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Hedia Adelsman

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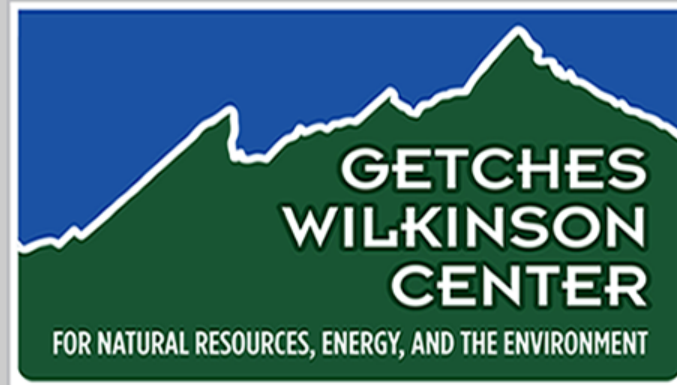
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Washington Instream Resources Protection - In Transition

Hedia Adelsman

**Program Manager, Water Resources Program
Department of Ecology, State of Washington**

Innovation in Western Water Law and Management

**Natural Resources Law Center
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Washington Instream Resources Protection - In transition

I. Introduction

A. Summary

Instream resource protection authorities have been in existence in Washington for more than 40 years. These laws came about as a result of losses of important instream resources. The State of Washington began in 1949 to systematically protect instream values. Passage of additional laws have strengthened the status of instream resource values. Under these laws the state conditioned water rights, closed streams, and established basin management plans and instream flow protection programs.

Although instream protection statutes have been enacted over time, they have, however, tended to simply overlay existing laws without sufficient attention to clarify the policies and set priorities among competing goals. Water laws and policies have not been sufficiently clear to guide administrative programs. Balancing increased consumptive use and economic growth with instream resource protection has and continues to be a major environmental challenge. In attempting to strike a balance, in the past, it is evident that the State has satisfied neither prospective water users nor fisheries or environmental interests.

The State needed fundamental review of its water management and allocation policies. Since the enactment of

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the Water Resources Act of 1971, there have been significant changes in the demands on the State's water supply, both for instream and out-of-stream uses. These changes have inspired the legislature and the executive branch to direct a thorough examination of the State's water resources laws and policies. While there was agreement that consistent and clear laws were needed, there was no agreement on how to achieve this goal.

Also, changes in the relationship between the State and Indian Tribes (from litigation to cooperative management) required that a new process be created to provide for active tribal participation in decision making and negotiation to resolve instream flow issues. A new public policy coalition was formed and a cooperative process was developed to reflect the new partnership of responsibilities and the government to government commitment.

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After years of confrontation over water use, intensive negotiation forged a landmark water agreement. The Chelan Agreement, widely recognized as the most significant natural resource management agreement in recent history, is an acknowledgment that cooperation offers the most promise for the broadest based implementation of instream flow protection. The Chelan Agreement represents a new and untested approach in western water resource management. The strength of the coalition will determine its success.

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B. General References

Shupe and Sheik, "Report of the independent fact finder to the joint select committee on water resource policy." (1988)

Beecher, "Standards for Instream Flows," Rivers, studies in the science, Environmental Policy, and law of instream flow, Volume 1, Number 2. (April 1990).

Barwin, Slattery, and Shupe, "Protecting Instream Resources in Washington State, prepared for University of Colorado, school of laws, Symposium on Instream Flow Protection. (March 1988).

Fraidenburg, Michael, "The New Politics of Natural Resources," Northwest Environmental Journal. (1989).

"The Northwest Renewable Resources Center Responds to the New Politics of Natural Resources," and "Michael E. Fraidenburg Responds," Northwest Environmental Journal (Vol. 6:1, 1990).

"Comprehensive Water Resources Planning, the Chelan Agreement: a partnership of responsibilities," Produced by the Northwest Indian Fisheries Commission on behalf of the Indian Tribes of Washington State.

II. History of Protecting Instream Resources

A. Legal Framework

1. Legislative authorization

Unlike some western states, Washington has long had strong legislative direction to protect instream values.

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These laws came about as a result of recognition of losses of important instream resources and changing perceptions of their value.

a. State Water Code

A centralized, state administered water rights system for surface water was established by the State Water Code in 1917. The focus of the Code was principally economic development. It did not recognize non-diversionary instream uses as beneficial, nor did it provide meaningful protection of public values. Under this Code, very little regard was given to instream flow needs. Many Washington streams, particularly in arid eastern Washington, were reduced in flow or appropriated to a dry stream bed.

While substantial economic and social benefits were obtained, there was an increasing awareness of the losses suffered by the state's economically significant anadromous fish resources. The loss of habitat and the fish passage difficulties presented by dam development and diversions remain a key environmental problem today in Washington.

b. 1949 and 1967 Legislative Acts

The Washington Legislature responded in 1949 by declaring it to be the policy of the State " . . . that a flow of water sufficient to support game fish and food fish population be maintained at all times in the streams of this state." This legislation was codified as Revised Code of

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Washington, Chapter 75.20.050 in the State Fisheries Code. Using general permit conditioning authorities and this law the State attached low flow conditions on water rights, denied applications on a case-by-case basis, or closed streams to further appropriation. This approach was viewed, however, as inadequate by those desiring a more systematic, planning oriented approach to water allocation with provision for public involvement.

In 1967, the Minimum Water Flows and Levels Act was enacted to provide a more formal process to protect instream flows. Minimum stream flows and lake levels were to be established through rule making procedures to protect fish, game, birds, or other wildlife resources or recreational or aesthetics values or to preserve water quality. The Act requires also the Department of Ecology and its predecessor agencies 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 interests of the State." However, the necessary resources were not provided to effectively implement the statute.

c. The Water Resources Act of 1971

The Water Resources Act of 1971 is a more comprehensive law than the 1967 Act. It provides for development of a statewide water resource program addressing

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all beneficial uses including instream flows. The Act declares a wide variety of water uses, including instream flow, to be beneficial and requires that water for future uses be allocated to achieve "maximum net benefits".

The Water Resources Act of 1971, Chapter 90.54 Revised Code of Washington (RCW), provides Ecology with ample authority to impose base flow conditions on water rights. RCW 90.54.020(3)(a) states:

"(3) The quality of the natural environment should be protected and, where possible, enhanced as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetics, and other environmental values . . . "

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Under the 1971 Act, quality of a river already degraded by over appropriation can be enhanced by base flow. Another important provision to protect instream flows is the requirement that the natural interrelationship between surface and ground water be recognized and restrictions on ground water withdrawals imposed.

A 1979 Water Code amendment affirmed that adopted instream flows constitute an appropriation with a priority date as of the effective date of adoption by administrative rules, further strengthening the instream flow provisions.

B. Process of setting flow levels

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1. Basin Plans

The Department of Ecology (Ecology) is vested with exclusive authority under state law to establish instream flows and levels on state waters.

Ecology adopted a regulation in 1976 establishing sixty-two Water Resources Inventory Areas as planning units. From 1975 to 1979, Ecology developed a series of comprehensive basin management plans primarily for eastern Washington basins experiencing intense competition for water. Most of these basin plans included establishment of instream flow levels in addition to requirements on future water allocation decisions.

When considering the establishment of instream flows, Ecology assessed the flow levels needed for fish, wildlife, recreation, scenic, aesthetic, and environmental values, water quality and navigation. It also consulted with and carefully considered the recommendations of the Departments of Fisheries, Wildlife, and Agriculture, the State Energy Office, and affected Indian Tribes.

2. Methodology and Recommendations

Ecology and Departments of Fisheries and Wildlife cooperated to carry out Instream Flow Incremental Method (IFIM) studies to determine fish habitat and streamflow relationships. Fish flow recommendations received from agency and tribal biologists were a key consideration. These recommendations were usually at a level that would

protect "optimum" habitat conditions for fish. These fish and wildlife recommendations determined through a consultation process were merged with the needs for other instream uses, such as recreation, navigation and boating.

Any new consumptive appropriation was then provisioned to require that the diversion cease when the flow of the stream falls below the instream flow established in the regulation.

III. Issues and Controversies

"The phrase instream flow in the law does not translate in actual flows in rivers." (Anonymous)

A. Lack of standards

1. Statutory Ambiguities

Even though Washington has extensive laws and policies protecting instream flows, that statutory language is unclear, unmeasurable and vaguely defined. In a report to the Washington Legislative Joint Select Committee, Shupe and Sheik stated, "water statutes enacted in the past decades have tended to simply overlay existing laws without sufficient attention to amending inconsistencies, clarifying intent, and providing clear legislative guidance to administrative programs."

Standards for instream flows have been subject to negotiation on a case-by-case basis, with three different statutes that allow establishment of instream flows

(Revised Code of Washington Chapters 75.20.050, 90.22, and 90.54). The 1949 Act relies on the opinion of the Department of Wildlife or Fisheries that granting a water right would reduce flow to a level no longer sufficient to sustain fish populations. Under RCW Chapters 90.22 and 90.54, two different and potentially conflicting standards have been implied. The terms "base flow" and "minimum flow" can be interpreted as prescribing a relatively low instream flows, whereas the terms "protect" and "preserve" have been interpreted as requiring a high quality habitat and in some cases nothing less than natural conditions.

2. Ecology's Response

The absence of clear standards resulted in Ecology attempting to strike a "balance" between environmental protection and economic development. Up to the early 1980's the focus was mostly to preserve instream flows to protect no less than 90 percent of optimum habitat based on the result of an IFIM study. In attempting, however, to strike a balance, Ecology has satisfied neither prospective water users nor fisheries or environmental interests.

3. Legislative Response

The State legislature considered during several recent legislative sessions, but did not pass, instream flow legislation that would have addressed the ambiguities of the program and clarified the policies. The bills were met with very strong opposition from agricultural, municipal, and

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hydropower interests. The past major policy directive from the legislature came in 1971 with the enactment of the Water Resources Act.

B. Changes to meet new challenges

In the early 1980's Ecology began to establish higher instream flows, focusing the program on Western Washington and developing basin management programs dealing mostly with instream flows protection and less on attempting to address future allocation of water for out-of-stream. These changes were needed to respond to new complex challenges such as salmon protection obligations in the 1985 Canadian - U.S. Treaty, Indian Tribes legal entitlements for both on-reservation water use and off-reservation fisheries, and the creation of the Northwest Power Planning Council by Congress to assess power, fish, and wildlife needs in the region.

1. Response and viewpoints from water interests.

As Ecology proceeded to establish increasingly higher instream flows and new stream closures through basin-by-basin planning, prospective out-of-stream water users became increasingly concerned about securing water supplies to meet projected future needs. Fisheries, tribal, recreational, and environmental interests, on the other hand, view Washington's population and economic growth and the new demands associated with it as a threat to important instream uses. Viewpoints gathered by Steven Shupe from around the state present these major concerns:

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■ Agriculturalists: existing water rights are vested property interests - any changes in law need to acknowledge that.

■ Hydropower interests: hydropower is a desirable alternative, future development should not be constrained for the sake of extreme instream flow protection.

■ Instream flow proponents: water allocation decisions ignored and undermined instream resources; stringent protection of all remaining instream resources is essential.

■ Indian Tribes: need respect for federal laws and treaty rights, enhance not simply maintain existing instream resources.

■ Water supply purveyors: high costs of new supplies should be spread through society as a whole, decisions should reflect regional and local differences.

■ Other parties: wetlands protection, water quality, land use are important issues associated with water allocation decisions, state policies should acknowledge issues of local concerns.

2. Reexamination of the Instream Flow Program

a. Administrative Review

In 1985, Ecology suspended establishment of new instream flow regulations and initiated an in-depth administrative review of its instream flow and surface water allocation program.

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Alternatives for water planning and management strategies including instream flow protection were evaluated and a "preferred alternative" was prepared. This resulted in contentious debate over the issue of instream flow and the need for a clearly articulated water policy, with all key terms defined, inconsistencies eliminated and goals clarified. This spurred the legislature to step in.

b. Legislative Review

A Joint Select Committee on Water Resource Policy was established and an independent fact finder was used to assist the Committee in its review. The fact finder, Steven Shupe, concluded in a report to the Committee "that the laws and policies regarding water resources and instream flows are inconsistent and unclear. There is a need to reconcile policies and set priorities among competing goals, otherwise confusion and inconsistencies typically result as administrative officials struggle to interpret and implement the policies."

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The Joint Select Committee, after studying the report, identified instream resource protection and water planning as the two issues of highest priority for legislative action. However, legislative proposals to deal with the issues generated heated debates similar to reactions to Ecology's preferred alternative.

IV. Instream Flow Protection - Entering a new age

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"Society concerns of yesterday became the political issues of today, the legislated requirements of tomorrow, and the litigated penalties of the day after". (Anonymous)

The public in Washington has a high level of interest in and commitment to environmental protection. Commercial fishing industry and more recently upon water-based recreational activities are an important part of Washington economy. Along with their economic value, there exists a strong emotional attachment to fisheries for sport and commercial purposes.

A. What has changed

There are few doubts that the instream flow program in Washington is at a critical stage. Solutions must be found by the legislature, executive branch, Indian Tribes, and interest groups. A new approach in setting a water resource agenda is needed as old ways of doing business are not working. A new paradigm in policy making has emerged: negotiation and cooperation is preferred to litigation.

1. State/Tribal Relationship

While the administrative agency and the legislature were unsuccessful in resolving issues of instream flow protection, the role of the Tribes with respect to environmental regulation was becoming clear through successful litigation. Tribal governments believe

they have a legal right to participate in water management planning and in setting goals for instream flow protection. Common related objectives between the State and the Tribes have been identified and willingness to jointly pursue these objectives with other means than litigation has been pronounced.

2. Tribal Treaty Rights

Two legal theories are the basis for tribal rights to water resources. "Winters" rights in waters are based on federal reserve waters necessary to fulfill the purposes of the Indian reservation. They have a priority date relating to the time the treaties were signed. Treaty reserved rights to fish implied a right to the water resources necessary to protect the fishery resource and have a priority date of time immemorial. This latter right is currently an issue in Phase II of the Pacific Northwest Indian Fishery Rights litigation known as the Boldt decision. (U.S. vs. Washington). In 1974, Boldt, Phase I interpreted tribal harvest rights for Pacific Northwest salmon runs. This decision dramatically changed Western Washington fisheries management.

3. Cooperative Fisheries Management

In 1984-85 a tribal/state plan for cooperative management of fisheries was developed and approved by the federal court under U.S. vs. Washington. This was the beginning of a new era. Today tribal/state litigation over

fishery issues is the exception. Cooperative resource management is the basis of natural resource management in the State of Washington. It is a unique approach in the nation.

4. Government to Government

This spirit of cooperation was institutionalized in 1983 when Governor Booth Gardner issued a proclamation that a government-to-government relationship respecting tribal sovereignty would form the basis of Washington State's tribal policy. A Centennial Accord was signed outlining implementation measures for this relationship. Subsequently, a Memorandum of Understanding on Environmental Protection was produced jointly by the State and the Tribes.

A Governor subcabinet on water policy was organized and a cooperative government-to-government approach was crafted to deal with statewide water resources planning and instream flow needs. Legislative leaders formally endorsed this approach to water resources by passing legislation calling for cooperative regional planning. Interest groups, local government, and water users helped develop the cooperative process.

B. Cooperative Approach

1. A New Public Policy Coalition

In 1990, two retreats with participants from a broad range of interests endorsed the need for creative and workable solutions based on the concept of cooperative

comprehensive water resource planning. All interests agreed this approach to solving a complex set of issues surrounding decisions on water allocations and instream flow was preferable to litigation. The following interests and organizations endorsed the "Chelan Agreement":

State government (executive and legislative branches), local governments (general and special purpose governments), tribal governments, environmentalists, business, agriculture, and commercial and sports fishing and recreational boating interests.

For many years, these interests had sought to prevail over others in the water decision making process. Through this cooperative process, the Chelan Agreement, all interests have turned from their individual focus to find more creative means of meeting their needs.

2. The Chelan Agreement

a. The Goal of the Agreement

The 20 page Chelan Agreement does not settle water disputes. It does not settle the issues of instream flow protection or out-of-stream needs. Rather, this Agreement sets goals, objectives and processes for settling these issues.

The Chelan Agreement includes as a goal:

"The recognition that actions will be guided by the Tribe's 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 entire 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."

Developing and implementing a program providing for conservation, efficiency, elimination of waste, water reuse, and restoration of riparian habitat areas for water retention is also a goal of the Agreement.

b. Major Elements of the Agreement

Creates a Water Resources Forum with representatives of each of the interests and organizations named in the Agreement. The Forum is to make

recommendations to the State Agencies on statewide policies and guidance.

- A cooperative pilot planning process will be field tested in two pilot basins. Policy disputes including instream flow protection levels will be resolved through mediation.

- Calls for development of criteria for organized response to critical situations which require immediate action.

- Local planning efforts will recognize water availability as key growth factors.

- Recognizes the importance of data management for water management.

- Calls for conservation legislation to remove impediments to conservation, provide incentives, and increase funding of compliance efforts.

- Calls for an on-going information and education program on water management.

V. Conclusion

Washington's Instream Resources Protection Program and more generally its water allocation program faced some very difficult problems that required a reexamination of the statutory foundations of the program and a redefinition of water planning and management objectives. What emerged from the reexamination was the need for better and more comprehensive water planning, a redefinition of the role of the State in setting instream flows, and the introduction of a new public policy coalition in setting the water resource agenda.

A new approach based on cooperation and negotiation has been adopted. The catalyst was the need for the State to meet its habitat protection obligations to the Indian tribes set as a result of litigation. The "Chelan Agreement," viewed as the only likely alternative to the judicial process was produced by a broad coalition of Indian Tribes, government officials, recreationists, business representatives, environmentalists, agricultural interests, and fisheries interests. The Agreement, based on a cooperative process in water management, is highly appraised and is described as a standard by which success in water management will be measured nationwide. This new mediative, cooperative policy making approach is making a difference in that the multiplicity of players each with separate interests, political agendas and constituencies, came

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together this year to support the enactment of legislation dealing with conservation, integration of water resource planning and growth management, funding of data management and regional planning, and establishing a mechanism to respond to critical situations which require action now.

The three governmental entities (state, tribal, and general purpose local government) are now involved in a new partnership which offer the most promise for implementation of instream flow protection program. Fulfilling that promise will require continued commitment to cooperative water management.

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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 deliv-

ered 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 government-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 the 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:

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.

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 developed a Memorandum of Understanding on Environmental Protection (attached) for the purpose of initiating a cooperative approach to protection, enhancement, and restoration of fisheries habitat. Neither this agreement or the Environmental Protection MOU is a settlement of Phase II, U.S. v. Washington, nor shall either be construed to limit the right of any party to act in any administrative, judicial or legislative forum to protect its rights.

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3 . That the water resource planning process described in this Agree-
4 ment shall in no way affect existing water rights without the
5 consent of the water rights holder. Nor shall this planning
6 process necessitate, require or limit any formal determination or
7 resolution of any legal dispute about water rights under state or
8 federal law or Indian treaty. This process is an alternative
9 process, voluntarily designed by the affected parties to build on
10 the existing system of water rights through a cooperative, flexible
11 process to plan and manage the uses of Washington's water
12 resources.
13
14 . Develop and implement a program providing for conservation, effec-
15 iency, elimination of waste, water reuse, and restoration of
16 riparian habitat areas for water retention, including the develop-
17 ment of legislation and/or regulations where appropriate.
18
19 . Assist the Department of Ecology in locating the resources for
20 compliance, enforcement and administration of existing laws and
21 regulations.
22
23 . That the participants remain fully committed to the planning
24 process described in this agreement.

25
26 **Planning Guidance:**

27
28 Planning guidance to local/regional planners is provided by the goals
29 and principles of this agreement, and the fundamentals of state water
30 resource policy as listed in the Water Resources Act of 1971, as set
31 forth in RCW 90.54.020, (attached for guidance). The perspectives of
32 each caucus on water resource management are attached.
33

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

43 ² Any test currently found in any state law used to allocate, determine, or prioritize water rights (such as the "maximum net
44 benefits" test) has no application to tribal governmental interests in this cooperative process, unless they determine otherwise. Neither
45 the participation by all governments and other organizations and individuals nor their concurrence in generally applicable water resource
46 guidelines, standards or criteria shall be deemed a waiver of any federal law obligations in regard to the rights of any of those parties or
47 their members.
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4 **III. WATER RESOURCES FORUM**
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6 The Chelan Agreement recommends the creation of the Water Resources
7 Forum (Forum). The Forum will have the same number of representatives
8 from each caucus as the Interim Team: 6 Tribal, 3 State, 3 Local
9 Government, 3 Business, 2 Fisheries (1 sports and 1 commercial), 1
10 Recreational, 3 Environmental, and 3 Agriculture. Each caucus will
11 select its own representation. Each caucus will assure its own
12 internal communication. Each participant will have his/her own voice
13 in decision making.

14
15 **General Function:**

16
17 The general function of the Forum will be to:

- 18
19 . Shape state policy
20
21 . Clarify existing terms and policies
22
23 . Recommend statutory changes as needed
24
25 . Provide policy guidance, if necessary, in addressing critical
26 issues.

27
28 Generally, the Forum will perform the following functions and tasks
29 in a prioritized order which recognizes that work related to specific
30 regional planning processes shall be secondary to policy guidance:

- 31
32 1. Serve as a mechanism to review water resource planning and
33 implementation.
34
35 2. Continue the cooperative nature of the Chelan process.
36
37 3. Provide creative solutions and options on issues of statewide
38 significance, such as policies guiding the processing of pending
39 water right applications or issues determining hydraulic continu-
40 ity.
41
42 4. Develop criteria for selection of pilot projects.
43
44 5. Monitor, evaluate, report on and recommend changes to the pilot
45 planning process.
46
47 6. Make interim modifications and amendments to the pilot planning
48 process.
49
50 7. Reconvene a plenary body as represented at the Lake Chelan retreat,
51 if significant changes are needed for the continued functioning of
52 the planning process.

1
2 8. Assist in making the transition from pilot projects to systematic
3 planning statewide.

4
5 9. Provide assistance and support to the regional planning process.

6
7 **Decision Making:**

8
9 The Forum shall make decisions by consensus. Consensus is defined as
10 no negative votes, with abstentions allowed. If no consensus is
11 reached, such will be noted and all the information generated during
12 the process will be collected and made available to all participants.

13
14
15 The Forum will make recommendations to the state agencies. There is
16 a commitment from the Department of Ecology and other relevant state
17 agencies to give substantial weight to the consensus agreements
18 reached. The Forum will have discretion in setting its own agenda.
19 Items for consideration can come from:

20
21 1. The Forum's own initiative

22
23 2. Response to agencies' requests

24
25 3. Response to requests for specific policy guidance from other
26 organizations (particularly regional planning groups).

27
28 The Forum's charge shall be on issues of statewide policy or guidance,
29 NOT day-to-day management.

30
31 **Review and Evaluation:**

32
33 The Forum will review and evaluate the implementation of the Chelan
34 Agreement, including the Guidelines developed for this process. (See
35 Section XI.) Participants in regional planning processes and other
36 water projects shall be provided the opportunity to participate in
37 this review. The Forum will prepare a report for use in review by
38 legislative bodies. The Forum will report on progress by December 31,
39 1992, and submit a final report at the completion of the pilot
40 projects. (See section IV.)

41
42 The Washington State Legislature shall review the pilot projects, the
43 effectiveness of the Forum and the effectiveness of water resource
44 planning and management in the State of Washington.

45
46 In conducting the review of the pilot projects, the Chelan partici-
47 pants recommend that the legislature use the following to measure
48 success/failure:

49
50 . Were the goals of the pilot projects satisfied? How many? Which
51 ones?
52

- 1 . How efficient and cost effective were the pilot projects?
- 2
- 3 . Was adequate funding provided for an effective planning process?
- 4 If not, what was the impact?
- 5
- 6 . Do the plans satisfy the needs and interests of all of the
- 7 caucuses?
- 8
- 9 . Did the plans meet the schedules and deadlines?
- 10
- 11 . Did the plans provide for broad-based participation?
- 12
- 13 Funding for the Forum is essential, but the level and mechanism is yet
- 14 to be determined. Travel and per diem will be provided for Forum
- 15 members (which will require a statutory authority). Staff for the
- 16 Forum is essential so as not to deplete the time of State staff. If
- 17 there are sub-groups of the Forum, they should also be funded. The
- 18 Interim Team will serve as the Forum until such time as the Forum is
- 19 convened.

IV. PILOT PLANNING PROCESS

To Initiate Water Resource Planning:

- 1. The water resources planning process may be triggered by either of the following methods:
 - a. 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.
 - b. Any of these governmental entities may convene preliminary discussions to begin the planning process.
- 2. 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:

- 1. The petitioner may direct its request to initiate a planning process to a general purpose local government, tribe or the Department of Ecology.
- 2. 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

1 governments, to determine their willingness to participate in and
2 pay for the planning process. The government entities may prepare
3 an intergovernmental agreement addressing the proposed planning
4 process. The governmental entities will also conduct the public
5 process and outreach to inform other interested parties of the
6 opportunity to participate in the regional planning process in
7 order to facilitate the formation of caucuses. If mutually agree-
8 able, the entity and the Forum may jointly conduct these activ-
9 ities.

10
11 3. An invitational meeting will be called, and at that meeting the
12 caucuses and expected agencies will be identified, and a time line
13 will be set for the scoping process.

14
15 4. During the Scoping Process, the boundaries, time frames, caucuses
16 and representatives of those caucuses will be identified, and a
17 coordinating entity will be chosen.

18
19 5. Participation in the Regional Planning Effort: Opportunity to
20 participate in the regional planning effort must be extended to
21 representatives of affected state and local governments and Indian
22 tribes. It must also be extended to representatives of the fol-
23 lowing interests:

- 24 Agricultural
- 25 Environmental
- 26 Fisheries, both sport and commercial
- 27 Recreational
- 28 Business

29
30
31 6. Additional caucuses may be added by consensus of the existing
32 regional planning participants. If a group is not granted caucus
33 status, it may petition the Department of Ecology for caucus
34 status. The petition shall justify the need for the new caucus
35 based on the existing caucuses' goals. In reaching its decision,
36 the Department of Ecology may consult with the Water Resources
37 Forum.

38
39 7. Representatives will be chosen by each caucus. Government and
40 interest groups who have responded affirmatively shall determine
41 whether the number of parties participating is enough to allow the
42 planning effort to commence.

43
44 8. Coordinating Entity: For the purpose of regional planning
45 processes, any participating government entity or combination of
46 governmental entities chosen by a consensus of the participating
47 caucuses may be the coordinating entity. The coordinating entity
48 role is more appropriate for a general purpose government due to
49 their broad perspective. However, some flexibility and collabor-
50 oration is needed regionally since local governments may lack the
51 capacity to conduct a water planning process.

1 9. The coordinating entity will be responsible for administering the
2 process and entering into contracts agreed to by the planning
3 group. The coordinating entity shall also be responsible for
4 coordinating intergovernmental agreements among the participating
5 entities, as necessary.
6

7 10. Those federal agencies that have an impact or would be
8 impacted by regional planning should be invited to participate
9 in whatever manner is dictated by that region.
10

11 11. In regional planning, all appropriate state agencies shall
12 participate, including the Department of Ecology. Ecology's
13 role in finalizing planning projects will be to approve or
14 remand. (See p. 11, State Review of Completed Plans.) The
15 reasoning for this is that the final rule-making role of
16 Ecology on approved plans is informed by intervening steps
17 (i.e. State Environmental Policy Act and Administrative
18 Procedures Act) and is therefore legally appropriate.
19

20 **Dispute Resolution:**
21

22 Policy disputes will be resolved, where possible, through mediation.
23 The Water Resources Forum may also provide assistance to resolve
24 disputes at the regional planning level.
25

26 Technical disputes may be resolved through the use of a technical
27 advisory team or by retention of an agreed upon outside technical
28 expert.
29

30 **Boundaries:**
31

32 Boundaries will be selected during the original scoping process and
33 submitted to Ecology for review and approval. The planning region
34 will be one or more Water Resource Inventory Areas (WRIA's), unless
35 there is a specific need for a smaller area within a WRIA which is a
36 specific hydrologic area. Larger planning units/regions will be one
37 or more contiguous WRIA's or other contiguous hydrologically justi-
38 fiable units. If there is no need for coordination among more than
39 one WRIA, one WRIA can constitute a "region."
40

41 Other than planning by an Indian tribe within its reservation, any
42 water resource planning activities within the exterior boundary of a
43 reservation can only be done by mutual agreement of the affected tribe
44 and the state.
45

46 For the purposes of the pilot regional planning processes, the
47 Department of Ecology will select the regions, based on the recom-
48 mendations of the Forum.
49

1
2 All planning boundaries will be determined by using resource- and
3 user-based factors. A checklist incorporating the following factors
4 should be developed by the Forum to ensure their consideration in
5 determining boundaries:
6

7 Resource Based Factors
8

- 9 1. Hydrology: Planning boundaries should primarily reflect
10 hydrological, rather than political boundaries. This may include
11 groupings of watersheds which have several characteristics in
12 common such as geological conditions, gradient, precipitation
13 pattern, etc.
14
- 15 2. Fisheries Management: Areas containing stocks which are managed
16 under similar fisheries allocation and enhancement goals should be
17 grouped together. Major watersheds have specific enhancement goals
18 and often have fisheries rebuilding strategies which would be
19 affected by water resource planning. Some regions are already
20 grouped for harvest management purposes; for example, Hood Canal
21 is considered a "region of origin." It should be noted that
22 watersheds can have extended areas management. For example, the
23 depleted coho runs of the Skagit system impact management in all
24 intercepting fisheries including the Strait of Juan de Fuca and
25 Ocean.
26

27 User Based Factors
28

- 29 1. Similar Out-of-Stream Uses: Watersheds exhibiting similar types
30 of uses can be planned collectively more easily than diverse uses.
31 Also, the broader geographical planning base gives planners greater
32 flexibility of methods to achieve their goals. Examples of dis-
33 similar uses would include municipal, industrial and agricultural,
34 since these uses have different seasonal patterns and distribution
35 systems. An area containing several similar uses should probably
36 constitute a single planning unit.
37
- 38 2. Similar Land Use Patterns: Characteristics would include
39 rural/urban, agricultural, forest based, industrial, municipal,
40 growth pattern and rate.
41
- 42 3. Water Supply Linkages: Watersheds which involve out-of- basin
43 transfers need to be linked for planning purposes. For example,
44 Dungeness River water is transferred to the Sequim watershed, even
45 though the two areas are in different WRIA's.
46
- 47 4. Manageability of the Process: Factors which may lead to grouping
48 or splitting areas include the population base, size of area,
49 availability of a key governmental and affected interest groups,
50 and other public education efforts. Some areas which have been
51 involved in water quality plans may already have formed active
52 watershed management committees. Areas which cover wide geographic

1 territories with sparse populations may need to group WRIA's since
2 key jurisdictions would be required to participate in several
3 forums.

4
5 **Linkages:**

6
7 Regional planning efforts need to recognize the existence of and
8 relationships between a variety of other planning activities. In
9 scoping and developing regional plans, participants should avoid
10 duplication. In developing a water resource plan:

11
12 * There is recognition that water withdrawals can impact water
13 quality. Therefore water quality, both potability and envi-
14 ronmental quality issues, when related to water use and avail-
15 ability, should be integrated into the planning process.

16
17 * Local land use planning and permit decisions which will protect the
18 water resource or create demands for water shall be compatible with
19 water resource planning. Local governments shall provide for the
20 protection of the water resource and shall link development and
21 land use planning and zoning to water availability.

22
23 * Consideration should be given to what, if any, linkages between
24 on-reservation and off-reservation water use and management exist
25 or should be incorporated into a water resource plan. Reservations
26 are legally distinct units with a different body of applicable
27 laws.

28
29 * Other federal, state and local programs which impact water resource
30 use and availability should be integrated with the water resource
31 planning process.

32
33 The following are examples of such processes or programs:

- 34
35 . U.S./Canada Pacific Salmon Treaty
36 . Columbia River Systems Operation Review
37 . FERC licensing of hydropower facilities
38 . Forest Service Planning
39 . U.S./Canada Flow agreement on Columbia River
40 . Bureau of Reclamation Operations/Contracts
41 . Court Approved U.S. v. Oregon Columbia River Fishery
42 Management Plan
43 . Northwest Power Planning Council's Fish and Wildlife Program
44 . Various Wild and Scenic River proposals and related planning
45 processes
46 . Columbia Gorge National Scenic Area planning process
47 . Watershed planning process by the Department of Fisheries
48 . Watershed planning required by the Puget Sound Water Quality
49 Authority
50 . Comprehensive Hydroelectric planning process
51 . Growth management process
52 . Coordinated water system planning process

- 1 . Game Fish 2000 plan by the Department of Wildlife
- 2 . State Scenic Rivers program
- 3 . Groundwater Management area program
- 4 . Priority Species and Habitat Project (WDW)
- 5 . U.S. v. Washington Fisheries Management Plans
- 6 . Water System Comprehensive Plans
- 7 . Land Use Plans
- 8 . Threatened and Endangered Species Act

9
10 **Proposal/Scoping:**

11
12 The regional planning group will complete the scoping process by
13 determining the following:

14
15 1. Participation and workplan

- 16
- 17 a. List of participants to be included, name, affiliation, and
- 18 alternates
- 19 b. Designated coordinating entity(ies)
- 20 c. Intergovernmental agreements necessary to implement planning
- 21 process
- 22 d. Milestones and workplan
- 23 e. Public involvement and SEPA compliance
- 24 f. Public education elements

25
26 2. Identification of resources needed for planning process from state
27 and regional participants

- 28
- 29 a. Staffing requirements
- 30 b. Technical expertise
- 31 c. Funding
- 32 d. Other commitments

33
34 3. The scoping process shall consider and determine at a minimum which
35 of the following elements shall be addressed in the plan:

36
37 a. Groundwater

- 38
- 39 i. water quality protection
- 40 ii. conservation
- 41 iii. recharge
- 42 iv. inventory of current and exempted uses/data collec-
- 43 tion/methodologies
- 44 v. out of area distribution

45
46 b. Surface Water

- 47
- 48 i. water quality
- 49 ii. conservation
- 50 iii. minimum instream flows
- 51 iv. priority of use
- 52 v. inventory of current and exempted uses/data

- 1 collection/methodologies
2 vi. habitat
3 vii. out of area distribution
4 viii. peak flow management
5
6 c. Consumptive Needs
7
8 i. Domestic
9 ii. Agricultural
10 iii. Hatcheries
11 iv. Hydroelectric
12 v. Industrial
13
14 d. Non-Consumptive Needs
15
16 i. Instream Flows
17 ii. Recreational
18 iii. Aesthetics
19 iv. Ecosystem
20 v. Cultural
21 vi. Rivers assessed as eligible for designation as state
22 scenic rivers
23 vii. Rivers assessed as eligible for designation as
24 Federal wild and scenic rivers
25 viii. Fish and Wildlife
26 ix. Hydroelectric
27
28 e. Relationship between surface and groundwater
29
30 4. Description of relationship to other planning processes (see
31 above).
32
33 The completed scoping document will be submitted to the Department of
34 Ecology.
35
36 State Review/Approval of Scoping:
37
38 The Department of Ecology will review the scoping document for
39 completeness and compliance with applicable state and federal laws and
40 regulations, and water resource planning guidelines. In reaching this
41 decision, the Department of Ecology shall have the responsibility of
42 involving other state agencies where their participation is necessary
43 to the success of the proposed planning effort. This will ensure the
44 involvement of state agencies necessary to assist in the planning
45 effort and to implement the plan. If found satisfactory, the regional
46 planning process may begin. If not in compliance, Ecology will remand
47 the scoping document to the regional planning group for modifications.
48
49 Plan Development and Decision-Making:
50
51 The regional planning group will construct a plan that addresses the
52 elements identified through the approved scoping process. The plan

1 must be consistent with applicable state and federal laws and guide-
2 lines. The plan development process will be integrated with the SEPA
3 process.³ Throughout the plan development process, the regional
4 planning group will receive public comments as required by state law
5 and the plan document will be written as the SEPA document. In addi-
6 tion to the appeals processes detailed herein, plan development will
7 be required to be integrated with the SEPA process.

8
9 Each caucus will have one voice in decision-making. The planning
10 group will attempt to reach consensus whenever possible. In cases
11 where consensus is not possible, decisions will be made by a consensus
12 of the government caucuses and a majority of the interest group
13 caucuses. Minority reports, if prepared, shall be included in the
14 plan document.

15
16 Where consensus among the governments (tribal, state, and local
17 governments) and/or a majority of the interests is not achievable, the
18 Department of Ecology shall assume the lead role in assuring that the
19 plan is completed for the pilot projects in a timely fashion, not to
20 exceed twenty-four (24) months.

21
22 **State Review of Completed Plans:**

23
24 The Department of Ecology shall review the completed plans for
25 compliance with applicable federal and state laws and regulations,
26 including the state Administrative Procedures Act and SEPA, and
27 conformance with Ecology's water resource planning guidelines devel-
28 oped under this process. (See Section XI.) In conducting such a
29 review, Ecology shall give substantial weight to the regional plan
30 in meeting the fundamentals of the Water Resources Policy Act of 1971
31 (RCW 90.54), Memorandum of Understanding, and the agreed-to goals.
32 All plans shall recite "nothing herein authorizes the impairment of
33 any treaty or other right of an Indian tribe or member under federal
34 law."

35
36 The state shall approve or remand the plan within 90 days. Extension
37 may be recommended by the Water Resource Forum. Public comment will
38 be taken throughout the review of the plan. A petition for review on
39 process grounds may also be made to the Department of Ecology when it
40 reviews the final plans for consistency with state guidelines. The
41 Department may approve the plan as written or it may remand the plan
42 to the regional planning entity for revisions. The Department may not
43 make changes to the plan.

44
45 **Appeals Process:**

46
47 There will be no appeal of the planning effort during the planning
48 process. The appeals mechanisms available to challenge a completed

49 ³ This agreement will not result in SEPA being made applicable to tribal water planning within Indian reservations nor will SEPA
50 compliance necessarily satisfy federal law in regard to treaty and other reserved rights.

1 regional water resources plan will be those currently available under
2 existing law. Current rights and standing to appeal are not dimin-
3 ished in any way by the proposed planning process. Appeals of a plan
4 can be made to the appropriate court. In addition, actions taken by
5 the state or local governments to implement the plan, such as permits,
6 regulations, or local ordinances can be appealed to the Pollution
7 Control Hearings Board, or the appropriate appeals body.

9 **Implementation:**

10
11 Once a regional plan is completed, the Department of Ecology will
12 prepare and adopt implementing regulations as required by law. Local
13 governments will prepare and adopt any ordinance needed to implement
14 the plan at the local level. Once adopted, the regulations and
15 ordinances would be binding on the state and local jurisdictions in
16 their related planning and permit activities. The Department of
17 Ecology will be the state entity that reviews the regional plans for
18 compliance with state law and state standards. The Department of
19 Ecology, in cooperation with other state agencies, relevant federal
20 agencies, tribal governments, and other interested local governments,
21 will also perform the preliminary basin inventories that precede the
22 regional planning processes.

23 **Evaluation, Guidance, and Adaptation of Process:**

24
25 The planning process described in this Agreement is intended to be
26 applied to all regions of the state in need of water resource planning
27 and will be implemented in at least two regions within the next three
28 years. It is the intent of the Forum to evaluate the process period-
29 ically, identify improvements, and adapt the process accordingly for
30 future applications.

31
32 While the interests and organizations who developed this planning
33 process sought primarily to achieve a cooperative process for water
34 resource planning, they recognized that the broad goals of this effort
35 should also be integrated by the Department of Ecology into its on-
36 going water resource management activities. Further, local govern-
37 ments recognize that their ongoing land use or water resource activ-
38 ities also could be affected by the goals of this cooperative process.

39
40 Notwithstanding the commitment to cooperation, the interests and
41 organizations supporting this Agreement recognize that disputes may
42 arise in regions where a cooperatively developed plan has yet to be
43 implemented. The cooperative nature of the planning process described
44 in this Agreement is intended to encourage resolution of such dis-
45 putes, where possible, through mediation or other assistance.

48 **V. ORGANIZED RESPONSE TO CRITICAL SITUATIONS** 49 **WHICH REQUIRE ACTION NOW**

50
51 In watersheds other than those involved in the two pilot projects,
52 there will need to exist a mechanism to address issues and disputes

1 over water. This mechanism establishes the ability to deal with crit-
2 ical situations and lists some of the tools for resolving issues in
3 these areas. It is intended to take advantage of existing laws and
4 governmental structures and is explicitly intended to notify and
5 inform the parties of actions which may have an impact on the
6 resource. It is not intended to expand on existing law, or otherwise
7 alter the rights and responsibilities of the governmental entities.
8 An emergency regulation, followed by a permanent regulation, shall be
9 enacted establishing the mechanism to deal with critical situations.

10
11 This mechanism will be used when one of the following actions occurs:

- 12
13 1. Any of the three governmental entities (State, Tribal, General
14 Purpose Local Government) find that a need exists to apply the
15 mechanism. Such a finding can include the need to facilitate
16 communication and coordination on issues relating to water quantity
17 and related water quality concerns.
- 18
19 2. Any of the governmental entities applies their respective permit-
20 ting processes to a basin or WRIA which has been designated as
21 "critical situations" on the basis of limitations as to water
22 supply and related water quality concerns.
- 23 3. If a special purpose local government requests that the mechanism
24 be initiated to deal with the critical situation, the general
25 purpose local government, which includes a portion of the special
26 purpose district service area, shall initiate the mechanism on
27 their behalf.

28
29 The mechanism shall permit the affected governmental entities to
30 evaluate existing conditions or proposed actions which might have an
31 impact on the resource. Under this mechanism, a basin or WRIA could
32 be classified by agreement of the governmental entities into one of
33 two categories:

- 34
35 A. Critical Resource Impact - designating the water resource as being
36 over-appropriated or adversely impacted by water quality issues.
37 Any action in such a basin or WRIA which will likely have an
38 adverse impact on the instream resources as expressed in the
39 planning guidance of this Agreement would likely be delayed or
40 denied if such action might further harm the resource.
- 41
42 B. Probable Resource Impact - designating the water resource as being
43 in need of further evaluation to determine the nature and extent
44 of the impacts resulting from existing conditions or proposed
45 actions. After full evaluation, the water resource shall be
46 reclassified as having either a critical resource impact or no
47 impact, depending upon the findings.

48
49 When a proposed action or existing condition requires further eval-
50 uation or data collection, a number of tools shall be applied as
51 necessary to protect the resources. These include, but are not
52 limited to, targeted conservation efficiency, re-use; compliance and

1 enforcement; dispute resolution assistance, Memoranda of Understanding
2 and other agreements; local government restrictions on permit issuance
3 or moratoria; basin withdrawal by adoption of administrative regul-
4 ations under RCW 90.54.050 or limited state permit issuance. The
5 Forum shall review the need for guidelines to assist in the
6 implementation of this section.

7 8 9 VI. WATER RESOURCES PLANNING AND GROWTH MANAGEMENT

10 Recognizing the need to integrate the planning process outlined in the
11 Chelan Plan with other land and water resource planning processes, the
12 Chelan Plan recommends:
13

14
15 1. Amending HB 2929 to include a water resource component. This
16 component shall include, among other provisions:

17
18 a. Local planning efforts shall recognize water availability and
19 quality as key factors in an area's "carrying capacity."
20

21 b. Wherever state, tribal, or federal authorities believe there
22 to be problems with water availability or quality that will
23 affect a local governments permitting process under Section
24 63, these cases will receive first access to funding for
25 technical data analysis. Such technical data analysis shall
26 be completed in a timely manner.
27

28 2. Amending HB 2929 to include specific provisions whereby a model
29 intergovernmental agreement, similar to the "Centennial Accord,"
30 between local (including special districts) and tribal governments
31 is developed and adopted.
32

33 The Chelan Plan also recognizes that water resource planning, as
34 outlined in this document, will not take place on tribal reservations
35 without the consent of the appropriate tribes.
36
37

38 VII. DATA MANAGEMENT

39
40 The Chelan Agreement recognizes the importance of data to water
41 management. The Chelan Agreement supports the continuing efforts of
42 the Data Management Task Force in the development of a data management
43 plan and the collection of essential data necessary, among other
44 things, to commence the pilot planning process. The Chelan Agreement
45 also supports open access to any information collected and managed by
46 all state agencies pursuant to state law. For efficiency, the
47 collection, analysis, and management of water resource data will be
48 done cooperatively with state, tribal, local and federal governments.
49
50

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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:

1. Removing impediments to conservation, including the effect on wetlands loss due to improved efficiencies.
2. Providing incentives to promote conservation, water use efficiency, and re-use of water.
3. Providing funding for incentives, particularly for problem areas.
4. Determining how this program fits within the Department of Ecology's compliance effort.
5. Determining the relationship of conservation to the waste of water.
6. Removing impediments such as taxation on water use efficiency improvements.
7. 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 task force will complete its effort by January 31, 1991. The task force should be prepared to provide a briefing before the January 31, 1991, deadline to appropriate legislative committees.

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

1 existing information dissemination processes and integrate with and
2 possibly delegate to, the Environmental Education Council established
3 pursuant to the Environment 2010 Executive Order. The education
4 strategy should emphasize cross-cultural training for all water
5 resource planning participants.

6
7
8 **X. FUNDING REQUIREMENTS AND STRATEGIES**

9
10 (Reserved)

11
12
13 **XI. STATEWIDE GUIDANCE**

14
15 The development of guidelines and principles is essential for the
16 state to fulfill its stewardship role for resources. Guidelines
17 should be developed as soon as possible. Guidelines will speak to the
18 actual outcomes sought in plans. It is accepted that the 1971 Water
19 Resources Act, and Memorandum of Understanding on Environmental
20 Protection (attached) are the starting point for this planning
21 process, but they need clarification.

22
23 These general guidelines must be developed before the pilot projects
24 begin. The Interim Team should consider guidelines or pass the
25 responsibility on to the Forum.

26
27 Guidelines will be in place during the duration of the pilots, but
28 will be reviewed at the end of the projects. It is recognized that
29 they will probably need refinement. The guidelines will be applicable
30 to all water resource planning subject to state jurisdiction and
31 control.

33

33

33

COMPREHENSIVE WATER RESOURCES PLANNING



The Memorandum of Understanding: Partnership of Responsibilities



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

for copy of booklet, contact Washington Dept of Ecology,

(206) 459-6055

3

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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
and Heidi Sherk, Research Associate**

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*For copy of booklet, contact Washington Dept. of
Ecology (206) 459-6055.*

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