

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 the State. Additionally, the parties agree that the level of public education concerning these matters must be increased. The parties pledge to cooperatively undertake projects designed to carry out these agreements.

It is anticipated that the parties will review 1) information about the existing system of habitat protection and 2) proposed procedures for future protection in order to 3) determine the appropriate strategy to implement agreed measures to address the concerns of the parties and fulfill the goals of this Memorandum.

3.4 Habitat Restoration and Enhancement

The parties recognize that the magnitude of the opportunity to restore, where appropriate, degraded, damaged, or destroyed habitat, and to enhance potentially productive habitat presents issues of coordination, priority, funding and organization.

In recent years, various state agencies, the Tribes, federal officials, and/or members of the business community have engaged in discussions concerning habitat issues. Some of these discussions have focused on the effect on fisheries and wildlife resources by forest practices. Others have focused on what measures are necessary to provide the optimum production of fish on a watershed basis. Still others have focused on the steps necessary to improve and maintain the water quality in Puget Sound. These activities are positive, cooperative, and constructive steps towards addressing habitat restoration and enhancement.

The parties recognize that a process to deal with the breadth and complexity of habitat restoration and enhancement opportunities presented by Phase II must be developed. Successful restoration and enhancement efforts will require educational efforts involving constituencies of each of the parties, particularly so that full advantage can be taken of funding opportunities. The priorities, which may be regional, species, or conservation related must be developed within the government-to-government relationship envisioned in this Memorandum.

Accordingly, the parties agree to review current processes for resolution of habitat issues. The parties shall then determine whether those processes should be modified, or new processes created, in the spirit of this Memorandum.

4.0 COOPERATIVE RESOLUTION

One of the principal purposes of this process is to resolve environmental issues so that litigation might be avoided. The parties continue to be involved in ongoing activities related to fisheries and wildlife habitat. Each party agrees that it will, to the best of its ability and authority, take actions which will cooperatively identify and attempt resolution of specific issues of concern which may arise from time-to-time in relation to the fish and wildlife habitat. However, nothing in this Memorandum shall limit, preclude, restrict, or in any way affect the right of any party to act in any administrative, Judicial or legislative forum, or in any other place or way, to protect its rights or challenge the actions of any other party to this agreement.

The parties acknowledge that success of this process may be dependent upon informed consideration of the concerns of other governmental entities and private interests. The parties agree, therefore, of the need to keep interested entities informed of this process.

The parties are committed to complete the tasks outlined in this Memorandum by June 30, 1990. The parties recognize that their significant fisheries-related and other commitments during the term of this agreement also will be contributing to the restoration and management of the fishery resources. Throughout the term of this agreement, the parties shall communicate to each other their view about the progress of discussions and the fulfillment of responsibilities outlined in this Memorandum. Prior to June 30, 1990, the parties will confer to determine whether the progress to-date and the activities under the Memorandum warrant an extension of its term.

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FINAL DRAFT: JULY 12, 1989

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