Agreement

"Forum"- The Chelan Agreement establishes a Water Resources "Forum" represented by all participating governmental and public participants. Membership on the Forum will include six tribal policy participants representing regional areas throughout the state. Tribal participation and protocol will be determined by the tribal governments. The Forum will also include three state, three local government, three business, two fisheries, (1 sport and 1 commercial), one recreational, three environmental, and three agriculture representatives. The general function of the Forum will be to shape state water policy, clarify existing state law and policies, recommend statutory changes as needed and provide policy guidance on critical situations, if necessary. Decision-making within the Forum will be by consensus. Consensus was required, in part, to protect the individual sovereignty of the tribes.

Logistical/Staff Support - Ongoing logistical support (travel, room costs, etc.) for tribal policy participation is needed in the water resource process. A staff person is needed to coordinate tribal technical staff with the Forum, Data Management Task Force, and regional planning; prepare issue papers, draft proposed policies, coordinate with other state, federal, and local agencies, develop grant proposals, work on legislation, oversee development of guidelines and implementation of the Chelan Agreement. A staff policy analyst is needed to work with the lead staff on the development of proposed policies and legislation and all other activities related to the Forum. The policy analyst will work with tribal policy and legal representatives implementing the Chelan Agreement.

Facilitation of the Forum is necessary to foster and continue support of the water resources process. This is a shared expense with other participants. Travel and other expenses will be needed to support staff.

The Chelan Agreement recognizes practical limitations of implementing the process statewide; therefore, the parties have agreed to stage implementation of the statewide water resource planning process. In taking an adaptive management strategy, water resource planning will be initiated in at least two regions in the state. Pilot planning may also be triggered by any of the governments: Indian tribes, state, city or county. Criteria for selection of initial pilot projects will be developed by the Forum.

Plan adoption does not reside with the lead entity, but rather with the assembled caucuses. Each caucus has one vote. The three implementing governments (tribal, state, and local) must achieve consensus, and this must be joined by a majority vote of the remaining interest group caucuses. The State Department of Ecology cannot amend the plan, but can only approve or remand the plan to the regional planning entity for revisions. If the process fails, the Department of Ecology must produce a plan within 24 months. No legal appeals are permitted until the state begins implementation of a proposed plan.

Regional Water Resource Planner/Coordinators - Tribal staff is needed to coordinate participation in the regional water resource planning activities and the Water Resource Forum. Tribal staff would be required to coordinate on and off-reservation planning activities as necessary. Tribal staff would also coordinate with regional technical support teams. Staff would evaluate and assist in developing demand forecasting. It is estimated that there will be four affected tribes per regional planning process and each tribe would require a water resource planner.

Pilot Project Water Resource Technical Support Teams - Technical staff will be required for the development of water resource plans. Each regional technical support team would consist of one hydrogeologist, one instream flow expert and, and one data manager.

Facilitation for each regional pilot project will be required, as will equipment, travel, contracts, data management, and studies.

Critical Areas - This section of the agreement was designed to develop a mechanism addressing critical situations in watersheds outside the pilot planning projects. The critical areas process will enable governemntal entities to evaluate proposed and existing activities which might have a critical or probable impact on the water resources.

Staff would be necessary to address critical situations and develop information in support of policy decision-making in critical situations. One Full Time Equivalency (FTE) per tribe is expected. Some funding for this section could be identified as discretionary monies to provide for contracts, water quality testing, etc. to aid in gathering technical information to assist decision-making in critical areas.

Water Resources Planning and Growth Management - This Agreement acknowledges and addresses the linkage between water resources and growth management. The institutional framework is established in the existing Growth Management Act passed in 1990 and supplementary amendments. Local planning efforts recognize water availability and quality as key factors in an areas "carrying capacity."

Data Management - Funding is proposed to allow tribal governments to participate and assist in the implementation of regional planning and the Data Management Task Force Report. The proposed information management program includes staff for data coordination, the development of a five year plan, computer equipment, modelling, and continued implementation of tribal coordinated geographic information management systems.

Conservation - Detailed work plans for conservation will be developed in regional plans, which have yet to begin.

Public Information and Education - Staff is needed to assist in the development and implementation of a strategy for public information and education. In addition, contract costs for development of multi-media projects and equipment and the implementation of a cross-cultural values program will be required to implement this section.

"The tribes have a right to participate in a water resource planning process to ensure the development of a process that <u>can be</u> implemented..."

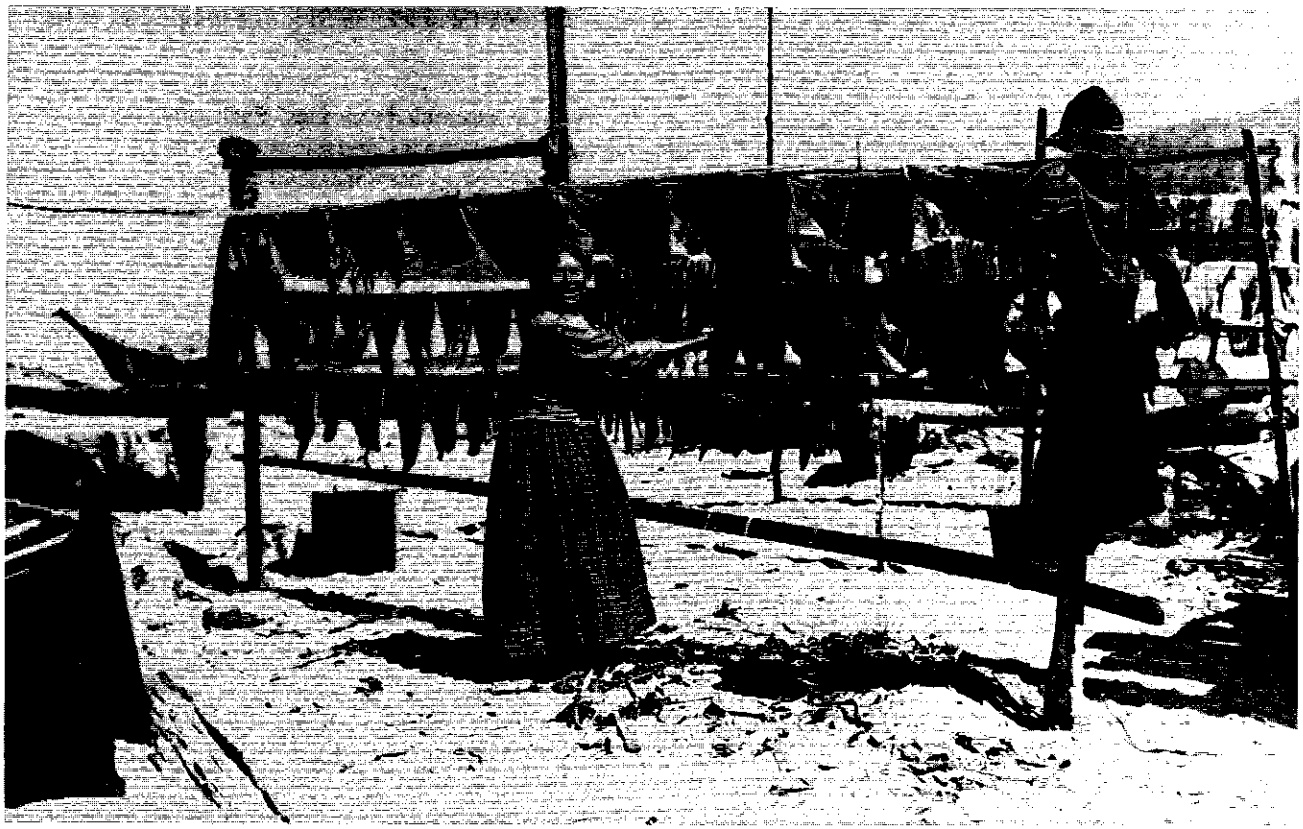


Photo courtesy of Special Collections Division, University of Washington Libraries. Negative #715.

TRIBAL IMPLEMENTATION OF THE CHELAN AGREEMENT
BUDGET REQUEST FOR FY-1992

WATER RESOURCES FORUM

Tribal participation with state and local governments, business, fisheries, recreation, environmental and agricultural caucuses.

Policy Logistic Support - tribal policy participation	$50,000
Staff Support	
Water Resources Coordinator - coordinate technical staff & issues	$65,000
Water Resources Policy Analyst - develop policy & legislation	$65,000
Facilitation - continued support of water resources process	$25,000
Travel and Other Expenses	$25,000

PILOT PLANNING PROCESS

Tribal participation in staged process implementation initiated in two regions.

Regional Water Resources Planner/Coordinators ($65,000 x 8)	$520,000
Pilot Project Technical Support ($65,000 x 6)	$390,000
Facilitation for Regional Pilot Projects - Tribal participation	$25,000
Equipment, travel, contracts, data management, and IFIM studies	$500,000

CRITICAL SITUATIONS

Tribal participation in development of mechanism addressing "critical situations" in watersheds outside "pilot planning projects".

Tribal staff ($65,000 x 26)	$1,690,000
Equipment, travel and contracts	$110,000

DATA MANAGEMENT

Tribal coordination, development of five year plan, equipment, modelling and incorporation of geographic information system (GIS) capabilities.

Information Management Coordinator	$65,000
Equipment, travel, contracts and data management.	$685,000

PUBLIC INFORMATION AND EDUCATION

Tribal development and implementation of public information and education strategy.

Public Information and Education Coordinator	$55,000
Multi-media projects and equipment	$45,000
Cross-cultural values program	$100,000

TOTAL BUDGET PROPOSAL	$4,415,000

Tribal Goals and Objectives

For tribal governments, the Chelan Process required that comprehensive water related goals be developed. The following goals and objectives were established in the water resource planning process.

Instream Flows- The long-term instream water resource management goal is the achievement of an overall gain of fish and wildlife habitats to their full productive capacity. This goal is necessary to comply with the intent of federal judicial and congressional laws. The policy also complies with the intent of other United States treaties and is good public policy in light of issues being addressed under the Endangered Species Act.

* Protection of full productive capacity of habitats
* Restoration of damaged habitats
* Enhancement of potentially productive habitats, and where otherwise appropriate

Out-of-Stream and Land Use- Withdrawals of water of the state shall not exceed or impact the productive capacity of the fish and wildlife resources, groundwater supplies, potable water and watersheds.

* Local growth management plans
* Adequate water supply demonstrated before development
* No water permits which impose risk to fish

Conservation/Re-use- Use of water without waste is required. Conservation will be the primary source of supply for restoration of instream flows and then for future out-of-stream uses. Re-use of "grey waters" shall be preferred over future out-of-stream withdrawals. Emphasis shall be placed on areas of known over-appropriation of surface and ground water and of water quality problems.

* Employ best available technology
* Develop well-defined local and regional and regional water resource management plans
* Establish minimum efficiency standards and guidelines for municipal, industrial and agriculture
* Facilitate public advisory committees and education
* Monitoring and enforcement

Groundwater- Protect and restore to comply with state, federal and tribal water quality standards and ensure they are not in conflict with the fish and wildlife habitat goals.

Water Quality- Protect and restore to comply with state, federal and tribal water quality standards and ensure they are not in conflict with the fish and wildlife habitat goals.

On-reservation Management/Ensurance of Individual Tribal Sovereignty- The tribes have a right to participate in a water resource planning process to ensure the development of a process that can be implemented. Tribal participation is based on individual tribal acceptance, and would subsequently entail the development of goals by individual tribes to ensure the preservation of tribal homelands, perpetuation of tribal traditions and beliefs essential to each tribe's self-identity and determination, provide for present and future economic development, and to sustain the ability of the tribes to endure as separate sovereign nations.

The Water Planning Process and Tribal Water Rights- The process is not intended to formally determine or resolve any dispute about water rights under state, federal or Indian treaty law. Rather, it is designed to provide full participation of the tribes in all decision-making which affect tribal governance. This shall be through the Government-to-Government process. Decision-making shall be at the local level, wherever possible. Adequate funding to all tribes and adequate data and scientific analysis is also needed.

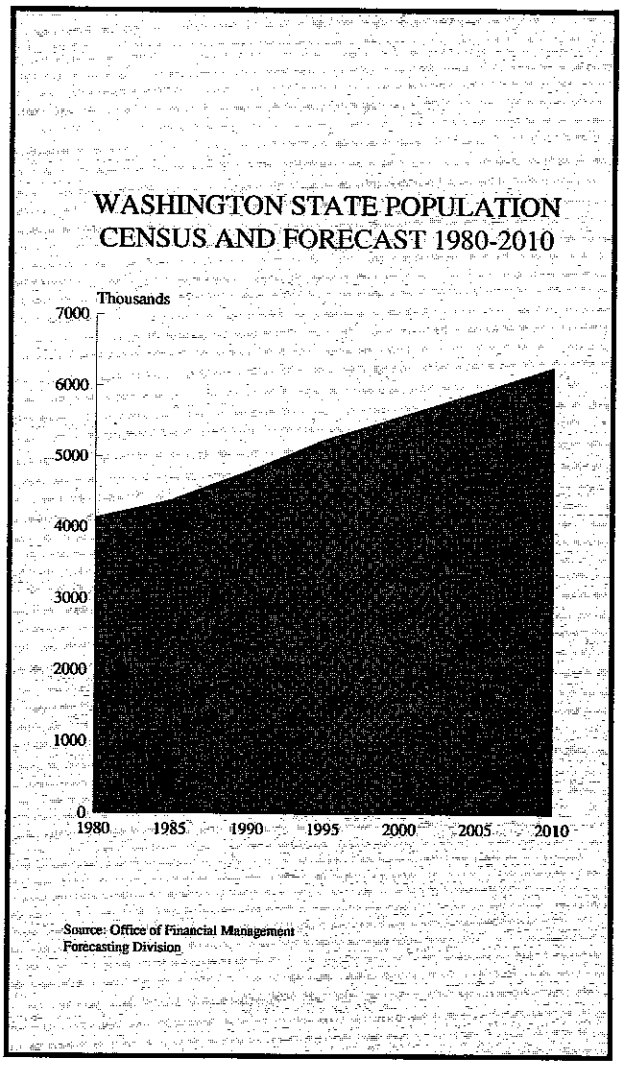
Why Should The Federal Government Support This Process?

The federal government must maintain a key leadership role in the effective management of natural resources in this nation. In so doing, it recognizes the absolute dependence of all its citizens upon these resources. It sends a clear message of care and concern to future generations, and to the rest of the world.

By supporting the cooperative water resource management process, the federal government maximizes the power of its investment in resource management by encouraging creative problem solving through a team effort. This process has been crafted by recreationists, environmentalists and industrialists alike, as well as Indian government and non-Indian government at all levels. It has been shaped and supported by a broad coalition of officials who have devoted extensive time, energy and thought to its development. It is a process that offers immediate progress, and which is vastly preferable for everyone concerned with the traditional waste of conflict and litigation, in terms of cost as well as potential.

Tribal governments, exercising their sovereign authorities within the federal system, are forging new relationships, unique in this country. Tribal governments are making decisions and thus changing the future through leadership, open-mindedness and tireless effort.

The federal government is the tribes' trustee, and it is paramount that the federal government support tribal efforts. The federal government has a trust responsibility to the tribes, including a fiduciary trust, which clearly protects Indian resource rights. The federal government should perform a major role in the negotiation of out-of-court resolution of issues. This process allows for such negotiation, outside of litigation.



Why Should The Public Support This Process?

There is a water management problem in Washington State that affects everyone. With hundreds of thousands of additional people expected to move into Washington in the next ten years, the problem intensifies. It is also intensified by the severe lack of water in other regions and the subsequently intensified desire for our water resources by the residents of those regions.

The value of cooperative resource planning has been proved time and time again in the Pacific Northwest through processes ranging from the development of the U.S.-Canada Salmon Interception Treaty to the Timber-Fish-Wildlife Agreement. Water is a precious and unique resource and it is incumbent upon this generation to assure its preservation for the generations to come. Cooperative planning provides the best possible opportunity to achieve this long-term goal, as well as such fundamental short term goals as continuing to provide for domestic use, irrigation, electricity and current fish runs.

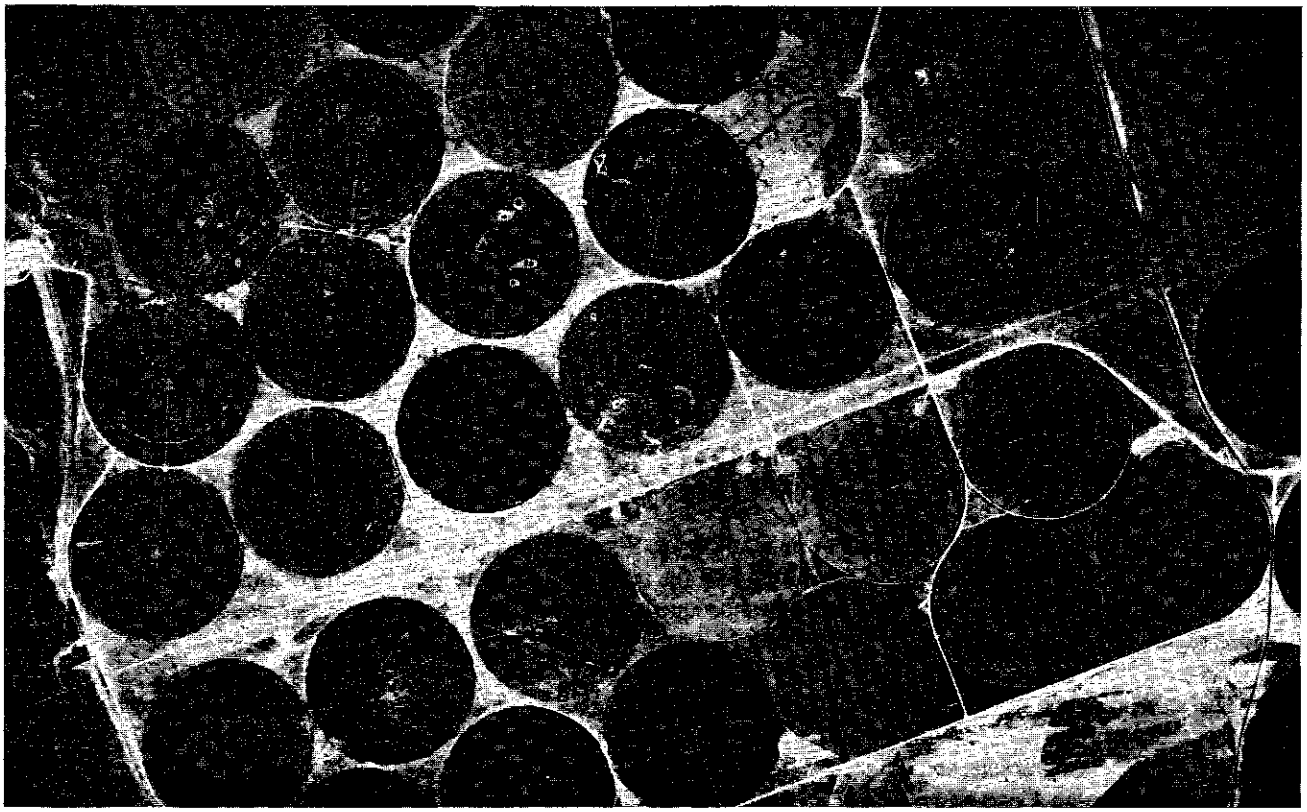
the generations to come. Cooperative planning provides the best possible opportunity to achieve this long-term goal, as well as such fundamental short term goals as continuing to provide for domestic use, irrigation, electricity and current fish runs.

Cooperation and Collaboration

Over the past two centuries, advocates for particular water uses worked to prevail over others in various arenas of the decision-making process. Through the cooperative process pursued in Washington State in recent years, all interests have turned their individual focus away from wasteful conflict and toward finding creative means to best meet all needs.

We are now at a transition point. Tribes have become integrated in decision-making and are part of the process. Tribes provide a sense of place and purpose to water planning that no other government can provide. In following this cooperative process in water management, all participating parties must recognize the legitimacy of the goals and objectives of others, and assume that theirs, too, will be respected. Thus is created a team effort which accentuates positive progress in resource management rather than senseless regression. The process does not eliminate the possibility of litigation. It remains a viable and proper dispute resolution and clarification tool, but it will be used only as a last resort. Every avenue of cooperation and negotiation should be pursued before court is considered an option by participants in the cooperative management process. The incredible reduction in the number of resource-related cases over the past seven years provides substantial proof that the cooperative process works.

"Tribes provide a sense of place and purpose to water planning that no other government can provide..."

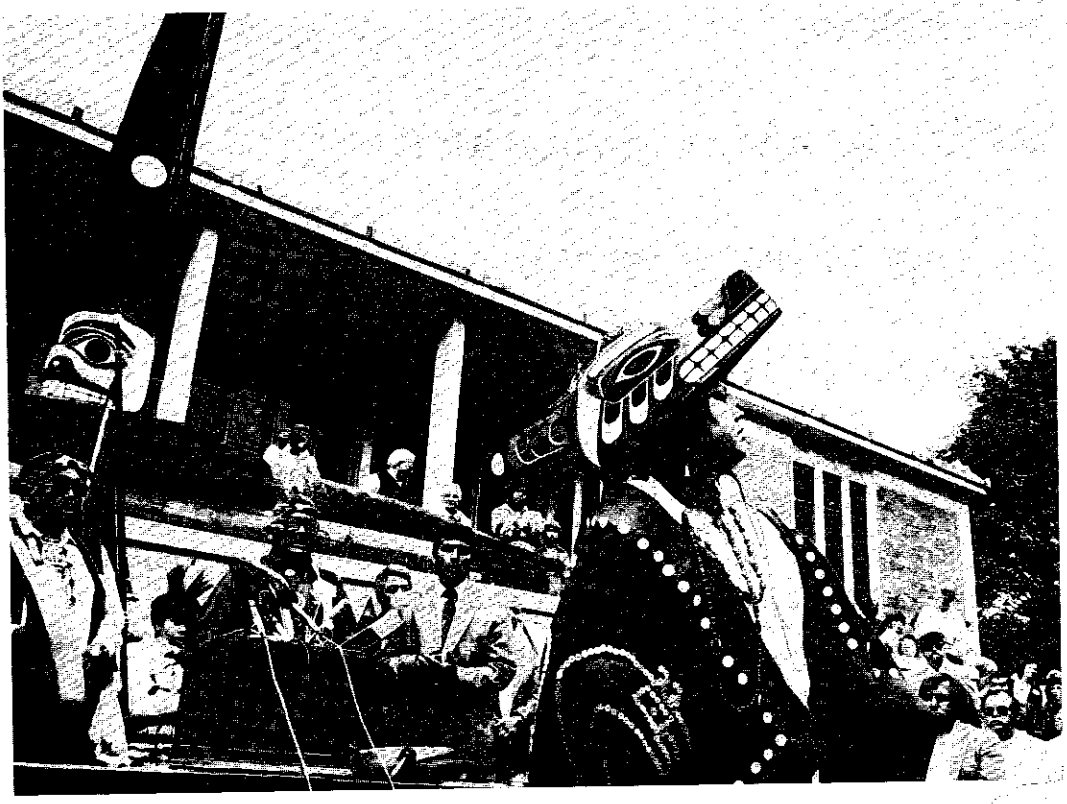


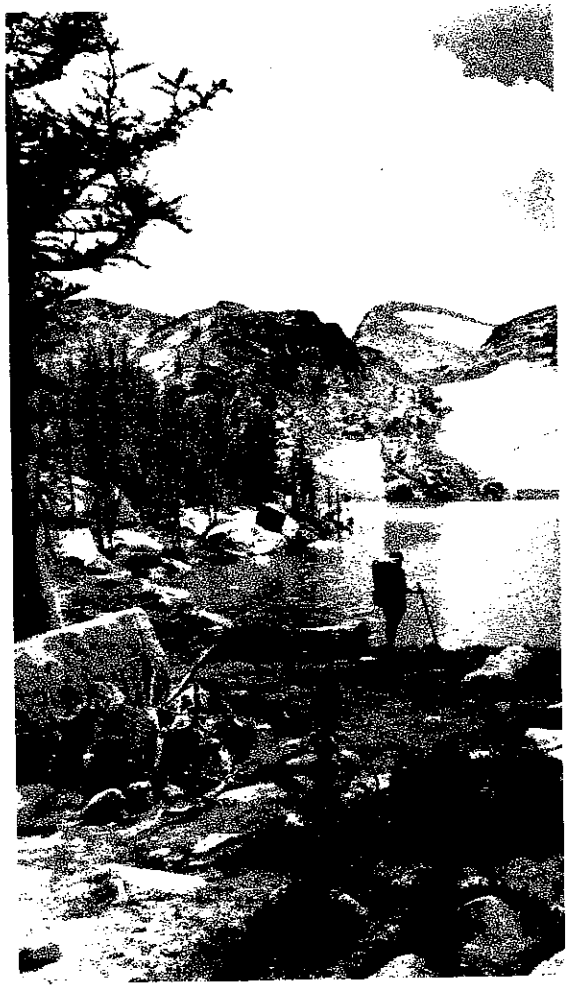
Green circles of irrigated land in Eastern Washington State stand in contrast to this arid area. Seventy-five percent of the state's water is used for irrigation **(see graph, page 7).**

Conclusion

The Chelan Agreement is a model for comprehensive water management planning nationwide. It is a partnership of responsibilities, never before put together in resource issues. It is a government-to-government process between governments at the federal, tribal, state and local levels. It maintains tribal sovereignty, as it effectively utilizes limited resources, and it is an agreement built upon an open, public process. Without this type of comprehensive process, further water shortages will occur. The only likely alternative is the judicial process. The Chelan Agreement represents a sincere effort on the part of many to head off such wasteful conflict, and to instead pursue mutual understanding between parties and thus use the team concept to develop mutual understanding and pursue common goals. The agreement will mean an overall gain of fish and wildlife habitats, and conservation/re-use related to out-of-stream water uses. It will mean healthier watersheds and more reliable groundwater supplies and land use needed to achieve full capacity of fish and wildlife, as well as conservation of groundwater supplies, potable water and watersheds, water quality, as well as ensurance of on-reservation management/individual tribal sovereignty. These goals are necessary to comply with the intent of federal judicial and congressional laws. They also comply with the intent of United States treaties and they are good public policy in light of issues being addressed under the Endangered Species Act.

It is a process that deserves a chance and an agreement that deserves the proactive support of government, as well as the public and every group, agency and individual who depend on water for their survival.





Appendices

A. Chelan Agreement

B. Budget Request (Summary)

C. News Release

D. State/Tribal Environmental MOU

E. The Interim Team (Forum)

F. Data Management Task Force

G. Participants at Rosario/Chelan Retreats

H. The Government-to-Government Accord

I. Tribal Map

Appendix A

CHELAN AGREEMENT

I. PREAMBLE

The purpose of the Chelan Agreement is to establish procedures to cooperatively plan for the management of water resources in Washington State to best meet the goals and needs of all its citizens. In addition to forming the basis for state water resource planning, the Chelan Agreement serves as a process for implementation of the general objectives set forth in the Memorandum of Understanding on Environmental Protection.[1]

II. GOALS AND PRINCIPLES

The Chelan Agreement recognizes that water is a finite resource. It further recognizes that the goals and principles of this agreement include, in no particular order:

That water resource management decisions be by hydrologic unit or regional planning area as defined in the "boundary" section in this document

That future conflicts will be reduced if water use needs located in a hydrologic unit first be met from water resources within that unit

The recognition that actions will be guided by the tribes' objective to achieve an overall net gain of the productive capacity of fish and wildlife habitats and the state's related objective to accommodate growth in a manner which will protect the unique environment of the state as those goals have been identified in the Memorandum of Understanding on Environmental Protection. The participants understand the achievement of an overall net gain of the productive capacity may, in addition to instream flows, include a variety of other means.

That the water resource planning process described in this Agreement is not intended to formally determine or resolve any legal dispute about water rights under state or federal law or Indian treaty. Rather, this process is an alternative planning process, voluntarily developed, designed to cooperatively plan and manage the uses of Washington's water resource.

Develop and implement a program providing for conservation, efficiency, elimination of waste, water reuse, and restoration of riparian habitat areas for water retention, including the development of legislation and/or regulations where appropriate.

Assist the Department of Ecology in locating the resources for compliance, enforcement and administration of existing laws and regulations.

That the participants remain fully committed to the planning process described in this agreement.

Planning Guidance:

Planning guidance to local/regional planners is provided by the goals and principles of this agreement, and the fundamentals of state water resource policy as listed in the Water Resources Act of 1971, as set forth in RCW 90.54.020, (attached for guidance). The perspectives of each caucus on water resource management are attached.

Because this cooperative planning process stands in contrast to judicial determination of conflicting rights or claims to water, it will not result in the allocation of water among competing interests. This cooperative process will not "allocate" water in this sense.[2] However, implementation of plans developed through this cooperative process could result in the identification of quantities of water available for specific purposes. Because of its cooperative nature, the results of this planning process will maximize the net benefits to the citizens of the state.

III. WATER RESOURCES FORUM

The Chelan Agreement recommends the creation of the Water Resources Forum (Forum). The Forum will have the same number of representatives from each caucus as the Interim Team: 6 Tribal, 3 State, 3 Local Government, 3 Business, 2 Fisheries (1 sports and 1 commercial), 1 Recreational, 3 Environmental, and 3 Agriculture. Each caucus will select its own representation. Each caucus will assure its own internal communication. Each participant will have his/her own voice in decision making.

General Function:

The general function of the Forum will be to:

Shape state policy.

Clarify existing terms and policies.

Recommend statutory changes as needed.

Provide policy guidance, if necessary, in addressing critical issues.

Generally, the Forum will perform the following functions and tasks in a prioritized order which recognizes that work related to specific regional planning processes shall be secondary to policy guidance:

Serve as a mechanism to review water resource planning and implementation.

Continue the cooperative nature of the Chelan process.

Provide creative solutions and options on issues of statewide significance, such as policies guiding the processing of pending water right applications or issues determining hydraulic continuity.

Develop criteria for selection of pilot projects.

Monitor, evaluate, report on and recommend changes to the pilot planning process.

Make interim modifications and amendments to the pilot planning process.

Reconvene a plenary body as represented at the Lake Chelan retreat, if significant changes are needed for the continued functioning of the planning process.

Assist in making the transition from pilot projects to systematic planning statewide.

Provide assistance and support to the regional planning process.

Decision Making:

The Forum shall make decisions by consensus. Consensus is defined as no negative votes, with abstentions allowed. If no consensus is reached, such will be noted and all the information generated during the process will be collected and made available to all participants.

The Forum will make recommendations to the state agencies. There is a commitment from the Department of Ecology and other relevant state agencies to give substantial weight to the consensus agreements reached. The Forum will have discretion in setting its own agenda. Items for consideration can come from:

The Forum's own initiative.

Response to agencies' requests.

Response to requests for specific policy guidance from other organizations (particularly regional planning groups).

The Forum's charge shall be on issues of statewide policy or guidance, NOT day-to-day management.

Review and Evaluation:

The Forum will review and evaluate the implementation of the Chelan Agreement, including the Guidelines developed for this process. (See Section XI.) Participants in regional planning processes and other water projects shall be provided the opportunity to participate in this review. The Forum will prepare a report for use in review by legislative bodies. The Forum will report on progress by December 31, 1992, and submit a final report at the completion of the pilot projects. (See section IV.)

The Washington State Legislature shall review the pilot projects, the effectiveness of the Forum and the effectiveness of water resource planning and management in the State of Washington.

In conducting the review of the pilot projects, the Chelan participants recommend that the Legislature use the following to measure success/failure:

Were the goals of the pilot projects satisfied? How many? Which ones?

How efficient and cost effective were the pilot projects?

Was adequate funding provided for an effective planning process? If not, what was the impact?

Do the plans satisfy the needs and interests of all of the caucuses?

Did the plans meet the schedules and deadlines?

Did the plans provide for broad-based participation?

Funding for the Forum is essential, but the level and mechanism is yet to be determined. Travel and per diem will be provided for Forum members (which will require a statutory authority). Staff for the Forum is essential so as not to deplete the time of State staff. If there are sub-groups of the Forum, they should also be funded. The Interim Team will serve as the Forum until such time as the Forum is convened.

IV. PILOT PLANNING PROCESS

To Initiate Water Resource Planning:

The water resources planning process may be triggered by either of the following methods:

Petition by an individual. Any state resident may petition a general purpose local government (city or county), tribe, or the state Department of Ecology to initiate planning. One of those levels of government must agree for the planning to begin.

Any of these governmental entities may convene preliminary discussions to begin the planning process.

The Forum will recommend criteria for selecting pilot projects. The Department of Ecology, in cooperation with the Forum, will select at least two projects for planning to be conducted over the next three years, to field test the planning process.

Regional Level Participation:

The petitioner may direct its request to initiate a planning process to a general purpose local government, tribe or the Department of Ecology.

The general purpose local government or tribe, in consultation with the Department of Ecology, or Ecology itself, will be called an initiating entity. The entity may at this stage consult with other governmental agencies, including affected special purpose local governments, to determine their willingness to participate in and pay for the planning process. The government entities may prepare an intergovernmental agreement addressing the proposed planning process. The governmental entities will also conduct the public process and outreach to inform other interested parties of the opportunity to participate in the regional planning process in order to facilitate the formation of caucuses. If mutually agreeable, the entity and the Forum may jointly conduct these activities.

An invitational meeting will be called, and at that meeting the caucuses and expected agencies will be identified, and a time line will be set for the scoping process.

During the Scoping Process, the boundaries, time frames, caucuses and representatives of those caucuses will be identified, and a coordinating entity will be chosen.

Participation in the Regional Planning Effort: Opportunity to participate in the regional planning effort must be extended to representatives of affected state and local governments and Indian tribes. It must also be extended to representatives of the following interests:

Agricultural
Environmental
Fisheries, both sport and commercial
Recreational
Business

Additional caucuses may be added by consensus of the existing regional planning participants. If a group is not granted caucus status, it may petition the Department of Ecology for caucus status. The petition shall justify the need for the new caucus based on the existing caucuses' goals. In reaching its decision, the Department of Ecology may consult with the Water Resources Forum.

Representatives will be chosen by each caucus. Government and interest groups who have responded affirmatively shall determine whether the number of parties participating is enough to allow the planning effort to commence.

Coordinating Entity: For the purpose of regional planning processes, any participating government entity or combination of governmental entities chosen by a consensus of the participating caucuses may be the coordinating entity. The coordinating entity role is more appropriate for a general purpose government due to their broad perspective. However, some flexibility and collaboration is needed regionally since local governments may lack the capacity to conduct a water planning process.

The coordinating entity will be responsible for administering the process and entering into contracts agreed to by the planning group. The coordinating entity shall also be responsible for coordinating intergovernmental agreements among the participating entities, as necessary.

Those federal agencies that have an impact or would be impacted by regional planning should be invited to participate in whatever manner is dictated by that region.

In regional planning, all appropriate state agencies shall participate, including the Department of Ecology. Ecology's role in finalizing planning projects will be to approve or remand. (See p. 11, State Review of Completed Plans.) The reasoning for this is that the final rule-making role of Ecology on approved plans is informed by intervening steps (i.e. State Environmental Policy Act and Administrative Procedures Act) and is therefore legally appropriate.

Dispute Resolution:

Policy disputes will be resolved, where possible, through mediation. The Water Resources Forum may also provide assistance to resolve disputes at the regional planning level.

Technical disputes may be resolved through the use of a technical advisory team or by retention of an agreed upon outside technical expert.

Boundaries:

Boundaries will be selected during the original scoping process and submitted to Ecology for review and approval. The planning region will be one or more Water Resource Inventory Areas (WRIA's), unless there is a specific need for a smaller area within a WRIA which is a specific hydrologic area. Larger planning units/regions will be one or more contiguous WRIA's or other contiguous hydrologically justifiable units. If there is no need for coordination among more than one WRIA, one WRIA can constitute a "region."

Any water resource planning activities within the exterior boundary of a reservation can only be done by mutual agreement of the affected tribe and the state.

For the purposes of the pilot regional planning processes, the Department of Ecology will select the regions, based on the recommendations of the Forum.

All planning boundaries will be determined by using resource- and user-based factors. A checklist incorporating the following factors should be developed by the Forum to ensure their consideration in determining boundaries:

Resource Based Factors:

Hydrology: Planning boundaries should primarily reflect hydrological, rather than political boundaries. This may include groupings of watersheds which have several characteristics in common such as geological conditions, gradient, precipitation pattern, etc.

Fisheries Management: Areas containing stocks which are managed under similar fisheries allocation and enhancement goals should be grouped together. Major watersheds have specific enhancement goals and often have fisheries rebuilding strategies which would be affected by water resource planning. Some regions are already grouped for harvest management purposes; for example, Hood Canal is considered a "region of origin." It should be noted that watersheds can have extended areas management. For example, the depleted coho runs of the Skagit system impact management in all intercepting fisheries including the Strait of Juan de Fuca and the Pacific Ocean.

User Based Factors

Similar Out-of-Stream Uses: Watersheds exhibiting similar types of uses can be planned collectively more easily than diverse uses. Also, the broader geographical planning base gives planners greater flexibility of methods to achieve their goals. Examples of dissimilar uses would include municipal, industrial and agricultural, since these uses have different seasonal patterns and distribution systems. An area containing several similar uses should probably constitute a single planning unit.

Similar Land Use Patterns: Characteristics would include rural/urban, agricultural, forest based, industrial, municipal, growth pattern and rate.

Water Supply Linkages: Watersheds which involve out-of- basin transfers need to be linked for planning purposes. For example, Dungeness River water is transferred to the Sequim watershed, even though the two areas are in different WRIA's.

Manageability of the Process: Factors which may lead to grouping or splitting areas include the population base, size of area, availability of a key governmental and affected interest groups, and other public education efforts. Some areas which have been involved in water quality plans may already have formed active watershed management committees. Areas which cover wide geographic territories with sparse populations may need to group WRIA's since key jurisdictions would be required to participate in several forums.

Linkages:

Regional planning efforts need to recognize the existence of and relationships between a variety of other planning activities. In scoping and developing regional plans, participants should avoid duplication. In developing a water resource plan:

* There is recognition that water withdrawals can impact water quality. Therefore water quality, both potability and environmental quality issues, when related to water use and availability, should be integrated into the planning process.

* Local land use planning and permit decisions which will protect the water resource or create demands for water shall be compatible with water resource planning. Local governments shall provide for the protection of the water resource and shall link development and land use planning and zoning to water availability.

* Consideration should be given to what, if any, linkages between on-reservation and off-reservation water use and management exist or should be incorporated into a water resource plan. Reservations are legally distinct units with a different body of applicable laws.

* Other federal, state and local programs which impact water resource use and availability should be integrated with the water resource planning process.

The following are examples of such processes or programs:

U.S./Canada Pacific Salmon Treaty
Columbia River Systems Operation Review
FERC licensing of hydropower facilities
Forest Service Planning
U.S./Canada Flow agreement on Columbia River
Bureau of Reclamation Operations/Contracts
Court Approved U.S. v. Oregon Columbia River Fishery Management Plan
Northwest Power Planning Council's Fish and Wildlife Program
Various Wild and Scenic River proposals and related planning processes
Columbia Gorge National Scenic Area planning process
Watershed planning process by the Department of Fisheries
Watershed planning required by the Puget Sound Water Quality Authority
Comprehensive Hydroelectric planning process
Growth management process
Coordinated water system planning process
Game Fish 2000 plan by the Department of Wildlife
State Scenic Rivers program
Groundwater Management area program
Priority Species and Habitat Project (WDW)
U.S. v. Washington Fisheries Management Plans
Water System Comprehensive Plans
Land Use Plans
Threatened and Endangered Species Act

Proposal/Scoping:

The regional planning group will complete the scoping process by determining the following:

Participation and workplan:

List of participants to be included, name, affiliation, and alternates
Designated coordinating entity(ies)
Intergovernmental agreements necessary to implement planning process
Milestones and workplan
Public involvement and SEPA compliance
Public education elements

Identification of resources needed for planning process from state and regional participants

Staffing requirements
Technical expertise
Funding
Other commitments

The scoping process shall consider and determine at a minimum which of the following elements shall be addressed in the plan:

Groundwater:

water quality protection
conservation
recharge
inventory of current and exempted uses/data collection/methodologies
out of area distribution

Surface Water:

water quality
conservation
minimum instream flows
priority of use
inventory of current and exempted uses/data collection/methodologies
habitat
out of area distribution
peak flow management

Consumptive Needs:

Domestic
Agricultural
Hatcheries
Hydroelectric
Industrial

Non-Consumptive Needs:

Instream Flows
Recreational
Aesthetics
Ecosystem
Cultural
Rivers assessed as eligible for designation as state scenic rivers
Rivers assessed as eligible for designation as Federal wild and scenic rivers
Fish and Wildlife

Relationship between surface and groundwater

Description of relationship to other planning processes (see above).

The completed scoping document will be submitted to the Department of Ecology.

State Review/Approval of Scoping:

The Department of Ecology will review the scoping document for completeness and compliance with applicable state and federal laws and regulations, and water resource planning guidelines. In reaching this decision, the Department of Ecology shall have the responsibility of involving other state agencies where their participation is necessary to the success of the proposed planning effort. This will ensure the involvement of state agencies necessary to assist in the planning effort and to implement the plan. If found satisfactory, the regional planning process may begin. If not in compliance, Ecology will remand the scoping document to the regional planning group for modifications.

Plan Development and Decision-Making:

The regional planning group will construct a plan that addresses the elements identified through the approved scoping process. The plan must be consistent with applicable state and federal laws and guidelines. The plan development process will be integrated with the SEPA process.[3] Throughout the plan development process, the regional planning group will receive public comments as required by state law and the plan document will be written as the SEPA document. In addition to the appeals processes detailed herein, plan development will be required to be integrated with the SEPA process.

Each caucus will have one voice in decision-making. The planning group will attempt to reach consensus whenever possible. In cases where consensus is not possible, decisions will be made by a consensus of the government caucuses and a majority of the interest group caucuses. Minority reports, if prepared, shall be included in the plan document.

Where consensus among the governments (tribal, state, and local governments) and/or a majority of the interests is not achievable, the Department of Ecology shall assume the lead role in assuring that the plan is completed for the pilot projects in a timely fashion, not to exceed twenty-four (24) months.

State Review of Completed Plans:

The Department of Ecology shall review the completed plans for compliance with applicable federal and state laws and regulations, including the state Administrative Procedures Act and SEPA, and conformance with Ecology's water resource planning guidelines developed under this process. (See Section XI.) In conducting such a review, Ecology shall give substantial weight to the regional plan in meeting the fundamentals of the Water Resources Policy Act of 1971 (RCW 90.54), Memorandum of Understanding, and the agreed-to goals.

The state shall approve or remand the plan within 90 days. Extension may be recommended by the Water Resource Forum. Public comment will be taken throughout the review of the plan. A petition for review on process grounds may also be made to the Department of Ecology when it reviews the final plans for consistency with state guidelines. The Department may approve the plan as written or it may remand the plan to the regional planning entity for revisions. The Department may not make changes to the plan.

Appeals Process:

There will be no appeal of the planning effort during the planning process. The appeals mechanisms available to challenge a completed regional water resources plan will be those currently available under existing law. Current rights and standing to appeal are not diminished in any way by the proposed planning process. Appeals of a plan can be made to the appropriate court. In addition, actions taken by the state or local governments to implement the plan, such as permits, regulations, or local ordinances can be appealed to the Pollution Control Hearings Board, or the appropriate appeals body.

Implementation:

Once a regional plan is completed, the Department of Ecology will prepare and adopt implementing regulations as required by law. Local governments will prepare and adopt any ordinance needed to implement the plan at the local level. Once adopted, the regulations and ordinances would be binding on the state and local jurisdictions in their related planning and permit activities. The Department of Ecology will be the state entity that reviews the regional plans for compliance with state law and state standards. The Department of Ecology, in cooperation with other state agencies, relevant federal agencies, tribal governments, and other interested local governments, will also perform the preliminary basin inventories that precede the regional planning processes.

Evaluation, Guidance, and Adaptation of Process:

The planning process described in this Agreement is intended to be applied to all regions of the state in need of water resource planning and will be implemented in at least two regions within the next three years. It is the intent of the Forum to evaluate the process periodically, identify improvements, and adapt the process accordingly for future applications.

While the interests and organizations who developed this planning process sought primarily to achieve a cooperative process for water resource planning, they recognized that the broad goals of this effort should also be integrated by the Department of Ecology into its ongoing water resource management activities. Further, local governments recognize that their ongoing land use or water resource activities also could be affected by the goals of this cooperative process.

Notwithstanding the commitment to cooperation, the interests and organizations supporting this Agreement recognize that disputes may arise in regions where a cooperatively developed plan has yet to be implemented. The cooperative nature of the planning process described in this Agreement is intended to encourage resolution of such disputes, where possible, through mediation or other assistance.

V. ORGANIZED RESPONSE TO CRITICAL SITUATIONS WHICH REQUIRE ACTION NOW

In watersheds other than those involved in the two pilot projects, there will need to exist a mechanism to address issues and disputes over water. This mechanism establishes the ability to deal with critical situations and lists some of the tools for resolving issues in these areas. It is intended to take advantage of existing laws and governmental structures and is explicitly intended to notify and inform the parties of actions which may have an impact on the resource. It is not intended to expand on existing law, or otherwise alter the rights and responsibilities of the governmental entities. An emergency regulation, followed by a permanent regulation, shall be enacted establishing the mechanism to deal with critical situations.

This mechanism will be used when one of the following actions occurs:

Any of the three governmental entities (State, Tribal, General Purpose Local Government) find that a need exists to apply the mechanism. Such a finding can include the need to facilitate communication and coordination on issues relating to water quantity and related water quality concerns.

Any of the governmental entities applies their respective permitting processes to a basin or WRIA which has been designated as "critical situations" on the basis of limitations as to water supply and related water quality concerns.

3. If a special purpose local government requests that the mechanism be initiated to deal with the critical situation, the general purpose local government, which includes a portion of the special purpose district service area, shall initiate the mechanism on their behalf.

The mechanism shall permit the affected governmental entities to evaluate existing conditions or proposed actions which might have an impact on the resource. Under this mechanism, a basin or WRIA could be classified by agreement of the governmental entities into one of two categories:

Critical Resource Impact - designating the water resource as being over-appropriated or adversely impacted by water quality issues. Any action in such a basin or WRIA which will likely have an adverse impact on the instream resources as expressed in the planning guidance of this Agreement would likely be delayed or denied if such action might further harm the resource.

Probable Resource Impact - designating the water resource as being in need of further evaluation to determine the nature and extent of the impacts resulting from existing conditions or proposed actions. After full evaluation, the water resource shall be reclassified as having either a critical resource impact or no impact, depending upon the findings.

When a proposed action or existing condition requires further evaluation or data collection, a number of tools shall be applied as necessary to protect the resources. These include, but are not limited to, targeted conservation efficiency, re-use; compliance and enforcement; dispute resolution assistance, Memoranda of Understanding and other agreements;

local government restrictions on permit issuance or moratoria; basin withdrawal by adoption of administrative regulations under RCW 90.54.050 or limited state permit issuance. The Forum shall review the need for guidelines to assist in the implementation of this section.

VI. WATER RESOURCES PLANNING AND GROWTH MANAGEMENT

Recognizing the need to integrate the planning process outlined in the Chelan Plan with other land and water resource planning processes, the Chelan Plan recommends:

Amending HB 2929 to include a water resource component. This component shall include, among other provisions:

Local planning efforts shall recognize water availability and quality as key factors in an area's "carrying capacity."

Wherever state, tribal, or federal authorities believe there to be problems with water availability or quality that will affect a local governments permitting process under Section 63, these cases will receive first access to funding for technical data analysis. Such technical data analysis shall be completed in a timely manner.

Amending HB 2929 to include specific provisions whereby a model intergovernmental agreement, similar to the "Centennial Accord," between local (including special districts) and tribal governments is developed and adopted.

The Chelan Plan also recognizes that water resource planning, as outlined in this document, will not take place on tribal reservations without the consent of the appropriate tribes.

VII. DATA MANAGEMENT

The Chelan Agreement recognizes the importance of data to water management. The Chelan Agreement supports the continuing efforts of the Data Management Task Force in the development of a data management plan and the collection of essential data necessary, among other things, to commence the pilot planning process. The Chelan Agreement also supports open access to any information collected and managed by all state agencies pursuant to state law. For efficiency, the collection, analysis, and management of water resource data will be done cooperatively with state, tribal, local and federal governments.

VIII. CONSERVATION

The Chelan Agreement recommends that a task force, composed of representatives appointed by the caucuses, be created to develop legislation for the 1991 legislative session. In developing the legislation, the task force should consider:

Removing impediments to conservation, including the effect on wetlands loss due to improved efficiencies.

Providing incentives to promote conservation, water use efficiency, and re-use of water.

Providing funding for incentives, particularly for problem areas.

Determining how this program fits within the Department of Ecology's compliance effort.

Determining the relationship of conservation to the waste of water.

Removing impediments such as taxation on water use efficiency improvements.

Restoration and enhancement of instream flows through, among other mechanisms, conservation and more efficient management of the water resources.

In developing the legislation, the task force should utilize prior studies, legislative committee work, and draft Department of Ecology legislation.

The task force will attempt to make consensus recommendations. When consensus recommendations cannot be reached, the task force will present the alternatives considered and propose additional work, if appropriate.

The public will be informed throughout the development of this legislation.

IX. PUBLIC INFORMATION AND EDUCATION

The Chelan Agreement supports building a framework for an on-going information process to build public support for cooperative water resource planning and management. The Chelan Agreement recommends development of an information strategy, to be reviewed and approved by the Water Resources Forum. The strategy shall identify and utilize existing information dissemination processes and integrate with and possibly delegate to, the Environmental Education Council established pursuant to the Environment 2010 Executive Order. The education strategy should emphasize cross-cultural training for all water resource planning participants.

X. FUNDING REQUIREMENTS AND STRATEGIES

(Reserved)

XI. STATEWIDE GUIDANCE

The development of guidelines and principles is essential for the state to fulfill its stewardship role for resources. Guidelines should be developed as soon as possible. Guidelines will speak to the actual outcomes sought in plans. It is accepted that the 1971 Water Resources Act, and Memorandum of Understanding on Environmental Protection (attached) are the starting point for this planning process, but they need clarification.

These general guidelines must be developed before the pilot projects begin. The Interim Team should consider guidelines or pass the responsibility on to the Forum.

Guidelines will be in place during the duration of the pilots, but will be reviewed at the end of the projects. It is recognized that they will probably need refinement. The guidelines will be applicable to all water resource planning in the state.

[1] Tribal governments in 1970 brought suit in United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974); aff'd in Washington v Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) against the state seeking a declaration and enforcement of their treaty fishing rights. Litigation which ultimately could interpret or lead to the quantification of certain tribal claims to water currently is pending before the United States District Court in Phase II, U.S. v. Washington, 506 F. Supp. 187 (W.D. Wash. 1980), vac'd 759 F 2d. 1353 (9th Cir. 1985).

In Phase II, the tribes allege that the state agencies have been unsuccessful in properly protecting the habitat. Within the context of this litigation, the state has contested the nature and extent of the treaty environmental rights alleged by the tribes. The parties to U.S. v. Washington recognize the potential for litigation of the Phase II issues in either the general or specific sense and have joined in a Memorandum of Understanding on Environmental Protection (attached) for the purpose of initiating a cooperative approach to protection, enhancement, and restoration of fisheries habitat. This agreement is not a settlement of Phase II, U.S. v. Washington, nor shall it limit the right of any party to act in any administrative, judicial or legislative forum to protect its rights.

[2] Any test currently found in any state law used to allocate, determine, or prioritize water rights (such as the "maximum net benefits" test) has no application to tribal governmental interests in this cooperative process, unless they determine otherwise.

[3] The SEPA process does not necessarily fulfill compliance with federal Indian law since reservations are legally distinct units with a different body of laws.

Appendix B

TRIBAL IMPLEMENTATION OF THE CHELAN AGREEMENT
BUDGET REQUEST FOR FY-1992

WATER RESOURCES FORUM Tribal participation with state and local governments, business, fisheries, recreation, environmental and agricultural caucuses.	$230,000
PILOT PLANNING PROCESS Tribal participation in staged process implementation initiated in two regions.	$1,435,000
CRITICAL SITUATIONS Tribal participation in development of mechanism addressing "critical situations" in watersheds outside "pilot planning projects".	$1,800,000
DATA MANAGEMENT Tribal coordination, development of five- year plan, equipment, modeling and incorporation of geographic information system (GIS) capabilities.	$750,000
PUBLIC INFORMATION AND EDUCATION Tribal development and implementation of public information and education strategy.	$200,000
TOTAL BUDGET PROPOSAL	$4,415,000

Appendix C

Joint News Release issues following Lake Chelan Retreat

LANDMARK WATER AGREEMENT FORGED

OLYMPIA (11/13/90)-- Top level officials of state, tribal and local government, user groups, and environmentalists have forged a landmark agreement on water management which will have long lasting, statewide implications. The Chelan Agreement, widely recognized as the most significant natural resource management agreement in recent history, was completed Saturday following three days of intensive negotiation at Lake Chelan, months of meetings, and years of confrontation over water use.

Christine Gregoire, director of the State Department of Ecology, said the agreement is significant because everyone involved agreed "to stop the litigation and start talking to each other. This is not to say that litigation is no longer considered an option in the battle over water. Rather, the agreement is an acknowledgement that we have a water problem in this state. A problem we all share, and one that will be better solved through cooperation."

"It was a sight to behold," said Terry Williams, commissioner to the Northwest Indian Fisheries Commission and director of fisheries for the Tulalip Tribes. "More than 200 people were there. Legislators, mayors, tribal chairmen, fishermen, recreationists, environmentalists, farmers, ranchers and business executives. These were people who have vastly different uses for water. But by coming together in forging the Chelan Agreement, they have recognized that we must work together to protect our precious water resource and all the living things that depend on it."

"It may be difficult in view of current flooding for people to recognize the critical need for water conservation and management," said Suquamish Tribal Chair Georgia George. "But flooding is part of the problem. Flooding now might mean a drought next summer. Also, people need to realize that rivers throughout the state are over-allocated, and that fish and wildlife must have water in the rivers to survive. The tribes have been catalysts in this process because we depend on fish and wildlife for our survival. We recognize the importance of working with state and local government on a government-to-government basis, and support litigation only as a last resort."

The 20-page Chelan Agreement does not settle water disputes, but rather establishes a process for establishing cooperative water management plans in basins across the state and a forum for the settlement of differences. It establishes a Water Resources Forum to oversee local watershed planning efforts. It endorses the progressive Centennial Accord, which acknowledges government-to-government relations between the state and the Indian tribes.

Two pilot projects will be established next year, according to the agreement, to once again prove that the cooperative process works.

The agreement, which still has to be fine-tuned for final approval by the constituencies of the various participants, calls for water use decisions to be made on geographic, rather than political boundaries. Most of the agreement will not require action by the state Legislature. However, requests for funding support and provisions related to growth management and conservation are expected to be addressed in the 1991 session.

Appendix D

MEMORANDUM OF UNDERSTANDING

BETWEEN FEDERALLY RECOGNIZED TRIBES OF WASHINGTON STATE AND THE STATE OF WASHINGTON

ENVIRONMENTAL PROTECTION

1.0 PREAMBLE

Fisheries and wildlife resources are of great value and importance to Washington citizens. Protection of these resources is a matter of high priority for Washington's Indian tribes and the agencies and departments of Washington state government.

The State and the Tribes are interested in making a major commitment to protecting the habitat and increasing production of the fisheries resource. Cooperative efforts between state agencies and Tribal governments will assure protection of habitat and full success of enhancement programs.

Each of the parties desires to restore, where appropriate, habitat that has been degraded through prior activities and to enhance potentially productive habitat. The parties agree that the development of a cooperative plan to protect, restore, and enhance habitat is an essential element of the discussions outlined in this memorandum. The parties agree to use good faith efforts to jointly seek funding necessary to carry out the activities contemplated in this agreement.

2.0 SUMMARY OF UNITED STATES v. WASHINGTON

Tribal governments in 1970 brought suit in United States v. Washington against the State seeking a declaration and enforcement of their treaty fishing rights. There were two distinct segments in that lawsuit. Phase I involved the determination of the nature and extent of the fishery harvest rights. Those basic harvest rights were affirmed by the United States Supreme Court in 1979 and the federal court has retained jurisdiction to fully implement those fishing rights.

In Phase II, the Tribes allege that state agencies have been unsuccessful in properly protecting the habitat. The Tribes seek a declaration that the treaties guarantee habitat protection and have alleged first, that state agencies have an obligation to protect the supply of fish and second, that agency actions which damage, degrade, or destroy habitat or current levels of harvestable fish violate treaty rights.

The parties of United States v. Washington recognize the potential for litigation of the Phase II issues in either the general or specific sense. However, the parties have learned that the benefits of cooperative resolution of disputes may exceed those obtainable through litigation. The Tribes have expressed an interest in working cooperatively with the state in habitat and water protection matters, rather than pursue this expensive and time consuming litigation.

Further, the parties recognize that prior efforts of the state and the tribes to resolve issues of mutual concern have been enhanced by the active cooperation and participation of non-parties representing private interests. The parties recognize that the state will seek to cooperatively involve these private interests in achieving the objectives state in the PREAMBLE to protect natural resources, improve where appropriate degraded habitat, and enhance potentially productive habitat.

Accordingly, the parties join in this memorandum of understanding for the purpose of initiating a cooperative approach to protection, enhancement, and restoration of fisheries habitat.

3.0 GENERAL PRINCIPLES

The state recognizes the tribes as sovereign entities under federal law with certain governmental authorities and responsibilities. Accordingly, discussions under this Memorandum will be conducted between the parties on a government-to-government basis. While the parties agree to pursue the cooperative approach outlined in this Memorandum, they recognize that the litigation was initiated for the purpose of establishing Tribal rights to habitat protection.

3.1 Tribal Concerns and Goals

The tribes believe and contend that this right obligates the state to protect the supply of fish, and actions which damage, degrade, or destroy habitat, such that the rearing or production potential of the fish will be impaired or the size or quality of the run will be diminished, violates Tribal Treaty fishing rights.

The tribes contend that the state does not give enough priority to protection of the fish habitat and therefore subordinates treaty-protected rights to other interests. The Tribes believe that the state's legal and fiscal authorities should be used to ensure that activities undertaken, managed, regulated, or permitted by the state shall result in a net gain to the productive capacity of the fish and wildlife habitats.

The tribe's general long term policy objective of this Memorandum is the achievement of an overall net gain of the productive capacity of fish and wildlife habitats. Achievement of this objective shall occur through the acts of protection and conservation of the productive capacity of habitats, the restoration of damaged habitats, enhancement of potentially productive habitats, and where appropriate, proper mitigation techniques.

3.2 State Concerns and Goals

Within the context of the litigation, the state has contested the nature and extent of the treaty environmental rights alleged by the tribes. The state however acknowledges the benefit of attempting to address and resolve the underlying problems in a non-litigative context.

The parties further recognize that, although they may have differing views of the legal theories, the state shares interest and concern about protecting the fishery habitat. Therefore, the state enters into this Memorandum committed to cooperatively resolving environmental concerns raised in the litigation and to further protecting fisheries resources.

Washington has unique physical characteristics which support a variety of interests. Washington benefits from a multi-faceted economy with diverse fishing, agriculture, and timber industries, as well as industrial, retail and commercial entities. Washington's natural features make the state a highly desirable place to live. Because of these characteristics, the parties anticipate increases in population and economic growth. The goal of the state is to accommodate growth in a manner which will protect the unique environment of the state.

Local governments exist under legal and fiscal authorities which create a government-to-government relationship between them and the state. The Tribes recognize the importance of relationships with local governments throughout the state. The parties recognize the state will afford an opportunity for local government to properly represent their authorities and responsibilities within discussions contemplated by this Memorandum of Understanding.

3.3 Habitat Protection and Water Use

The parties agree that they must increase their understanding of the laws, regulations, ordinances, and jurisdictional system currently used that affect Washington's habitat and regulated use of water within thestate.

Appendix E

The Interim Team

The Interim Team met throughout the summer of 1990 with the assistance of a facilitator to develop a water resource planning process to meet the needs of all the caucuses. Operating under ground rules the team adopted, each caucus submitted a list of process elements deemed necessary in a water resource planning process. The lists were combined into a single list and the team met in three groups to begin developing a planning process. Items such as boundaries, participation, issues to be addressed, linkages with other processes, planning tiers, objectives and public involvement were among those discussed.

The work products of the three sub-groups were discussed by the team to determine if any planning elements had been overlooked and whether consensus could be reached on a single process to take to the fall retreat. The team had been directed by the participants of the Rosario retreat to present more than one alternative to the fall retreat at Chelan. The alternatives presented included: 1. The status quo, which would maintain the State Department of Ecology's current policies and programs as provided by existing statutes and regulations; 2. A process with a strong state emphasis, fixed standards, mandatory criteria and general guidelines to be met in local and regional water planning; 3. One with a strong local emphasis with state guidelines allowing considerable flexibility at the local and regional planning level; and 4. The Pack Forest Alternative. This alternative resulted from a special meeting of the Interim Team at Pack Forest on October 4 and 5. The team met here to complete work on the planning process options and prepare for the fall retreat. In stating expectations for the meeting, most Interim Team members expressed a need to take a solid package to the fall retreat with clean alternatives. It was determined that the team should reach as much consensus as possible and develop as much support for one alternative as they could.

During the course of the two-day meeting, Interim Team members spoke frequently of the need for several items: a planning process that would protect existing state and federal water rights; the assurance of water available for human needs today and for future generations; protection, enhancement and restoration of fish and wildlife resources; the protection of recreational and aesthetic values; and a process which would protect all interests around the table, yet somehow succeed where other efforts had ended in gridlock or litigation. Discussion also took place on such issues as linkages of water planning with growth management, land use planning, water quality protection, forestry issues, fish and wildlife enhancement, state and federal scenic rivers programs and various economic development activities. All such discussion clearly emphasized the need for development of a comprehensive water planning alternative which could draw the greatest amount of support from all participants. The result was the Pack Forest Alternative which, among other things, called for the execution of the state/tribal Memorandum of Understanding drafted in 1989 regarding fisheries and habitat issues, utilization of the 1990 report of the Data Management Task Force, use of the water resource planning fundamentals listed in the 1971 Water Resources Act and other agreed-to goals as guiding principles; completion of the water resource planning system design and conduct of at least two "field test" efforts to modify and perfect the process; aggressive pursuit of conservation; dispute resolution assistance; recognition and possible integration of federal, state and local planning processes with the water resource planning process; and creation of a water resources support group (the "Forum") to carry on the tasks of the Interim Team, work with the Department of Ecology in the implementation of the pilot projects, etc.

Members of the Interim Team presented these alternatives to the participants of the Chelan Retreat. At the recommendation of the team, participants at Chelan used the Pack Forest Alternative as a foundation to construct the Chelan Agreement.

Members of the Interim Team (now called the Forum) include:

State:
Chris Gregoire, Department of Ecology
Kaleen Cottingham, Governor's Office
Ed Dee, Select Committee on Water Resources

Tribal:
Bill Frank, Jr., Northwest Indian Fisheries Commission
Lorraine Loomis, Skagit System Cooperative/Swinomish Tribe
Doreen M. Maloney, Upper Skagit
Terry Williams, Tulalip Tribes
Ann Sieter, Jamestown/Klallam Tribe/Point-No-Point Treaty Council
Larry Wasserman, Yakima Tribe

Agriculture:
Ben George, Washington State Cattlemen's Association
Alice Parker, Washington Agricultural Council
Darrell O. Turner, Washington State Farm Bureau

Local Government:
John C. Kirner, Local Government Coalition, Utilities

Pam Bissonnette, Local Government Coalition, Cities
Dwayne Colby, Local Government Coalition, Counties

Environmental:
Polly Dyer, The Mountaineers
Mike Williams, Washington Environmental Council
Cheryl Miller, The Sierra Club

Fisheries/Recreation:
Bill Robinson, Trout Unlimited
Ton Deschner, Northwest Rivers Council
Randy Ray, Salmon for Washington

Business:
Jim Williams, Seattle Master Builders
Bill Hartzell, Puget Power
Enid Layes, Association of Washington Business

Appendix F

The Data Management Task Force

As called for in ESHB 2932, passed by the Washington State Legislature in 1990, the State Department of Ecology established the Water Resource Data Management Task Force in June of that same year. The Task Force was created to develop a comprehensive water resource data program to provide the information necessary for effective statewide and regional planning of water resources.

The Task Force was set up to provide technical advice to the Joint Select Committee on Water Resources of the state legislature. However, all parties to the Chelan Agreement have also agreed that the Task Force will provide technical support to the "Forum" team, the policy sub-comittee of the cooperative water resource planning effort.

The Task Force includes representatives from state agencies, the tribes, counties, public utilities, irrigators and irrigation districts, academia, environmentalists, industries and recreation.

In its work to date, the Task Force has found that the flow of data among organizations is not simple. Much of the water data needed are already being collected by as many as 2,000 organizations. Coordination of these data is limited, sharing of the data is generally cumbersome and ineffective and there is no agreed upon plan or framework in place to coordinate such coordination and sharing.

There is a growing awareness among the Task Force members and their constituencies of the scope and complexity of managing the diverse water data that exist, but there is a correspondingly high interest and willingness to face and resolve these data management problems in a cooperative and constructive manner that benefits all organizations. Improvements are needed in existing data collection systems for water rights, water use and well data. The accuracy, completeness, consolidation and ease of access and sharing of these data need improvement in order to provide information for water resource decision making. Additional data need to be collected for the relationships between stream flow and inwater resources, the interaction of surface water and ground water, and the relationships between water quality and water use.

The need for support from a comprehensive coordinated technical body, such as the Task Force, is apparent to all participants.

Following is a list of the organizations currently represented on this Task Force:

Tribes
Northwest Indian Fisheries Commission
Department of Agriculture
Washington State University Water Research Center
U.S. Corps of Engineers
U.S. Environmental Protection Agency
Department of Trade and Economic Development
U.S. Forest Service
National Park Service
National Oceanic and Atmospheric Administration
U.S. Census Bureau
Washington Association of Water and Sewer Districts
Washington State Association of Counties
Cities
Irrigation Districts
Irrigation Non-Districts
Industry (Food processing, chemical, smelting, and others)
Counties (Local health departments, planning/engineering departments and recreation departments)
Public Utility Districts
Private (Hydropower, domestic, recreation)

Appendix H

CENTENNIAL ACCORD
between the
FEDERALLY RECOGNIZED INDIAN TRIBES
in
WASHINGTON STATE
and the

STATE OF WASHINGTON

I. PREAMBLE AND GUIDING PRINCIPLES

This ACCORD dated August 4, 1989, is executed between the federally recognized Indian tribes of Washington signatory to this ACCORD and the State of Washington, through its governor, in order to better achieve mutual goals through an improved relationship between their sovereign governments. this ACCORD provides a framework for that government-to-government relationship and implementation procedures to assure execution of that relationship.

Each Party to this ACCORD respects the sovereignty of the other. The respective sovereignty of the state and each federally recognized tribe provide paramount authority for that party to exist and to govern. The parties share in their relationship particular respect for the values and culture represented by tribal governments. Further, the parties share a desire for a complete accord between the State of Washington and the federally recognized tribes in Washington reflecting a full government-to-government relationship and will work with all elements of state and tribal governments to achieve such an accord.

II. PARTIES

There are twenty-six federally recognized Indian tribes in the state of Washington. Each sovereign tribe has an independent relationship with each other and the state. This ACCORD, provides the framework for that relationship between the state of Washington, through its governor, and the signatory tribes.

The parties recognize that the state of Washington is governed in part by independent state officials. Therefore, although, this ACCORD has been initiated by the signatory tribes and the governor, it welcomes the participation of, inclusion in and execution by chief representatives of all elements of state government so that the government-to-government relationship described herein is completely and broadly implemented between the state and the tribes.

III. PURPOSES AND OBJECTIVES

This ACCORD illustrates the commitment by the parties to implementation of the government-to-government relationship, a relationship reaffirmed as state policy by gubernatorial proclamation January 3, 1989. This relationship respects the sovereign status of the parties, enhances and improves communications between them, and facilitates the resolution of issues.

This ACCORD is intended to build confidence among the parties in the government-to-government relationship by outlining the process for implementing the policy. Not only is this process intended to implement the relationship, but also it is intended to institutionalize it within the organizations represented by the parties. The parties will continue to strive for complete institutionalization of the government-to-government relationship by seeking an accord among all the tribes and all elements of state government.

This ACCORD also commits the parties to the initial tasks that will translate the government-to-government relationship into more-efficient, improved and beneficial services to Indian and non-Indian people. This ACCORD encourages and provides the foundation and framework for specific agreements among the parties outlining specific tasks to address or resolve specific issues.

The parties recognize that implementation of this ACCORD will require a comprehensive educational effort to promote understanding of the government-to-government relationship within their own governmental organizations and with the public.

IV. IMPLEMENTATION PROCESS AND RESPONSIBILITIES

While this ACCORD addresses the relationship between the parties, its ultimate purpose is to improve the services delivered to people by the parties. Immediately and periodically, the parties shall establish goals for improved services and identify the obstacles to the achievement of those goals. At an annual meeting, the parties will develop joint strategies and specific agreements to outline tasks, overcome obstacles and achieve specific goals.

The parties recognize that a key principle of their relationship is a requirement that individuals working to resolve issues of mutual concern are accountable to act in a manner consistent with this ACCORD.

The state of Washington is organized into a variety of large but separate departments under its governor, other independently elected officials and a variety of boards and commissions. Each tribe, on the other hand, is a unique government organization with different management and decision-making structures.

The chief of staff of the governor of the state of Washington is accountable to the governor for implementation of this ACCORD. State agency directors are accountable to the governor through the chief of staff for the related activities of their agencies. Each director will initiate a procedure within his/her agency by which the government-to-government policy will be implemented. Among other things, these procedures will require persons responsible for dealing with issues of mutual concern to respect the government-to-government relationship within which the issue must be addressed. Each agency will establish a documented plan of accountability and may establish more detailed implementation procedures in subsequent agreements between tribes and the particular agency.

The parties recognize that their relationship will successfully address issues of mutual concern when communication is clear, direct and between persons responsible for addressing the concern. The parties recognize that in state government, accountability is best achieved when this responsibility rests solely within each state agency. Therefore, it is the objective of the state that each particular agency be directly accountable for implementation of the govern-to-government relationship in dealing with issues of concern to the parties. Each agency will facilitate this objective by identifying individuals directly responsible for issues of mutual concern.

Each tribe also recognizes that a system of accountability within its organization is critical to successful implementation of the relationship. Therefore, tribal officials will direct their staff to communicate within the spirit of this ACCORD with the particular agency which, under the organization of state government, has the authority and responsibility to deal with the particular issue of concern to the tribe.

In order to accomplish these objectives, each tribe must ensure that its current tribal organization, decision-making process and relevant tribal personnel is known to each state agency with which the tribe is addressing an issue of mutual concern. Further, each tribe may establish a more detailed organizational structure, decision-making process, system of accountability, and other procedures for implementing the government-to-government relationship in subsequent agreements with various state agencies. Finally, each tribe will establish a documented system of accountability.

As a component of this system of accountability within state and tribal governments, the parties will review and evaluate at the annual meeting the implementation of the government-to-government relationship. A management report will be issued summarizing this evaluation and will include joint strategies and specific agreements to outline tasks, overcome obstacles, and achieve specific goals.

The chief of staff also will use his/her organizational discretion to help implement the government-to-government relationship. The Office of Indian Affairs will assist the chief of staff in implementing the government-to-government relationship by providing state agency directors information with which to educate employees and constituent groups as defined in the accountability plan about the requirement of the government-to-government relationship. The Office of Indian Affairs shall also perform other duties as defined by the chief of staff.

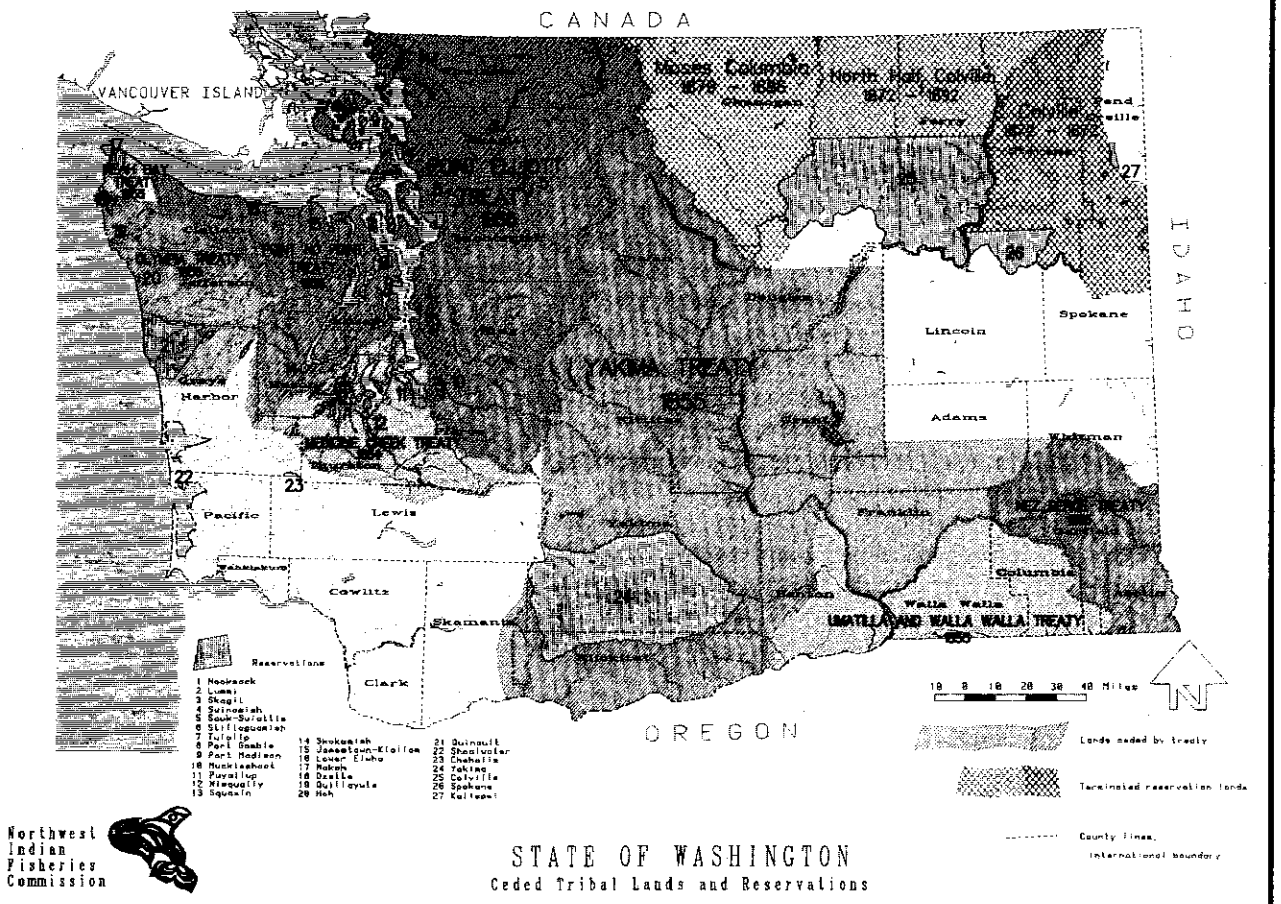
V. SOVEREIGNTY and DISCLAIMERS

Each of the parties respects the sovereignty of each other party. In executing this ACCORD, no party waives any rights, including treaty rights, immunities, including sovereign immunities, or jurisdiction. Neither does this ACCORD diminish any rights or protections afforded other Indian persons or entities under state or federal law. Through this ACCORD parties strengthen their collective ability to successfully resolve issues of mutual concern.

While the relationship described by this ACCORD provides increased ability to solve problems, it likely will not result in a resolution of all issues. Therefore, inherent in their relationship is the right of each of the parties to elevate an issue of importance to any decision-making authority of another party, including, where appropriate, that party's executive office.

Signatory parties have executed this ACCORD on the date of August 4, 1989, and agreed to be duly bound by its commitments.

Appendix I



Acknowledgments

We gratefully acknowledge the help received from the following groups and agencies in producing this publication:

The participants at the Rosario and Chelan Retreat
Tribal Environmental Policy Committee
The Northwest Renewable Resources Center
The members of the Forum (water policy committee)
The Data Management Task Force
The Washington State Department of Ecology
The Washington State Department of Natural Resources, Public Affairs Division and
The Washington State Legislature

For more information related to the Indian tribes, contact: Northwest Indian Fisheries Commission, 6730 Martin Way East, Olympia, WA 98506, Phone: (206) 438-1180.

THIS IS MY LAND

This is my land
From the time of the first moon
Till the time of the last sun
It was given to my people.
Wha-neh Wha-neh, the great giver of life
Made me out of the earth of this land
He said, "You are the land, and the land is you."
I take good care of this land,
For I am part of it.
I take good care of the animals,
for they are my brothers and sisters.
I take care of the streams and rivers,
for they clean my land.
I honor Ocean as my father,
for he gives me food and a means of travel.
Ocean knows everything, for he is everywhere.
Ocean is wise, for he is old.
Listen to Ocean, for he speaks wisdom.
He sees much, and knows more.
He says, "take care of my sister, Earth,
she is young and has little wisdom, but much kindness."
"When she smiles, it is springtime."
"Scar not her beauty, for she is beautiful beyond all things."
"Her face looks eternally upward to the beauty of sky and stars."
Where once she lived with her father, Sky."
I am forever grateful for this beautiful and bountiful earth.
God gave it to me.
This is my land.

by Clarence Pickernell,
Quinault

PRINTED ON
RECYCLED PAPER

Tribal Natural Resource Policy
M.E.S. Program, Spring, 1992
Jovana J. Brown
Office: Sem. Bldg. 4417, phone: #6651

Indian tribes are playing an increasingly important role in environmental decision making in the Washington state. This includes co-management of the salmon resource, decisions about the impacts of logging, development, and growth upon fish habitat, participation in the current state-wide water planning process, involvement in licensing and re-licensing hydropower projects, and responsibility for air and water quality on tribal lands. This course will look at the history leading up to these policies and examine current natural resource issues.

Students will write three short (3-4 pages in length) essays one longer issue paper (15-20 pages) during the quarter. The topics for the short essays are assigned, the longer essay should be on a topic of tribes and the environment, or tribal natural resource issues. These essays will be typed or prepared with word processing, double spaced, and represent graduate level writing and analysis.

In order to receive credit for this course, students must attend class sessions and submit their written work on-time. Due dates for the essays and time-lines for the issue paper are listed below.

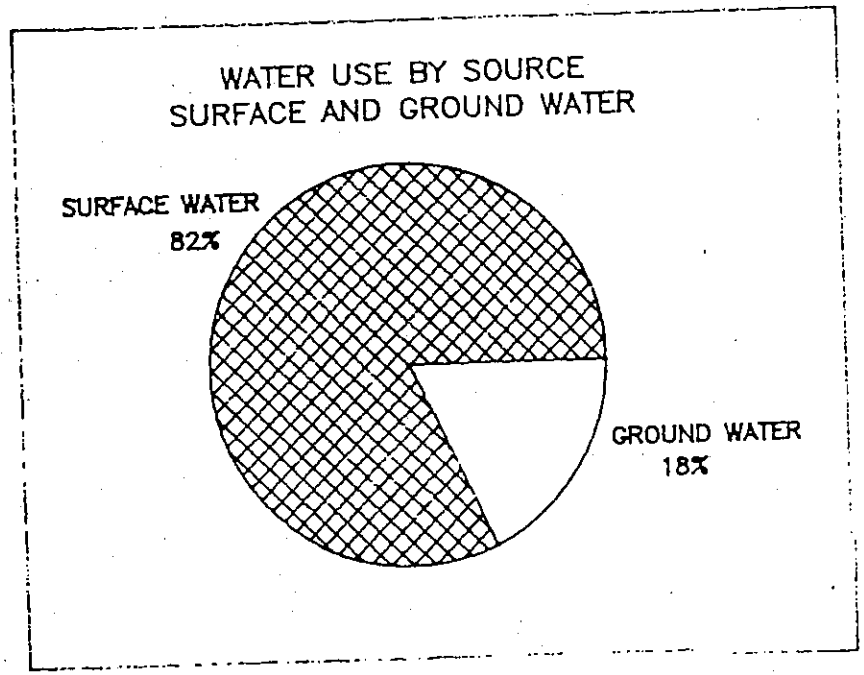
Week I: March 30 - April 3: INTRODUCTION
Read: Olson and Wilson, Native Americans in the Twentieth Century.
Lecture: Introduction to course
"Images of Native Americans"

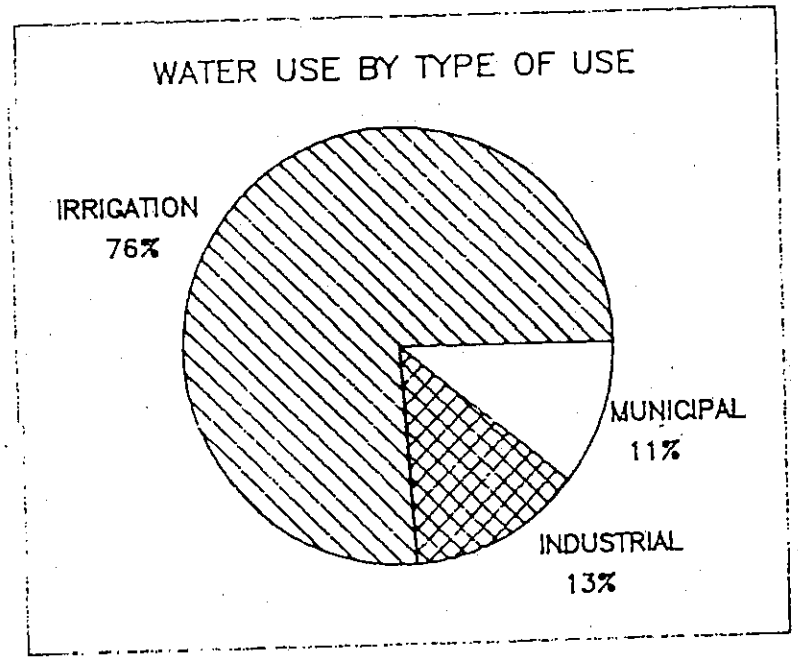
Week II, April 6 - 10: ECONOMIC DEVELOPMENT ON RESERVATIONS
Read: U.S., Report of the Task Force on Indian Economic Development, and Williams, Susan, "The Governmental Context for Natural Resource Development in Indian Country." Plus: handouts
Lecture: "Economic Development and Natural Resources."

Week III, April 13 - 17: INDIAN WATER RIGHTS
Read: Burton, American Indian Water Rights and the Limits of the Law.
Lecture: "The Yakima Nation"
Paper due: "Indian Water Rights."
Choose issue paper topic

Week IV, April 20 -24: U.S. v. WASHINGTON (THE BOLDT DECISION)
Read: Brown, Mountain in the Clouds, and Cohen, Treaties on Trial.
Lecture: "State-Tribal Relations after Boldt."
Draft outline of issue paper due.

WATER USE IN WASHINGTON STATE
1985





TOTAL WATER USE = 2,377 BILLIONS OF GALLONS OF WATER PER YEAR

SOURCE: DEPT OF ECOLOGY WATER RESOURCES PROGRAM, 1988

(IN JSC 1989)

State-Tribal Relations and Natural Resources:

Washington State After the Boldt Decision

Submitted for publication in:
Geographic Perspectives of Economic Development Among North American Indians. Edited by Tom Ross and Tyrel Moore

December, 1991

Jovana J. Brown
Environmental Studies
The Evergreen State College
Olympia, Washington 98505

Economic development in Indian country often depends on the use of tribal natural resources.[1] In the last few years tribes have increased their autonomy and are more directly involved in the decision-making about the use of these resources. Self-determination has meant less involvement of the Bureau of Indian Affairs (BIA) in tribal use of these resources. The tribes are now confronting state power and regulatory authority in natural resource use. This is particularly true in Washington state where significant changes in the state-tribal relationship have occurred in the last decade.

In January of 1989, the second term Democratic Governor of Washington, Booth Gardner, announced that he had signed a proclamation formalizing the cooperative relationship that his administration had developed with Washington state Indian tribes. His order declared that it now is Washington state government policy to conduct relations between the state and Indian tribes on a government-to-government basis. He stated that the proclamation was issued in order to institutionalize the cooperative relationship that had developed over the last few years and had resulted in successful agreements such as Timber/Fish/Wildlife and the Puyallup land claims settlement. "Formalizing these productive relationships between the state and tribal governments should help establish the kind of continuity that can lead to even greater success for the state, the tribes, and for everyone involved," Gardner said.[2] A related press release noted that the policy is also intended to heighten awareness within state government of tribal issues and tribal governments, and to clearly indicate the importance of such issues. "Our policy is to work together with Indian tribes to solve problems, and this declaration serves to affirm the integrity of the principle of government-to-government relationship which is the foundation of cooperative problem solving," Gardner stated.[3]

Just eleven years ago, in a 1978 decision upholding U.S. v. Washington, the Boldt decision, the Ninth Circuit Court of Appeals stated:

> The record in this case and the history set forth [in related cases] make it crystal clear that it has been [the] recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian fishing rights requiring intervention by the District Court.... The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of its decree. Except for some desegregation cases ... the district court has faced the most concerted official

> and private efforts to frustrate a decree of a federal court witnessed in this century.[4]

Seemingly the Boldt decision and Boldt-Phase II have ushered in a new era of cooperation and negotiation between the Washington state government and the federally recognized Indian tribes in the state. There are several indicators of this new period of state-tribal relations: cooperative management of the fish resource, the Timber/Fish/and Wildlife Agreement about logging practices, the Puyallup land settlement mentioned in the Governor's news release and tribal involvement in the U.S. - Canada Pacific Salmon Treaty.[5] However, there are still areas where conflict and litigation are the order of the day.

This paper examines several of these issues on a continuum from cooperation to conflict in the context of natural resources and attempts to show the nature of the conflict which still exists. The Timber/Fish/and Wildlife (TFW) Agreement is examined first as an example of a cooperative arrangement that resulted from Boldt - Phase II. This agreement is significant because it gives the tribes a role in the protection of salmon habitat on privately owned timber lands. Next, current policy making regarding water resources in the state is reviewed to demonstrate the inability of the legislative committee dealing with this to include the tribes in this process in a meaningful way. The conflict generated by interim hunting agreements negotiated by the Department of Wildlife with the tribes is then examined to demonstrate the continuing anti-Indian sentiment in the state. Finally, the suit filed by tribes over the right to gather shellfish on private lands is briefly noted.

The Legal Background

We know that historically state-tribal relations have been difficult. Indian tribes regard themselves as sovereign entities, while the states do not or cannot recognize this status. While the following, often quoted, language of the U.S. Supreme Court describes the political relationship between the states and tribes as it existed a century ago, it still retains some significance today:

> They [tribes] owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.[6]

Historically tribes and states have viewed each other as adversaries rather than as partners. There has been a very real "us" versus "them" mentality on both

sides. A good illustration of this was the blatant failure of the Washington state government to enforce the decision of Judge Boldt in the U.S. v. Washington case of 1974. This decision which allocated to western Washington Indian tribes half of the harvestable salmon and steelhead was not enforced until it was upheld by the Supreme Court decision of 1979.

Francis Prucha, an historian of federal Indian policy, has stated that the question of state jurisdiction over Indian reservations has been a critical one, for states have been irked by restrictions on enforcing their laws and regulations over areas within their boundaries. He points out that the courts have said that where federal law has preempted jurisdiction the states do not have authority, "but the conflict between state and tribal jurisdiction is far from resolved."[7] Another commentator has noted: "State assertions of authority stem primarily from the refusal of the states to perceive Indian country as extraterritorial to state borders."[8]

The Commission on State-Tribal Relations notes that a relationship exists whether the two sides attend to it or not.
"Tribes often ascribe all of their coordination problems with state government to anti-Indian, anti-tribal state policies."[9] While racism and religious and cultural intolerance do exist, tribes need to realize that at least some of the problems arise from the inevitable inter-governmental frictions which always occur between neighboring or overlapping jurisdictions. "A state may have exactly the same problem with neighboring states or with the federal government, but the tribe often fails to realize this and is therefore unable to suggest ways of managing conflicts.[10]

The key element in starting the change that has taken place in Washington state was the Boldt decision. It is necessary to briefly review this historic case.

The treaties signed in Washington territory in 1854-55 stated:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.[11]

However, by the time of the Boldt decision in 1974, Indians were taking approximately 2 percent of the salmon and steelhead in western Washington.[12] In 1970, the United States, on its own behalf and as trustee for seven Indian tribes, brought suit against the state of Washington, seeking an interpretation of the treaties and an injunction requiring the state to protect the Indians' share of runs of anadromous fish.[13]

After three years of research and review of previous court decisions the decision that was reached in February of 1974 in U.S. v. Washington (commonly referred to as the Boldt decision) ruled that the treaty tribes had been systematically denied their rights to fish off their reservations, and that the tribes were entitled to the opportunity to catch half the harvestable salmon and steelhead returning to the traditional off-reservation fishing grounds.

To clarify the complicated issues involved in the suit, Judge Boldt divided U.S. v. Washington into two phases. He would initially hear Phase I which would decide whether or not Indians had treaty rights to fish off the reservation. Once this issue was decided, he would move on to Phase II which would address two questions: 1) Do the fish allocated to the Indians include hatchery-bred fish? and, 2) Do the treaties guarantee the continued protection of the salmon from the destruction of its habitat?[14]

Phase II of U.S. v. Washington was initially heard in 1980 by Judge Orrick in federal district court. He ruled that hatchery-bred fish were included in the tribal share. In regard to the second issue he noted that if fish habitat destruction were to continue, "the right to take fish would eventually be reduced to the right to dip one's net into the water...and bring it out empty."[15] Judge Orrick ruled that the tribes fishing right included the right to have treaty fish protected from environmental degradation.[16] The state appealed this decision and in 1982, the Ninth Circuit Court of Appeals rejected Judge Orrick's decision about an absolute right to environmental protection and instead said that: "The state and the tribes must each take reasonable steps commensurate with the resources and abilities of each to preserve and enhance the fishery."[17]

This time the tribes requested a rehearing of U.S. v. Washington, Phase II. They stated that this reinterpretation of Judge Orrick's decision would undermine their right to exercise their treaty rights. On review, the Ninth Circuit Court of Appeals determined that fixing the scope of the environmental right in a proceeding not based on a specific case with concrete facts was impermissible.[18]

Nevertheless, Phase II leaves the tribes with treaty-based environmental rights that have made them participants in natural resource and environmental decision-making in the state of Washington.

The Era of Cooperation

The Department of Fisheries began the era of cooperation in Washington state in 1983. The change occurred when state officials recognized that the continuing litigation over Indian fishing rights was not producing any fish. In fact, the fishery resource had declined during the previous ten years. Explaining this change, the current Director of the Department has stated: "We had to be hit between the eyes with a two by four, the 1978 9th Circuit Court of Appeals decision (upholding the Boldt decision) did this."[19] In February of 1983, the then Director of Fisheries announced a change of policy. After observing that Washington state had lost nearly twenty major court cases with Indian tribes, Bill Wilkerson said: "The status quo is not working ... we have to sit down and negotiate".[20] He invited the tribes to a conference at a Port Ludlow resort to work out the details of cooperative salmon management between the tribes and the Fisheries Department. Today cooperative management of the salmon resource is an accepted fact in Washington state.[21]

The tribes that were litigants in U.S. v. Washington established the Northwest Indian Fisheries Commission in 1974. Twenty tribes are now served by this organization. The Commission's role is to: "coordinate an orderly and biologically sound treaty Indian fishery in the Pacific Northwest, and provide member tribes with a single unified voice on fisheries management and conservation matters."[22] Today, the state Departments of Fisheries and Wildlife work with the Northwest Indian Fisheries Commission to plan for annual and long range salmon harvests and for habitat protection. The Deputy Director of the Department of Fisheries has stated:

> The benefits of state-tribal cooperation with respect to fishery management are significant. The resource is in better shape. Fishing opportunities are expanding and habitat protection is improving. In short, we are all better off because we are working together. The tribes and state are now spending their time, energy and funds on what really matters ... the resource. We strongly support cooperative management.[23]

It should be noted that while the tribes publicly stress the positive achievements of cooperative management, privately they have some concerns about

it. They feel that the state sometimes perceives the tribes as co-managers of only harvest management. The tribes must, they maintain, be co-mangers of habitat protection (Phase II), enhancement, enforcement, and public education.

The Timber/Fish/Wildlife Agreement

One of the most talked about arrangements to come out of the current era of negotiation and cooperation is the Timber/Fish/ Wildlife Agreement (TFW), which addresses habitat protection. There are 8.7 million acres of privately owned commercial timber land in Washington state. (By comparison, the U.S.Forest Service has 5.4 million acres of commercial forests in the state.) In Washington State regulation of the timber industry is carried out by the Department of Natural Resources (DNR). The DNR is responsible for managing two million acres of state timber land and for regulating timber industry lands. In 1946 the Washington State Legislature adopted the first Forest Practices Act. This act stated that it was in the public interest to keep privately owned forest land "continuously and fully productive."[24] In 1974 a new Forest Practices Act was passed to protect timber quality, soil, water, fish, wildlife, and amenity resources by regulating timber removals, forest road construction and maintenance, reforestation, and the use of forest chemicals. The Forest Practices Board (FPB) created by this legislation sets minimum standards for forest practices on industry lands. It processes forest practice applications and enforces the rules and regulations that it establishes. In recent years, the Forest Practices Board has faced increasing controversy, conflict, and disputed data. New regulations were about to be published in 1986. The tribes, the timber industry, the DNR itself, and environmental groups were all frustrated with the revision process and were unhappy with the proposed new regulations. The need for protecting water quality, fish and wildlife habitat, along with maintaining a viable timber industry had reached a critical point.[25] The tribes were increasingly recognizing themselves as significant players in this process and the timber industry was seriously worried about the outcome of the pending Phase II court decision.

In July, 1986 forty people representing the tribes, the environmental community, the state departments of Natural Resources, Fisheries, Wildlife, and Ecology, and the timber industry were brought together in a meeting (again at Port Ludlow) to see if they could prepare alternative regulations to those prepared by the Forest Practices Board. Their goal was to formulate guidelines which met the needs of each of these four groups. In December, 1986 after more than six months

of long and intensive meetings the TFW participants reached an agreement on a regulatory framework. The TFW document states:

> This agreement describes an historic shift in the way we manage natural resources, resolve problems and make changes in our future management. It provides the frame-work, procedures and requirements for successfully managing our state's forests so as to meet the needs of a viable timber industry; fish, wildlife and water, as well as the cultural/archeological resources of Indian tribes within our state.[26]

The goals of the TFW agreement are ambitious. In addition to addressing maintenance of wildlife habitat, water quality and quantity, the agreement states:

> The fishery resource goals are long-term habitat productivity for natural and wild fish, and the protection of hatchery water supplies.
>
> ...
>
> The archeological and cultural goals are to develop a process to inventory archaeological/cultural spaces in managed forests; and to inventory, evaluate, preserve and protect traditional cultural and archeological spaces and assure tribal access.[27]

Hearings on the new draft regulations were held throughout the state in the summer of 1987. The Forest Practices Board (FPB) adopted most of the regulations recommended by TFW in January, 1988. The coalition of interests backing the TFW agreement then successfully lobbied the state legislature for an additional $4.5 million appropriation for implementation by the Departments of Natural Resources, Ecology, Fisheries, and Wildlife. The tribes received an appropriation of $2 million six months later from Congress to implement the agreement.

The TFW agreement addressed road construction and orphaned roads, riparian management zones, upland management areas for wildlife, unstable slopes, timber harvest, silviculture, Indian archaeological and cultural sites, old growth, and cumulative effects. "Major principles in the agreement were the emphasis on the protection of whole watersheds, long-term management of resources, development of site-specific forest practices prescriptions and cooperative nonregulatory agreements between affected parties and groups."[28] It is interesting to observe that participants in the TFW process carry and refer to both copies of the 1988 FPB regulations and the TFW Agreement itself in training and assessment meetings.

Two key features of the TFW Agreement are the inter-disciplinary teams (ID teams) and "adaptive management." The ID teams carry out on-site review and evaluations of harvest applications that will impact the resources identified by

the TFW process. These teams are made up of timber company representative (s), DNR staff, and technical experts from Fisheries, Wildlife, or other appropriate state agencies, a forest practices representative from the Washington Environmental Council, and, when applicable, a representative (usually someone from the fishery staff) from the affected tribe. "Site specific" management is a term that is used a great deal in the DNR these days, but it refers to very real, on-the-ground discussion, agreement, and decision making by this team.

Adaptive management means that the participants in the TFW agreement believe that it is an evolving process, that the agreement and the regulations need to be dynamic, updated, and refined on an on-going basis as they see how the process works and as they learn more about the impact of forest practices on the environment. The term was borrowed from Kai N. Lee, Institute of Environmental Studies, University of Washington, who defines adaptive management as "a policy framework that treats program implementation as a set of experiments."[29] Monitoring and evaluation of what has worked and what has not worked is an important part of the adaptive management idea. Unfortunately, although the initial TFW allocation provided for additional agency staff, it did not include monies for this essential part of TFW. There is some concern on the part of the tribes that while all the TFW participants use the term, the timber industry does not yet realize that adaptive management could come to have a more substantial impact on their harvest methods.

At the first annual review held in June, 1988, participants identified old growth harvesting, forest conversion in urbanizing areas, and archaeological and culturally significant sites as priority issues to be addressed during the following year. By the time of the fourth annual review in 1991 these issues were still unresolved.

How do the tribes in Washington state view the TFW process? At this point, cautious optimism seems to be the official opinion voiced by tribal leaders and by the tribal employees involved in the ID teams and other TFW activities. For one thing, the tribes, though involved as participants in drawing up the agreement, were not funded for staff until several months after the other participants. By the time staff were hired and in place, the tribes were about six months behind. Although the tribes were, for the most part, able to hire an additional person (in a few instances two) the process and the resulting work load remains extremely time-consuming. For example, the Yakima Indian Nation was able to hire two

additional staff in the natural resource office with the federal TFW appropriation. However, the area that the Yakima Tribe is responsible for is roughly one forth of the state of Washington. It is an overwhelming work-load.

The things that have improved are communication with the Department of Natural Resources and the timber industry, and site specific planning. Some timber cuts have been modified as a result of the I.D. team's site visit. What is not working at the present time is wildlife habitat protection - the upland management areas for wildlife are voluntary and few have been set aside. It is clear that "adaptive management" cannot occur without research and monitoring funds. This has been inadequately funded in the budgets passed since TFW was implemented.

Most important to the tribes is the inclusion of the TFW protection of cultural and religious sites in the FPB regulations. Although the TFW agreement stated that an inventory of cultural sites would be prepared and that affected tribal representatives could review timber harvest on these sites, this was not included in the 1988 regulations. Nor had it happened by the time of the fourth annual review in 1991. And, finally, it is unclear if the tribes can continue to be effective participants in the process with current staff levels.

At least one knowledgeable observer has stated that TFW is a lot of trouble simply to accomplish the simple tasks of keeping logging debris out of fish streams and leaving some trees standing on each side of the streams. A related concern is that the tribes have negotiated away some of the power that they have as a result of Phase II. In this sense, because they have been perceived as having some real voice in fish habitat protection on timber industry lands, they have been coopted into a process that dilutes this.[30] At this point in Washington state, however, TFW is important because it is a symbol of the negotiation and cooperation stage. If it works it will mean that this approach pays off, if it doesn't work, it could signal a return to litigation to settle these issues.

Water Resources

Indian reserved water rights are one of the most important issues in the western United States.

> The legal principles embodied in U.S. v. Winters and in Indian treaties reserving the right to take fish clearly require water for secure tribal homelands and thriving Indian fisheries. Yet the reality of getting the water needed to fulfill these promises has proven elusive.[31]

Water is vitally important for Washington state tribes because of the importance of instream flows for fish habitat. In fact, water resource policy for the state as a whole has become an important policy question in the last few years.

In March of 1988 the State Legislature decided that:

> "the fundamentals of water resource policy in this state must be reviewed by the legislature to ensure that the water resources of the state are protected and fully utilized for the greatest benefit to the people of Washington..[32]

A Joint Select Committee on Water Resource Policy with six members from each house was established to prepare a written report on water resource policy by the end of the year. The Department of Ecology was directed to hire an independent fact-finding service to consult with all user groups and interested parties including Indian tribes.

One of the recommendations of a 1971 Washington state Indian Affairs Task Force was that Indian water resource specialists and their tribal consultants be included in all future water use planning by the state.[33] An interesting part of the deliberations of the Joint Select Committee on Water Resource Policy is their recognition of the existence of Indian reserved water rights and of tribal interest in the development of water resource policy, but at the same time their inability to act on this knowledge. How the committee dealt with (or sometimes danced around) these issues speaks to the current spirit of negotiation in the state.

The 1985 Attorney General's report on The State of Washington and Indian Tribes did recognize the Winter's doctrine:

> State-tribal relations are also tangled in the area of water rights. When the federal government created an Indian reservation it impliedly reserved sufficient water to satisfy the primary purposes for when the lands were set aside. The priority date ...is when the federal reservation was established. The measure and quantity of this ... has not been ascertained for most reservations in the State. Potentially, the right could be of such a magnitude as to severely impact existing users who have built up cities, homes, businesses, and crops in reliance on long-accepted, available amounts of water.[34]

The Department of Ecology hired as independent fact-finder a consultant with a background in engineering and law, who was based in the southwest and had experience working on Indian water issues. The fact finders report issued in July, 1988 summed up the comments expressed by tribal representatives as follows:

> Indian tribes are sovereign governments, not just another interest group. More than 20 such governments exist within Washington, each with respective goals and water policies. Many of these goals are similar to those of the state (e.g. maintaining water quality, protecting fish runs, ensuring supplies for future generations), and much room exists for cooperative tribal-state solutions to water management problems. Cooperation, however, depends upon the state respecting federal laws and treaty rights, and dealing with tribes on a government-to-government basis. Coordinated efforts in particular need to be made to enhance, not simply maintain, existing instream resources.[35]

The Joint Select Committee on Water Resource Policy's mandate was to recommend procedures for allocating the water resources of the state, considering both the fact-finders report and present and future demands on the use of water resources, and to evaluate the need to prioritize the use of the water resources of the state.[36]

The Joint Select Committee realized it was going to have to address, if not the question of tribal water rights, at least the primacy of tribal concerns in this matter. While the Committee may not have understood the implications of the Winters doctrine, it did know the ramifications of the Boldt decision, the existing ruling from Boldt Phase II, and the Governor's office desire to negotiate on Phase II issues rather than wait for a court decision. What it did during the first years of its existence was to try to decide how it was going to address these very difficult questions, and how it was going to solicit information and testimony from the tribes.

There was initial public testimony from the Yakima Indian Nation and the Point No Point Treaty Council at the first hearing. The Yakima representative requested that two tribal representatives be appointed to the committee. Thereafter the tribes agreed that they did not want to appear to be just another interest group by giving public testimony to the committee. After this point, the committee met with tribal representatives in closed meetings.

Comments made by Committee members in the public hearings were clear evidence of their confusion about the tribes. At the first public hearing a legislator from the Yakima area stated that the tribes were unwilling to work with state agencies because they regard themselves as sovereign nations. She asked a tribal representative who was testifying if the tribes were now moving beyond this? At the next public meeting, the representative whose district includes the Yakima Nation stated that the tribes maintained that they only dealt with the federal

government, so how could they talk to the committee? At a later meeting a senator from west of the mountains, following up on a point about having a process to work with the tribes, addressed the problem from a different direction. "We need to decide which face of the state we are going to present to the tribes, we need to be consistent in what we say," he pointed out.

The Committee considered and rejected the proposal of adding two tribal representatives to the committee. Members and staff felt it was too far along in the process to add new members. Instead the committee arranged a series of two to three separate meetings between some committee members and tribal representatives. In addition the Committee was briefed by the Governor's office on the Phase II government-to-government negotiations in a closed meeting. At one of these meetings attended by tribal representatives, natural resource agency directors and staff, and Committee staff, the following issues were raised by the tribes: The means by which tribal input could be transmitted to the Joint Select Committee, the complexity of issues and regional planning processes in which the tribes were already participating, the need for funding and data to resolve water resource issues, and the risks involved in committing to a process for which long term funding may not be available. The Committee staff expressed the need for assistance in developing the process of interaction, i.e., how the tribes would be involved in the future workings of the Joint Select Committee.

The interim report of the committee stated:

> Any discussion of water policy must include a dialogue with several Indian tribes whose reservations are located within Washington State. ... The Joint Select Committee recognizes and supports the states efforts through the Governor's office to reach some foundation and ground rules for further discussion to resolve ... (Phase II) issues. As the Joint Select Committee continues its work ... a continuing dialogue with the Indian tribes will be part of its efforts. The Committee will explore with tribal representatives all feasible and productive methods of establishing and maintaining this dialogue while it continues its work.[37]

Maintaining a dialogue may not mean addressing and solving the issues, but it does mean that this particular legislative committee pays lip service to the fact that the tribes have a part in the process. However, while acknowledging the tribes' interest in this process, the committee has not been able to include them in any meaningful way.[38] Thus while the Joint Select Committee on Water Resource Policy reflects the general move in Washington state from litigation and

controversy to negotiation and dialogue, it is unable to take the next step of involving the tribes directly in the process. It is instructive to review briefly how this occurred in this committee's deliberations. First of all the legislation initiating the process specifically directed the independent fact-finder to consult all user groups including tribes. Secondly, the state Department of Ecology hired a consultant who knew something about Indian water rights. Thirdly, the Committee was very much aware of the wish of the Governor's Office to avoid a court decision on Phase II and of the government-to-government accord being worked out between the Governor's Office and the tribes. What has been missing is the ability to incorporate tribal interests in the committee deliberations. This is, of course, not exclusively the fault of this state legislative committee. There are numerous substantive questions which exist about Indian water rights which makes them extremely difficult to settle at the state level. These include: who reserved the water, the federal government or the tribes? What quantity of water is reserved? Do Indian water rights include future needs? Can these rights be sold or leased to non-Indians? Is it in the best interests of the tribes to quantify their rights?[39] These and other questions cannot be settled at the state level without a formal mechanism for resolving these issues.

Tribal Off-Reservation Hunting

In Washington state one of the current public battlegrounds is clearly about tribal hunting rights. Although a state normally enjoys great latitude in regulating the management of game and wildlife, its power is significantly reduced when treaty rights are involved.[40] In fact, a State Environmental Issues Review report on Indian Rights and Claims in 1977 noted: "Bitter disputes between Indian tribes and state governments over the regulation of hunting and fishing have increased."[41]

The controversy in Washington state has resulted from the re-organization of the game/wildlife department and the appointment of a director who is knowledgeable and sensitive to Indian issues. Until 1988, Washington state's Department of Game was an agency largely run by and for the recreational hunters in the state. The Commissioners were appointed by the Governor, but they in turn appointed its director. The agency generated its own revenue through the sale of hunting and fishing licenses. The Democratic Governor, re-elected to his second term of office in 1988, has been concerned about several agencies run by commissions with agency heads independent of gubernatorial appointment. He was

able to successfully sponsor legislation changing the status of the Game Department in 1987. The name was changed to the Department of Wildlife and the Director appointed by the Governor. Though most of the departments budget still comes from revenues from hunting and fishing, 11% was allocated by the state legislature to the agency. The new agency has a broader mandate than the old, it's purpose is to protect both game and non-game wildlife resources in the state and to serve hunters and anglers.

The Governor appointed Curt Smitch to be the new Director of the Department of Wildlife. Smitch had been on the Governor's staff as an advisor in natural resource policy and as an advocate of a government-to-government negotiation with the tribes. One of Smitch's first actions was to sign an agreement with several tribes in regard to off-reservation hunting. This interim big game management agreement with six western Washington treaty tribes stated:

> Its purposes include reducing conflicts arising out of Indian off-reservation hunting to the absolute minimum and jointly developing procedures for exchanging wildlife management information. The parties acknowledge that they continue to disagree about the nature and extent of both treaty hunting rights and state management authority, and agree that this agreement is not intended to resolve these questions, but only to provide, instead, an interim plan for management of game resources.[42]

In the fall of 1990 the interim agreement was replaced with an on-going management plan that is to be reviewed annually.
The agreement is for off-reservation hunting on state lands (with some provisos), open and unclaimed lands, and forest service lands.[43] Hunting is to be for subsistence and not for commercial purposes. Tribal hunting regulations are to be enforced by the respective tribe.

The reaction of the state's anti-Indian forces to the initial agreement was immediate. The most vocal opponent of Indian rights is State Senator Jack Metcalf who represents three counties in the northwestern part of Washington state and is Chair of the Washington state Senate, Environment and Natural Resources Committee. In a letter to his constituents in September, 1988, Metcalf accused the Gardner administration of having a consistent policy of "giving a larger share of our resources to the tribes than any court requires." He went on to say: "I want you to know that I plan to lead the battle against confirmation of acting Wildlife Director Curt Smitch." In January of 1989 he sent out a letter to more than 1,700 members of outdoor sports groups and other hunters and anglers asking them to

attend Smitch's confirmation hearing before the Environment and Natural Resources Committee to help block Smitch's appointment. In both letters Metcalf seriously misrepresented the terms of the agreement and its consequences.

Metcalf was successful in keeping Smitch's appointment from being reported to the full Senate and thus being confirmed. In a counter move, at the end of the legislative session, Smitch resigned and was immediately re-appointed by the Governor. The fact that this nomination did not reach the Senate floor was more the result of partisan politics in Washington state in the winter and spring of 1989 (the Republicans had a one seat majority in the Senate) than it was of anti-Indian sentiment. The fact remains, however, that Metcalf was able to successfully rally a large group of anti-Smitch people because of his misrepresentations of the hunting agreements. Metcalf and three other senators have also sued the Department of Wildlife on the grounds that the hunting agreements were negotiated in private meetings with tribal representatives and thus were in violation of the state's Open Public Meetings Act. In November, 1988 a Thurston County Superior Court judge denied their injunction to block the hunting agreements.[44]

> The irony of the lawsuit brought by S/SPAWN and Senator Metcalf is that it might precipitate the very thing the department, the commission and the Governor worked so hard to avoid, i.e., an allocation of a harvestable share of big game to the tribes. Currently the tribes harvest 1/10 of one percent of the elk and deer in the state. Non-Indians harvest approximately 10 percent and poachers steal another 10 percent. If history repeats itself, it will be an unfortunate lesson for the state's non-Indian hunters.[45]

One of the reasons for this controversy is that tribal members hunt for subsistence while non-Indian hunters do so for recreation. It is very difficult for each to understand the other. It is obvious, however, that part of this debate was generated by the changed mandate of the new Department of Wildlife. The re-organized agency was no longer being run exclusively for the benefit of the hunters and sportsfishers in the state. It now had a broader role, i.e., to address wildlife resources which included non-game species. As a result of this, the former clientele of the agency felt disenfranchised and the tribal hunting agreements provided a clear focus for their anger. Nevertheless, the fact that this anger and resentment can be utilized and channeled by Metcalf into anti-Indian sentiment is worrisome. It demonstrates that there is strong residual

negative feelings about the Boldt decision and treaty rights among the citizens of the state.[46]

Shellfish

The right of Washington state Indian tribes to use a resource "in common" with other citizens of the state is going to be tested in court again. In May of 1989, sixteen tribes in the Puget Sound area filed suit under the auspices of U.S. v. Washington to obtain a larger share of the regional shellfish harvest and to gather shellfish on privately owned tidelands and beaches. They are asking the federal court to determine the nature and extent of their treaty rights to harvest shellfish off-reservation.

In Washington state 80% of the tidelands are in private ownership. Of the tidelands that remain in public ownership, 16% are owned by the Department of Natural Resources (with the best of these tidelands being leased to commercial oyster growers). The remaining 4% of the tidelands are owned by the state departments of Fisheries, Wildlife, and Parks and Recreation. Thus the bulk of the resource available to the tribes is on the public beaches managed by Parks and Recreation. However, some of these tidelands are eliminated because of pollution.

There are several competing uses for these public tidelands: 1) the general public who want to gather shellfish, 2) the owners of the adjacent land who don't want public access to their beaches, 3) tribal shellfish harvesters, and 4) aquatic farmers who lease the Department of Natural Resources (DNR) tidelands for raising commercial shellfish. A factor that makes this issue of the use of public tidelands more complicated is the fact that each of the state agencies has a different management philosophy. The DNR is mandated to manage its lands for the highest economic return, Parks and Recreation to provide public recreational opportunities, and the Department of Fisheries is charged with the conservation, enhancement, and management of the resource. Since 1983 when the Department of Fisheries began working cooperatively with the tribes, tribal members have had access to a number of these public tidelands to harvest, primarily clams, for subsistence and ceremonial purposes. It is estimated that tribes harvest about 8% of the total shellfish harvest each year.[47] However, the tribes want to be able to harvest shellfish commercially, i.e., not just for subsistence and ceremonial uses. It is obvious that there are not enough public tidelands to allow them a 50% share (following the amount set in the Boldt decision). Also since 1983, the

tribes and the state have been meeting to try to set up a plan for cooperative management of the shellfish resource. A news release about the suit noted:

> Despite notable progress in negotiations with the state over shellfish harvesting by tribal members, Western Washington treaty Indian tribes were forced to file suit here today in Federal District Court to obtain a legal determination on their shellfish harvesting rights as guaranteed in treaties between the tribes and the U.S. government.[48]

The goal of the state Department of Fisheries has been to work with other state and federal agencies to increase the tidelands and beaches available for tribal harvest. The tribes negotiating with Fisheries (i.e., with the State of Washington) have stated that they need to be able to harvest five million pounds of clams per year. However, there are only 1.2 million pounds on the beaches now available to them.[49] Plans by Fisheries for enhancement of these tidelands and beaches cannot begin to make up the difference, particularly in the short term. The tribes are therefore formally asserting their rights to harvest shellfish on privately owned tidelands and beaches.

In 1970 when U.S. v. Washington was originally filed Department of Fisheries personnel were in open warfare with Indians trying to exercise their treaty fishing rights. Twenty years later a different relationship exists between the tribes and the Department. Fisheries and the tribes have had a seven year record of working together to manage salmon and steelhead harvests. They have spent the same amount of time discussing potential shellfish harvest. The state feels, however, that tribal access to private land is a matter for federal court determination. In the new release about the suit, the tribes stressed their desire to continue to work with the state:

> Since 1983 the tribes and state have negotiated in good faith to develop an orderly and biologically sound plan for cooperative management of the shellfish resource... The tribes want to return to the negotiations that have brought us so far in resolving our differences. Unfortunately, we were forced to seek a court ruling to remove some of the stumbling blocks that are preventing both us and the state from reaching our goal.[50]

Though this is a "return to litigation" to settle an issue, the tone in 1991 is vastly different from the tone in 1970.

Conclusion

The Boldt decision and its implementation by the state of Washington has made a significant change in state-tribal relations. The period of intense

confrontation between the tribes and the state has, to a large extent, been replaced by discussion, negotiation, and agreement. In the areas where conflict still exists, the tone of the interchange has altered considerably. The TFW Agreement provides an example of cooperation between the tribes and the state. The legislative review of the state's water resource law represents the inability of the state to address tribal water rights. Off-reservation hunting illustrates the persistent anti-Indian sentiment in the state. Finally, the shellfish litigation represents a return to the courts only after extensive negotiation.

There will always be areas of disagreement and contention, even as the "main" issues are settled, a host of smaller ones come to the fore.[51] The areas of conflict that have been examined show two main reasons for this: an absence of explicit mechanisms to work out the issue and the lingering anti-Indian sentiment that still exists in the state. The new government-to-government Accord between the state and the tribes may well provide the framework for continuing to work out mutually productive agreements.[52] Anti-Indian bias needs long term solutions of education and positive public leadership.

Notes

1. "Indian country is an incredibly complex jurisdictional issue disguised in a colorful phrase." Fred L. Ragsdale, Jr, "The Deception of Geography," in Vine Deloria, Jr., ed., American Indian Policy in the Twentieth Century, Norman, Oklahoma Press, 1985, p. 69. The use of the term in the context of Washington state is necessary, however, because many of the natural resource use issues occur off-reservation.

2. Governor Booth Gardner, press release, Jan. 9, 1989. This agreement is now called the "Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington." June 6, 1989. The Accord was officially signed in August of 1989.

3. Ibid.

4. U.S. v. Washington 573 F. 2d 1123, 1126. (1978)

5. The Puyallup Indian tribe agreed to relinquish claims to valuable lands in Tacoma, Washington for a $162 million settlement package that includes land, direct payments to tribal members, economic development assistance, and job training. The federal government, the state, the county and city are all participating in paying for the settlement.

The tribes were instrumental in helping to negotiate the U.S.-Canada Pacific Salmon Treaty. The U.S. legislation implementing the treaty considers the tribes on an equal basis with the states and gives them direct representation on the commission and other bodies which implement the treaty. Anadromous Fish Law Memo, issue 48 (Jan., 1989), p. 5.

6. United States Commission on Civil Rights, Indian Tribes: A Continuing Quest for Survival. Wash., D.C., G.P.O., 1981, p. 41, citing: US. v. Kagama 118 U.S. 375, 384 (1986).

7. Prucha, P. Francis, The Great Father: the United States Government and the American Indians. Lincoln, University of Nebraska Press, 1984, p. 391.

8. Royster, Judith V. and Rory SnowArrow Fausett, "Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion." Washington Law Review, v. 64 (July, 1989), p. 600.

9. Commission on State-Tribal Relations, Handbook on State-Tribal Relations. Albuquerque, N.M., American Indian Law Center, n.d., p. 52.

10. Ibid.

11. The Treaty of Point Elliott with the Dwamish, Suquamish and other Allied and Subordinate Tribes of Indians in Washington. 12 Stat. 927, Article V.

12. U.S. v. Washington 459 F. Supp, 1020, 1032. (1978)

13. U.S. v. Washington, 384 F. Supp. 312 (1974)

14. U.S. v. Washington 506 F. Supp. 187, 190 (1980)

15. Ibid., 203.

16. Ibid., 204, 205.

17. U.S. v. Washington, 694 F. 2nd 1374, 1389 (1982)

18. U.S. v. Washington, 759 F 2nd 1353, 1357 (1985)
A review of Phase II court cases is found in: Meyers, Gary, "U.S. v. Washington (Phase II) Revisited: Establishing an Environmental Servitude Protecting Treaty Fishing Rights," Oregon Law Review, v. 67 (1988), pp. 771-797.

19. Joseph R. Blum, speaking at the Symposium on Indian Fisheries, "A Resource in Common," July 5, 1989, Seattle, Washington.

20. Interview, March 16, 1989.

21. Cohen, Fay, Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights, Seattle, University of Washington, 1986, is a comprehensive study of the Boldt decision and its aftermath. See also: Olson, Mary B. "The Legal Road to Economic Development: Fishing Rights in Western Washington," in Public Policy Impacts on American Indian Economic Development, edited by C. Matthew Snipp, Albuquerque, Native American Studies, University of New Mexico, 1988, pp. 77-109, and Pinkerton, Evelyn, Co-Operative Management of Local Fisheries: New Directions for Improved Management and Community Development, Vancouver, University of British Columbia Press, 1989.

22. Northwest Indian Fisheries Commission, Annual Report, 1987, p. 1. Other tribal fish commissions are the Columbia River Inter-Tribal Fish Commission, The Great Lakes Indian Fish and Wildlife Commission, and the Chippewa-Ottawa Treaty Fishery Management Authority.

23. Press conference, Dec. 16, 1988, "Cooperative Management: Policy of the Century. Northwest Indian Fisheries Commission press release.

24. Encyclopedia of American Forest and Conservation History, N.Y., Macmillan, 1983. p.680.

25. Schwarber, James A. "Negotiating Cross-Culturally: The Timber, Fish and Wildlife Project." Unpublished paper submitted to Political Ecology Program, The Evergreen State College, March, 1987, pp. 2,5.

26. Timber/Fish/Wildlife Agreement. Final Report, February 17, 1987, p. 1.

27. Ibid., pp. 2-3.

28. Washington, Department of Natural Resources, Totem, v. 30 (Spring, 1988). Annual Report, 1987, p. 12.

29. Fluharty, David and Kai N. Lee, "Neither Wilderness Nor Factory: Learning from Program Implementation in Natural Resources," Proceedings: First Annual Meeting Puget Sound Research, vol. 1. Seattle, Puget Sound Water Quality Authority, 1988. See also: Halbert, Cindy L., and Kai N. Lee, "Timber, Fish and Wildlife: Implementing Alternative Dispute Resolution in Washington State," Northwest Environmental Journal, v. 6 (Spring/Summer, 1990), pp. 139-175.

30. This uses Lacy's definition: "Cooptation occurs if, in a system of power, the power holder intentionally extends some form of political participation to actors who pose a threat." See Michael Lacy, "The United States and American Indians: Political Relations," in Vine Deloria, Jr., ed., American Indian Policy in the Twentieth Century, Norman, University of Oklahoma Press, 1985, p. 83.

31. Wapato, S. Timothy and James W. Weber, "Introduction," to Fulfilling Indian Water Rights: Practical Approaches. Conference, Dec. 16-17, 1986, Spokane, Washington, p. i. Conference sponsored by the Columbia River Inter-Tribal Fish Commission.

32. Washington, Legislature, Joint Select Committee on Water Resource Policy, Report to the Legislature, January, 1989, p. 10.

33. Washington. Indian Affairs Task Force, Are You Listening Neighbor and The People Speak: Will You Listen? Olympia, Washington State, 1978, p. 41.

34. p. 19.

35. Washington. Legislature. Washington's Water Future. The Report of the Independent Fact Finder to the Joint Select Committee on Water Resource Policy. Steven J. Shupe, Independent Fact Finder, July, 1988, p. 28.

36. Washington. Jt. Sel. Comm. on Water Resource Policy, op. cit.

37. Ibid., pp. 24-25.

38. Water planning has moved into a different forum in Washington State. In November, 1990 representatives of tribes, state and local government, agriculture, business, environmental groups, recreation, and sports and commercial fishing agreed to conduct comprehensive, cooperative water resources planning in the state. The overall goal of this process is to accommodate growth in a manner that protects water resources for fish habitat. A Water Resources Forum was set up to undertake this planning. The Joint Select Committee on Water Resource Policy is monitoring this process.

39. Indian Tribes as Sovereign Governments: A Sourcebook on Federal-Tribal History, Law and Policy. Oakland, CA, American Indian Lawyer Training Program, Inc., 1988, pp. 53-54.

40. Reynolds, Laurie, "Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption," North Carolina Law Review, v. 62 (April, 1984) p. 770.

41. Council of State Governments, Lexington, Kentucky, p. 22.

42. Washington. Department of Wildlife. Interim Big Game Management Agreement between the Western Washington Treaty Tribes and the Washington Department of Wildlife. Olympia, Washington, n.d., p. 1.

43. Reynolds notes on this point: "Several disputes have arisen over treaty language reserving to the tribe the rights to hunt and fish 'on open and unclaimed land'.... Indian off-reservation treaty rights (on lands which they originally hunted) continue unless the land has been settled by non-Indians or otherwise reduced to private ownership. Thus treaty rights extend to national forests and all other lands still held by the federal government." (latter in f.n. 60) Reynolds, op.cit., p. 752.
Seven western Washington treaty tribes have now signed the agreement.

44. Seattle Post-Intelligencer, Jan. 21, 1989, Sec. B, p. 2.

45. Washington, Department of Wildlife, "Frequently Asked Questions About Indian Hunting and the Interim Hunting Agreement," Oct. 1988, p. 2.

46. Obviously Washington state is not the only place this exists. The vociferous white opposition to tribal off-reservation fishing rights in northern Wisconsin, to name one example, is testimony to anti-Indian sentiment throughout the United States.

47. Judith Freeman, Assistant Director of the Department of Fisheries, Shellfish, in a presentation to Public Land Policy class, The Evergreen State College, May 1, 1989.

48. Northwest Indian Fisheries Commission, "Tribes Seek Ruling on Treaty Shellfish Rights," May 19, 1989.

49. Freeman, op. cit.

50. Northwest Indian Fisheries Commission, op. cit.

51. For example, Washington state is now emphasizing sports fisheries over commercial fisheries. Sportsfishers use a punched card system to count their catch. This is essentially an honor system at the present time. With the increased emphasis on sports fishing, accurate catch counting is important to the tribes in the determination of their 50% of the salmon harvest. This is an issue of current contention between the Northwest Indian Fisheries Commission and the state departments of Fisheries and Wildlife.

52. There are numerous examples of state-tribal agreements. The State-Tribal Compact Act of 1978 was intended to provide clear federal authorization to Indian nations and the states (and counties and cities) to enter into agreements on a wide range of issues. It did not become law. The Hearings provide examples of existing agreements. United States. Senate. Select Committee on Indian Affairs, Hearings: State Tribal Compact Act of 1978, S. 2502, 95th Congress, 2nd Session.

Black Queenslanders on reserves – what laws do they want?

The results of a black-controlled survey

MATT FOLEY

The Queensland *Aborigines Act* of 1971-1975 and the *Torres Strait Islanders Act* of 1971-1975 have been criticized severely in recent years on the grounds that they are paternalistic, repressive, and in breach of the United Nations *Universal Declaration of Human Rights, 1948*. Professor Garth Nettheim was commissioned in 1973 by the *International Commission of Jurists* to analyze these Acts. His book *Outlawed* was critical of the content of the Acts and of the high degree of delegation of responsibility to the executive allowed by the Act.* Throughout the 1970's there have been protests, mainly in Brisbane, by Aborigines and Islanders against the Act. "Free the Blacks, Smash the Act" has been a common cry of many Queensland urban Aborigines who feel that the Act is holding back their people.

At present some 40,000 people live on Aboriginal and Islander Reserves in Queensland. The Queensland Government has consistently claimed that it has the support of reserve residents in its legislation and policies. The Queensland Government refers to the Aboriginal Advisory Council which is comprised of members of the various Aboriginal Communities. This Advisory Council meets from time to time in Brisbane. The Government claims that the Advisory Council supports the present *Aborigines Act*. There has been criticism of the Advisory Council on the grounds that it does not have a secretariat of its own and that it meets only under the auspices of the Queensland Department of Aboriginal and Islander Advancement.

In mid-1977 the Queensland Government appointed an "Aboriginal and Islander Commission" composed of four indigenous Queenslanders. Mr. Les Stewart, Chairperson, represented reserve Aborigines, Mr. Noel Fatnowna represented South Sea Islanders, Mr. Getano Lui represented Torres Strait Islanders, Mrs. Rose Colless from Cairns was selected to represent urban Aborigines. The Commission was not provided with any research or secretarial assistance, other than within the Department of Aboriginal and Islander Advancement itself. The Commission was not gazetted under the *Commissions of Inquiry Act* and so lacked formal legal power. One of the commissioners, Mrs. Rose Colless, has now been sacked following her criticism of Queensland Government policy on the Aurukun and Mornington Island dispute.

The Aboriginal and Islander Commission has been asked to advise the Queensland Government on the review of the *Aborigines Act*, due to expire in December, 1977, and extended to June, 1978. The Commission was to report on what laws indigenous Queenslanders wanted. In the past it has been difficult to obtain independent information about the reserves as the State Department of Aboriginal and Islander Advancement (D.A.I.A.) controlled both the telephones and the permit system of who was allowed into reserves. Most reserves are in remote parts of the State, particularly in Cape York Peninsula. Now, however, the permit system is in the hands (legally speaking) of the Community Council on each reserve.

The Aborigines and Torres Strait Islanders Legal Service (Qld.) Ltd. (ATSILS) and the Foundation for Aboriginal and Islander Research Action (F.A.I.R.A.) decided to mount a joint research project to find out what black Queenslanders thought about the laws affecting them. This project was to include Aborigines and Islanders both on and off reserves. The present article is concerned only with the results of the survey conducted on the reserves. The full results of the research will soon be available in booklet form.

THE METHOD

The method of the survey was based on the principle of black control. All previous research by anthropologists, universities, etc. has been done by whites. In this survey white consultants were used to assist in questionnaire design, training of research staff, and computer processing of the data. The project committee was jointly chaired by the President of the Aboriginal and Islander Legal Service Mr. Eric Kyle, and the President of the Foundation for Aboriginal and Islander Research Action, Mr. Les Malezer.

The questionnaire method selected was the most satisfactory as it gave some written record of what people said. This was held to be important in the light of repeated Queensland Government claims that present laws are based on "grass-roots consultation" with the reserve residents.

Aboriginal and Islander research staff underwent a week's training programme in which they participated in settling the final draft of the questionnaire. The dangers of bias or prompting, both verbal and non-verbal, were stressed. The questionnaire included a wide range of questions and one open-ended question, "Do you have any suggestions for changes in the laws affecting Aborigines and Islanders? If so, what?" Only the most salient questions will be discussed here. On age and education variables the sample was found to approximate the distribution characteristics of the census sample. There was a slight bias (60%-40%) in the sample towards males.

All major reserves in Queensland were visited by

Community where permission to enter was refused. A total of 913 persons were questioned (a sample of about one in seventeen adult reserve Aborigines or Islanders). When the research team visited a reserve they conferred with the Community Council. The team would either wait in a central spot for people to come to take part or go to the people at work or at home — depending on the wishes of the local Community Council. Participation in the survey was voluntary. No names were recorded. The four-person research team travelled thousands of miles around Queensland from January to March 1978. As well as completing questionnaires, written reports were made of most of the reserves visited to give background information.

It should perhaps be noted that the team played an educative role as well as a research role. It was often found necessary to give information and explanations about legislation to people on various reserves. Some public meetings and many private discussions were held. A simplified outline of the *Aborigines Act* was prepared and distributed.

THE RESULTS

The results of the survey indicated that an overwhelming majority of reserve residents wanted:

- *the Commonwealth Government to replace the State Government as the body responsible for making laws;*
- *land ownership of the reserves to be in the hands of Aborigines and Islanders on reserves; and*
- *the Community Council on each reserve to control decision-making on a very wide range of matters.*

Legislative Responsibility

The responses to the question concerning legislative responsibility indicated that 73.1% of those questioned said that the Commonwealth Government should be responsible for making laws about Aboriginal and Islanders reserves in Queensland. In comparison only 14.5% of people questioned said that the Queensland Government should be responsible for making laws about Aboriginal and Islander reserves in Queensland.

Legislative Responsibility

At present, the Queensland Government is responsible for making laws about Aboriginal and Islander reserves in Queensland. Who do you think should be responsible for making laws about Aboriginal and Islander reserves in Queensland?

Queensland Government	Commonwealth Government	Don't Know
14.5%	73.1%	12.4%

One 42 year old man on Cherbourg reserve said:

Commonwealth should take over. People have never seen the Act and don't know what it's all about. New ideas are needed.

Land Ownership

The overwhelming response from persons questioned (85.6%) was that they thought that the Aboriginal reserves presently owned by the State Government.

Land Ownership

At present, the land of Aboriginal reserves is owned by the State Government. Who do you think should own the land of these reserves?

State Government	C'wealth Government	Aboriginal people on reserves	Someone Else	Don't Know
2.6%	6.4%	85.6%	2.1%	6.0%

A 50 year old woman on Woorabinda reserve said:

Queensland Acts should be abolished and replaced with a Land Rights Bill similar to the Northern Territory.

Control of Various Matters

Questions were asked as to who should control various activities on the reserve: housing, business enterprises, employment of staff, mining. Questions were also posed about control of persons entering the reserve, about the Aboriginal Police Force, liquor on the reserve, and waterways and forests. The responses indicate a clear expression of opinion that the Community Council on the reserve should be responsible for these matters. Responses varied from 72.0% — Aboriginal Police to 86.2% — who should be on the reserve. This would entail a dramatic increase in the powers of the Community Council on each reserve. (*See Table, p. 99*)

Perhaps the results of the survey are best summed up by a 64 year old man on Weipa South reserve who said:

Possessions of mine were taken away from me, police giving their excuse as, everything on Crown land belongs to Government and not belong to me. I would like the law to protect me from being dispossessed of my property and my livelihood.

CONCLUSION

Whether or not the manifest wishes of indigenous Queenslanders are to be put into legislation remains a political question. The Aurukun-Mornington Island dispute has illustrated the Queensland Government's reluctance to defer to the Commonwealth in this area. Political controversy should not, however, deter legal research. The techniques are available to allow for systematic surveys to find out what laws people want. Those techniques should be put at the disposal of those groups who most need the protection of the law.

This black-controlled research project has been an exercise with not insignificant fruits in legal education, consciousness-raising and community development. It may be salutary for research funding bodies to note that such goals would have been beyond the pale of a conventional, positivist, white research project.

FOOTNOTE

*See Garth Nettheim, 'Queensland's Laws for Aborigines', (1976) 1 *Legal Service Bulletin*, 321.

Who should control?	DAIA	Church Mission	Community Council	Someone Else	Don't Know
Housing on reserve	5.9%	3.4%	78.3%	7.1%	5.3%
Business Enterprises on reserve	4.8%	2.6%	80.4%	6.1%	6.2%
Employment of staff on reserve	7.1%	3.6%	76.0%	5.5%	7.8%
Who is allowed to be on reserve	2.2%	1.7%	86.2%	4.6%	5.3%
The Aboriginal Police Force	6.8%	2.6%	72.0%	10.8%	7.8%
Liquor on reserve	2.3%	2.4%	73.9%	13.5%	7.9%
Mining on the reserve	3.8%	2.4%	79.5%	6.9%	7.4%
Waterways and forests on reserve	3.5%	2.9%	81.8%	5.3%	6.5%

A 44 year old man on Yarrabah reserve said:

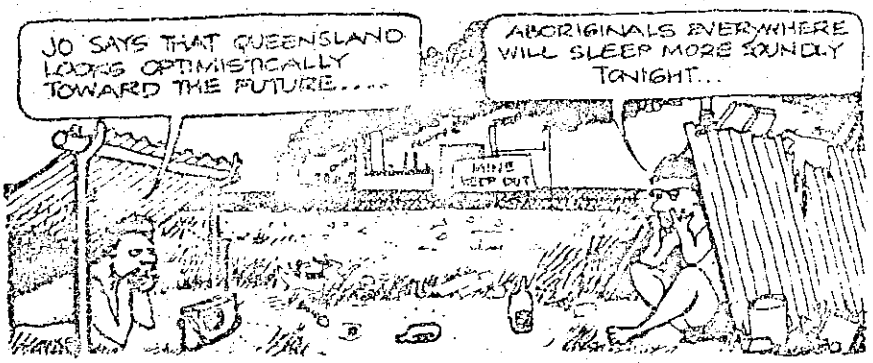
What about giving our young people chance to use their education? There's too many white staff around waiting for us and our young people to make a mistake so they can make a big thing out of them. They supposed to be helping our young people to take responsible positions; instead they come and go and another one come and we are still no better off. Give us a chance to make our own mistakes and correct them with dignity. After all we are not God.

BACKGROUND TO

SINCE THE RESERVES WERE FIRST SET-UP ABORIGINALS WERE FORCED TO WORK FOR RATIONS IN THE LATE FORTIES, WE WERE GIVEN A CPI¼:E PF BOB IN 1966, WE WERE PAID WAGES ABOUT A QUARTER OF THE AWARD WAGE IN 1968-19, THE RATIONS SYSTEM WAS CUT OUT.

RATIONS COMPRISED OF FLOUR, SUGAR, RICE, AND MEAT SCRAPES. SO MUCH WAS GIVEN ACCORDING TO THE NUMBER IN A FAMILY.

FOR MANY YEARS ABORIGINALS HAVE BEEN TRYING TO GET UNION REPRESENTIVES ONTO RESERVES, BUT BECAUSE OF THE QLD ABORIGINAL ACT, THE REPRESENTIVES HAD TO GET PERMISSION OFF THE WHITE DEPARTMENT MANAGER BEFORE HE WAS ALLOWED ON THE RESERVE. OF COURSE THIS PERMISSION WAS ALWAYS REFUSED. THE CASE WAS, THE UNION OFFICAL GOT ON THE RESERVE WITHOUT PERMISSION. HE WAS FORCIBLY REMOVED FROM THE RESERVE BY THE DEPARTMENT.



IN 1977, ARNOLD MURGUR AN ABORIGINAL AT YARRABAH, JOINED THE A.W.U. HE DEMANDED AWARD WAGES FROM THE DEPARTMENT FOR HIS EMPLOYMENT AS A ROAD WORKER, HE WAS REFUSED. THE A.W.U. TOOK HIS CASE TO COURT. THE CASE CAME BEFORE THE MAGISTRATE COURT IN NOVEMBER 1978, THE MAGISTRATE THREW THE CASE OUT OF COURT ON THE GROUNDS THAT ARNOLD MURGER WAS AN ABORIGINAL LIVING UNDER THE QLD ABORIGINES ACT THERFOR HE HAD NO RIGHTS UNDER THE INDUSTRAL LAW.

THE A.W.U. APPEALED ABOUT THIS DECISION, AND ON 29 MAY 1979, JUDGE MATHEWS IN THE QUEENSLAND INDUSTRAL COURT RULED THAT THE DEPARTMENT OF ABORGINIAL AND ISLANDERS ADVANCEMENT COULD NOT USE THE ABORIGINES ACT TO DENY RESERVE WORKERS THE WAGES OTHER QUEENSLANDERS GET UNDER EXISTING INDUSTRAL LAW. THIS, OF COURSE, THE DEPARTMENT REFUSED TO DO.

ON 19 AND 20 JULY 1979, THE A.W.U. SIGNED UP FIFTEEN MEMBERS AT YARRABAH. ALL THE WORKERS AT YARRABAH WANTED TO JOIN UP, BUT AS IT COST $40 EACH THE COMMITTEE COULD ONLY AFFORD TO PAY FOR FIFTEEN, WHICH COST $600. ON 23 JULY 1979, ELEVEN OF THE A.W.U. WORKERS WERE SACKED. ON THE 24TH, TWO MORE WERE SACKED - ONLY A.W.U. MEMBERS WERE SACKED. IT WAS QUITE PLAIN THESE WORKERS WERE SACKED FOR JOINING A UNION. IT WAS THE FIRST TIME A GROUP OF ABORIGINALS ON A QLD RESERVE HAD JOINED A UNION.

ON 1AUGUST 1979, THERE WAS A MEETING BETWEEN A.W.U. , D.A.I.A. AND SACKED ABORIGINALS. IT WAS CALLED BY THE STATE INDUSTRIAL COMMISSION. THE WORKERS WERE RE-INSTATED AT THE OLD WAGE.

A MEETING WAS HELD IN BRISBANE BEFORE COMMISSIONER LEEDIE. IT WAS ATTENDED BY A.W.U. AND D.A.I.A.. THE ABORIGINAL A.W.U. WORKERS WERE TOLD THEY WOULD NOT BE NEEDED AT THE MEETING.

AWARD WAGES

QLD. GOVEMENT OWES $11,000,000.

IN MAY LAST YEAR A QUEENSLAND INDUSTRAL COURT HANDED DOWN THE DECISION THE QUEENSLAND GOVERNMENT HAD TO PAY AWARD WAGES TO ABORIGINALS ON RESERVES. IT WAS FOUND ABORIGINALS WERE PAID $71.50 BELOW THE AWARD WAGE. THE QLD GOVERNMENT HAS REFUSED TO PAY. THE GOVERNMENT OWES THE 3,000 WQRKERS ON RESERVES OVER $11 MILLION IN BACK WAGES.

* EQUAL WAGES FOR EQUAL WORK

ABORIGINALS ON RESERVES WORK THE SAME HOURS AND DO AS MUCH IN CASES MORE WORK THAN THE AVERAGE EUROPEAN IN THE QUEENSLAND WORK FORCE BUT WORK UNDER INTOLERABLE CONDITIONS AND RECEIVE ONLY HALF THE PAY.

* FAMILY UNIT DESTROYED

SUPPORTING MOTHERS AND DESERTED WIVES BENIFITS ARE NEARLY TWICE AS MUCH AS WAGES. MARRIED WOMEN ARE LEAVING THEIR HUSBANDS. SINGLE WOMEN ARE NOT MARRING AS THERE IS MORE MONEY TO BRING UP THE CHILDREN. THIS OF COURSE BRINGS ON ALL THE SOCIAL PROBLEMS OF * EXCESS DRINKING. * ARGUMENTS AND FIGHTS THROUGH JEALOUSY. * NEGLECTED CHILDREN. * AND A GENERAL BREAK DOWN IN THE COMMUNITY WAY OF LIFE.

* IT PAYS, NOT TO WORK

UNEMPLOYMENT BENEFITS ARE HIGHER THAN WAGES. THIS ENCOURAGES ABORIGINALS NOT TO WORK OR IF THEY ARE EMPLOYED NOT TO REALLY CARE ABOUT GETTING THE SACK.

* PATERNALISTIC ATTITUDE

THE INFAMOUS AND MISS NAMED QUEENSLAND DEPARTMENT OF ABORIGINAL AND ISLANDER ADVANCEMENT HANDS OUT BETTER HOUSING BETTER JOBS AND PAY RISES TO ABORIGINALS WHO THE DEPARTMENT CAN DEPEND ON TO DO THE RIGHT THING BY THE DEPARTMENT. A BIT LIKE A PARENT GIVING A CHILD A LOLLY IF HE'S OR SHE IS A GOOD KID.

PRODUCED BY N.Q.L.C.
P.O. BOX 1429
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IN CONJUNCTION WITH

Phone 2283585
F.A.I.R.A.
P.O. BOX 385
WEST END Q 4101

* THE FEDERAL GOVERNMENT HAS REFUSED TO INTERVENE IN THIS DISPUTE.

IN JUNE 1980 ABORIGINALS ON RESERVES WERE GIVEN A $36 RISE THEY ARE NOW PAID A LITTLE OVER $100 A WEEK. MARRIED MEN GET MORE THAN THIS ON THE DOLE.

WE ARE SICK AND TIRED OF BEING TREATED AS SECOND CLASS CITIZENS IN THIS COUNTRY NOT ONLY BY THE GOVERNMENTS BUT ALSO BY ONE OF THE BIGGEST UNIONS IN AUSTRALIA.

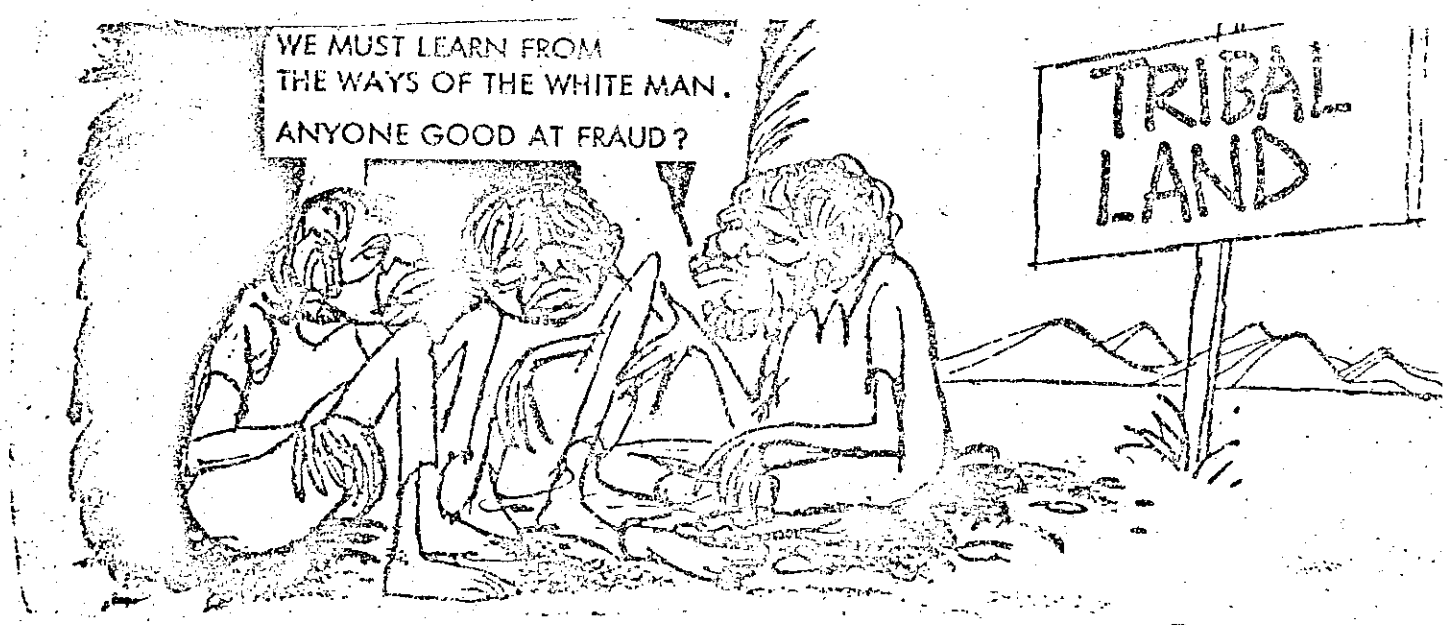
THE INFAMOUS AND MISS-NAMED DEPARTMENT OF ABORIGINAL AND ISLANDERS ADVANCEMENT WILL NEVER PAY AWARD WAGES BECAUSE ABORIGINAL ON RESERVES WILL BECOME UNIONISED. THIS OF COURSE WOULD MEAN THE END OF THE QUEENSLAND ACTS AND THE PATERNILISTIC DEPARTMENT OF ABORIGINAL AND ISLANDER ADVANCEMENT.

ABORIGINALS IN QLD BELIVE WE WILL NEVER HAVE A FAIR GO WHILE WE ARE STILL UNDER STATE CONTROLL.

IN 1976, THERE WAS A REFERUNDUM IN THIS COUNTRY TO GIVE THE FEDERAL GOVEMENT THE RIGHT TO LEGISLATE ON BEHALF OF ABORIGINALS.

THE REFERUNDUM WAS WON ON A 6% 8% MAJORITY. SINCE THEN THE FEDERAL GOVENMENT HAS REFUSED TO DO ANYTHING ABOUT THE SITUATION IN QUEENSLAND.

THE ONLY WAY WE WILL GET OUR RIGHTS IS WHEN THE FEDERAL GOVENMENT GETS A BIT OR BACKBONE AND TAKES OVER ABORIGINAL AFFAIRS IN QUEENSLAND.



MISLEADING STATEMENTS

MR CHARLES, PORTER THE QUEENSLAND MINISTER FOR ABORIGINAL AND ISLANDER ADVANCEMENT HAS STATED OVER THE PAST MONTH SINCE THE $36 A WEEK PAY RISE. ABORIGINALS ON RESERVES ARE NOW GETTING THE "AUSTRALIAN GUARANTEED WAGE" HE REFUSED TO STATE HOW MUCH THIS IS.

THE AUSTRALIAN GUARANTEED MINIMUM WAGE IS $127 A WEEK.

THE QUEENSLAND BASIC WAGE IS $86.30 FOR MALES, $69.90 FOR FEMALES. THIS WOULD BE A LOT CLOSER TO THE WAGES GEING PAID ON RESERVES.

To the Honourable Speaker and Members of the House of Representatives in the Parliament assembled. The petition of the undersigned citizens of Australia respectfully showeth:

That the humble petitioners respectfully believe that the Federal Government has the power conferred on it by the 1967 Referendum to intervene on behalf of Aboriginal people in any conflict with any State or Territory Government.

Your petitioners therefore pray:

That the Federal Government will assume its full responsibility for Aboriginal Affairs, and use the powers conferred on it by the people of Australia in the 1967 Referendum to intervene on behalf of Aboriginal in any conflict with any State or Territory Government;

That the Government respond to the report of the Senate Standing Committee on Constitution legal affairs on Aboriginal and Torres Strait Islanders on Queensland reserves which sets out precisely the Commonwealth Constitutional and legal position under Section 51;

That in addition the Government fulfil its stated policy of self-determination and self-management for Aboriginal people, by funding all housing, health, education, legal, employment strategy and welfare matters concerning Aboriginal people directly through Aboriginal Community based Community controlled organisations.

And your petitioners as in duty bound will ever pray.

Name	Signature	Address

THE ONLY NEWS YARRABAH PEOPLE RECEIVED OF THE MEETING WAS A LETTER FROM THE A.W.U. DISTRICT OFFICER. THE LETTER HAD POINTED OUT THAT THE A.W.U. HAD AGREED THAT THE DEPARTMENT DO A SURVEY TO SEE WHO WAS ENTITLED TO BE PAID AWARD WAGES, AND HAVE ANOTHER MEETING BEFORE NOVEMBER.

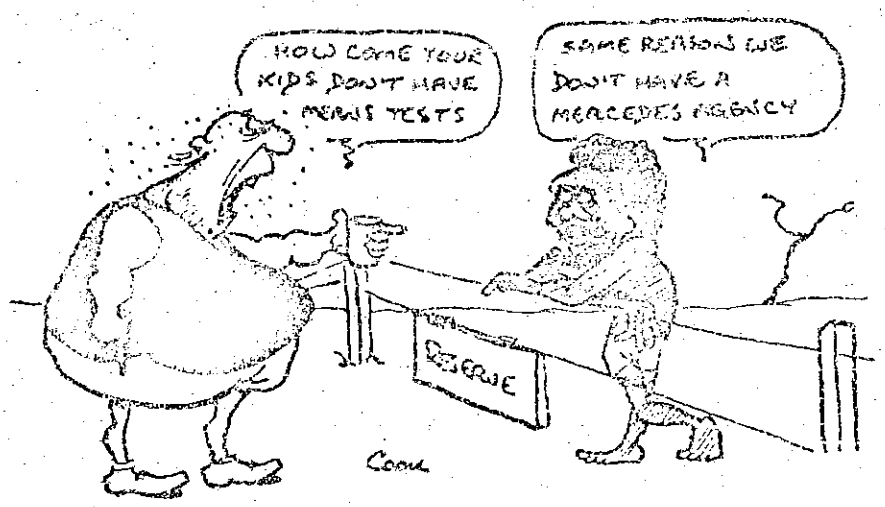
PEOPLE AT YARRABAH FELT THAT THEY HAD BEEN SOLD OUT.

ON 7TH SEPTEMBER 1979, SENATOR KEEFFE RECEIVED A LETTER FROM SENATOR CHANEY WHICH STATED "THE AUSTRALIAN WORKERS UNION SUPPORTS THE SURVEY AND HAS AGREED WITH THE COMMISSION DIRECTION TO REFRAIN FROM ENROLLING ANY MORE ABORIGINALS PRESENTALY EMPLYED BY THE DEPARTMENT."

THE PEOPLE AT YARRABAH NOW, NOT ONLY FEEL THEY HAD BEEN SOLD OUT - THEY NOW HAVE PROOF.

ON THE 18TH OCTOBER 1979, THE YARRABAH PEOPLE RECEIVED ANOTHER LETTER FROM THE A.W.U. DISTRICT OFFICER TELLING THEM THE A.W.U. HAD JUST HAD A MEETING WITH THE DEPARTMENT, AND THE DEPARTMENT HAD DONE A LOT OF WORK, BUT THEY HAD NOT FINISHED THE S RVEY AND THEY WANTED ANOTHER THREE MONTHS TO FINISH IT. THE A.W.U. AGREED TO THIS. THE DEPARTMENT HAD TO COME UP WITH AN AGREEMENT BEFORE 1ST FEBRUARY 1980.

THAT WAS THE LAST THE PEOPLE HEARD FROM THE A.W.U. YOU REALLY CAN NOT BLAME THE PEOPLE FOR LOSING HEART.



* THEY HAD BEEN TOLD THEY WERE NOT WANTED AT THE FIRST MEETING.

* THEY WERE NOT EVEN TOLD ABOUT THE SECOND MEETING UNTIL AFTER IT HAPPENED.

* IF THERE HAS BEEN A THIRD MEETING TH A.W.U. AND THE DEPARTMENT ARE KEEPING IT A SECRET.

* THE A.W.U. HAD ALLOWED THE BOSSES TO DO A SURVEY TO SEE WHO THEY WILL PAY OR HOW MUCH THEY WOULD PAY.

* THE A.W.U. HAD AGREED NOT TO JOIN UP MORE MEMBERS. THIS NEWS COME THIRD HAND TO THE PEOPLE.

* IF THE DEPARTMENT HAS DONE A SURVEY, NO-ONE HAS EVER SEEN IT.