Tribes and Watersheds in Washington State[1]

By

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Jane is a new employee in the Natural Resources division for X Indian Nation, located within the geographical boundaries of Washington State. Her supervisor has just given her a copy of the Washington state Watershed Management Act of 1998 on "collaborative watershed planning" and asked her to familiarize herself with this legislation and the issues it raises. The legislation allows tribes in specific watersheds to join with local governments, state agencies, and local citizens to develop watershed management plans. Jane's supervisor wants her to write a report on her findings and to make a recommendation about whether X Indian Nation should participate in this collaborative planning. As Jane reads the legislation and begins to understand all of its ramifications, she realizes that she is going to have to learn a lot of background information before she can make a recommendation. She realizes that she is going to have to learn something about state-tribal relations. She already knows that tribes and states often have difficult relationships. After this she needs to review federal and state water policy so she understands the difference between water quality issues (federal) and water quantity issues (state). She then has to make sure that she knows the important details of federal Indian reserved water rights and off-reservation Indian water rights in Washington State. Finally, after reviewing the legislation itself, she will be prepared to make a recommendation on watershed planning.

Section I Introduction: Watersheds & Watershed Planning

Indian tribes in the Pacific Northwest continue to work hard to implement their treaty rights and maintain their status as sovereign governments while participating in meaningful dialogue, and engaging pro-actively with their neighbors on issues of common interest. One of these important issues is watershed planning.

The rivers and marine waters provided abundant resources for the original inhabitants of the land that is now Washington State. The native people of the area, particularly those in Western Washington of Coast Salish descent have always known that their survival depended on clean, fresh water. They lived in harmony with nature and thus protected their natural ecosystems, their watersheds, and subsequently their culture. The coastal and Columbia River tribes have always relied heavily on salmon for subsistence as well as a trading commodity. The native peoples would catch the salmon as the fish returned up the rivers to their natal streams, only harvesting what they needed so that most of the fish remained in the streams to swim further up-stream to spawn. This natural method of conservation ensured that the fish would return every year. Thus watersheds have been historically critical to the native people of the Pacific Northwest.

A watershed is the area of land that drains to a larger stream, or to a lake, estuary, or to the ocean. A watershed may be very large and drain 250,000 square miles such as the Columbia River or it may be very small and drain an area such as the 250 square mile Skokomish River watershed which discharges into Hood Canal. The native people would utilize various parts of their watershed in their seasonal rounds of hunting, gathering, and harvesting salmon.

Today, in the twenty-first century, the watersheds are not thought of as geographical and cultural units, but are thought of in terms of who owns the land that the rivers and streams flow through. Patterns of ownership are complex and do not often coincide with watersheds. In Washington State the higher elevations are often lands owned and managed by the federal government: national forests and national parks. Lower elevation lands with timber are either owned by private timber companies or are state lands managed for timber production. In the valleys are farms and ranches. At the mouths of rivers are urban areas, often so large that they are moving further and further up the watershed such as Seattle. Figure 1 illustrates how watersheds work. (Clean Water Education Partnership)

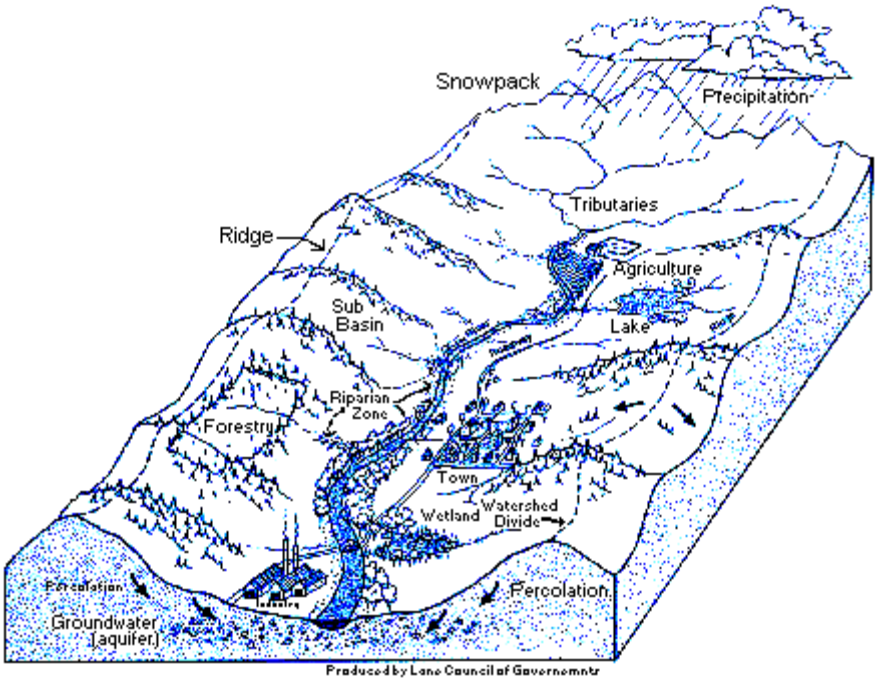

Figure 1: An Example of a Watershed

Two centuries of white settlement brought profound changes to the lands and waters of the Pacific Northwest as well as to native cultures. Indigenous people did not know of land tenure or property boundaries. These were foreign concepts. The treaties signed by tribal representatives ceded certain territories, but allowed continued use of the ceded land for fishing, hunting and gathering. As white settlement continued the rivers and watersheds were transformed by the withdrawal of water for irrigation, by the building of

dams for hydropower and flood control, by the harvesting of timber with the resulting severe impacts on forest cover, river riparian zones, and the quality of water in the streams and rivers. In addition, rivers have been impacted by the expansive growth of cities and ports at the mouths of the rivers and the resulting pollution from urban growth. Over fishing and the continued degradation of fish habitat resulted in the decline of the salmon that were once so abundant in the rivers and streams.

By the mid 1980's it was clearly recognized that wild salmon were in danger of extinction. Furthermore it was acknowledged that activities in the watersheds such as forestry, agriculture, grazing, industrial activities, urbanization, water pollution and dams had hastened this decline. Attention then focused on how watersheds as distinct units could be better taken care of to restore some of their former functions such as water quality, the amount of water in the stream or river, and fish habitat. This movement came to be called watershed management and watershed planning. After the growth of the environmental movement in the 1970's some people thought it was better to work on local issues such as the region's rivers and water, rather than on national issues. The idea of a watershed as a "bioregion" that could be looked at as a whole began to emerge during this period. The needs of the watershed could therefore be addressed irrespective of political boundaries such as county and even state jurisdiction and the various public and private ownership patterns. From this emerged the idea that the people in the region were "stakeholders" in this process and could engage in collaborative watershed activities.

The term "stakeholders" came to mean the people engaged in the collaborative planning activities such as tribes, representatives of government agencies whether federal, state, or local, irrigation districts, environmental groups, and landowner representation from farmers, timber companies, etc. The definition of who was a stakeholder depended on the circumstances of the specific watershed.

However, tribes do not regard themselves as stakeholders. Nor are they interest groups. Rather, they are sovereign governments with inherent powers to govern themselves. Indian tribes will interact with state governments, but they will usually only do so as sovereigns on a government-to-government basis. Jane understands that this is based on the history of tribal – state relations in the United States.

Discussion questions: Do you think a watershed, rather than a reservation, county or state, is a useful planning unit? If Jane recommends that X Indian Nation join the watershed planning process, what issues should the tribe put on the table?

Section II Tribal - State Relations

Jane knows that the primary relationship that Indian tribes have is with the federal government. The treaties were negotiated and signed with the United States government. A treaty is a legally binding contract between two sovereign nations that details the terms of the agreement between them. (States and Tribes, 1995, p 4) The U.S. Supreme

Court defined the relationship between Indian tribes and state governments in 1832. In *Worchester v. Georgia*, Chief Justice Marshall wrote: "The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States." (Wilkinson & AIRI, 2004, p.150) States have no authority over Indian tribes. Legal scholar Charles Wilkinson states: " The general principle that state law does not apply to Indian affairs in Indian Country without congressional consent has been recognized consistently since it first was formulated by the Supreme Court in …1832."(Wilkinson &AIRI, 2004, p. 40.)[2] Thus state governments do not have any regulatory or taxing authority over Indian country.

Jane realizes that this often irks the state governments because they think they should have such power! And many ordinary citizens don't understand this either. Historically, it has been very difficult for states to understand that while an Indian reservation is located geographically within a state's boundaries, the state government has no governmental jurisdiction over it. State governments have periodically tried to assert their authority (in many different ways) because they often refuse to perceive Indian tribes as separate, sovereign entities.

Jane knows that as the tribes have expanded their capacity to exercise self-governance and the visibility of tribal governments has increased in recent years, it has become more important for the states to interact with tribes on a government-to-government basis. Washington State has moved in this direction. The Centennial Accord was signed by federally recognized tribes in the State and Governor Booth Gardner in 1989. This declared that it was State policy for executive branch agencies to work with the tribes on a government-to-government basis on issues of mutual concern. In 2000 the Millennium Agreement was signed by Governor Gary Locke, Attorney General Christine Gregoire, and tribal chairs as a re-affirmation of the Centennial Accord.

Jane will keep these important points in mind as she learns more about the state watershed planning process. Since this is a Washington State law, she wants to make sure that it recognizes tribal sovereignty and government-to-government relations between the tribes and the State.

Discussion questions: Why do states think they have authority and jurisdiction over Indian tribes and reservation lands? How does this potential tribal – state conflict impact Jane's recommendation about the X Indian Nation joining the watershed planning process?

Section III Federal and State Roles in Water Policy

Jane understands that she has to be very clear about the development of federal and state water policy and Indian reserved water rights. These, she realizes, are the basic elements of watershed planning.

[2] "Indian Country is all the land located within the boundaries of an Indian reservation, regardless of ownership. Thus land owned by non-Indians, rights-of-way through a reservation, and other in-holdings are all in Indian country.

Federal water policy

In the 1800's the newly established government of the United States was interested in rivers as transportation corridors. Navigable rivers came under the jurisdiction of the new federal government. Flood control also became an issue that the federal government dealt with in the later 19th century. The U.S. Army Corps of Engineers would come to play a dominant role in flood control, and later become identified with many of the problems caused by dam building. Another interest of the federal government was facilitating settlement of the west. The western regions of the country were arid; clearly irrigation would be needed to encourage people to populate and farm these lands. The federal government was the only entity that could provide the impetus and funding for such large scale irrigation projects. The 1902 Reclamation Act set up what eventually became the Bureau of Reclamation to provide irrigation in 16 western states. During the early part of the 20th century the generation of hydropower became another federal objective. The Federal Power Commission was created in 1920 with the responsibility of licensing nonfederal power projects on navigable rivers. The Federal Energy Regulatory Authority (FERC) continues this responsibility today.

By the end of the first half of the 20th century the concept of integrated river planning had evolved. This planning meant the development and use of the rivers, not their preservation or conservation. The plan for the development of the Columbia River came from this period. This meant planning for how many dams could be built on the River to generate hydropower, prevent flooding, and provide water for irrigation. Large scale river development continued into the second half of the century. The final part of the Columbia River plan was the John Day Dam built in 1971 and the Lower Granite Dam on its tributary, the Snake River in 1975. Today, the Pacific Northwest relies on hydropower for about 70% of its electricity. Nationally, 40 percent of all U.S. hydropower is generated by the dams on the Columbia and Snake Rivers. Figure 2 (Salmon Solutions) shows the dams on the Columbia River system.

Figure 2 Dams in the Columbia River Basin

The Clean Water Act

Other important roles of the federal government in water policy came out of the environmental movement of the 1970's.. Rising concerns about the safety and cleanliness of the country's water had grown during the 1960's. This culminated in the passage of the federal Clean Water Act (CWA) of 1972 which sets national policy for clean water. The purpose of the Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The CWA requires state governments to: 1) Establish and periodically revise water quality standards; 2) Perform water quality assessments to identify waterbodies that are not meeting the standards, and to list these every two years; and 3) Develop cleanup plans (determine 'total maximum daily loads,' (TMDL's) for the listed waterbodies. In Washington State these activities are carried out in watersheds. The federal Environmental Protection Agency (EPA) was given the authority to enforce the CWA. The EPA can delegate the authority to enforce clean water standards and regulations to Indian tribes through a program called Treatment as State (TAS) as well as to states. States do not have regulatory authority on Indian

reservations.[3] The CWA states that only tribal governments can establish water quality standards and implement management plans on Indian reservations.

The majority of the twenty-nine federally recognized tribes in Washington have participated in developing and implementing plans for water quality. This is the Coordinated Tribal Water Quality Program (CTWQP) begun in 1990. The purpose of CTWQP is to assist Washington tribes in improving water quality, restoring salmon populations, and the protection of shellfish and their respective habitats. Individual tribes participate in the development and implementation of watershed management plans, monitor water quality trends, map problem areas, address contaminants affecting shellfish beds, establish well-head protection programs and develop water quality standards. The tribes often set higher water quality standards then the State government does. The Northwest Indian Fisheries Commission (NWIFC) acts as the coordinating entity for the tribes. (NWIFC, 2005) [4]

The Endangered Species Act

As Jane continues to learn about the federal government's role in water quality, she finds another federal law that is equally as important for her work as the CWA. It is the Endangered Species Act. She discovers that the federal Endangered Species Act (ESA) of 1973 is the most significant fish and wildlife law ever passed. It also impacts water because of salmon listings. The following are excerpts from this legislation.

> Congress finds …that 1) various species of fish, wildlife and plants in the United States have been rendered extinct as a consequence of economic growth and development…The purposes of this (law) are to provide a means whereby the ecosystems upon which the endangered …and threatened species depend may be conserved…. All Federal departments and agencies shall seek to conserve endangered …and threatened species and shall utilize their authorities in furtherance of (this) purpose…Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species. (U.S.C. 1531-1543)

The federal agencies that administer the ESA are the U.S. Fish and Wildlife (USFWS) agency in the Interior Department and the National Oceanic and Atmospheric Administration (NOAA), Fisheries (formerly NMFS, the National Marine Fisheries Service) in the Commerce Department.[5] Beginning in 1991 the federal government began to list Snake River salmon as threatened and endangered under ESA. By 1999 ESA

[3] Tribes may grant and codify certain restrictive and specific authority to states in unique situations that is captured in compacts, Memorandum of Understandings (MOU), and/or Memorandums of Agreement (MOA's)

[4] The NWIFC web site has a list of participating tribes. (www.nwifc.wa.gov)

[5] The USFWS coordinates protective mechanisms and biological opinions regarding bull trout and NOAA/NMFS coordinate the same for salmonid stocks.

listings of Chinook, coho, chum, and steelhead stocks in Washington occurred over 75% of the state.

State Water Policy

As Jane continues with her research, she finds that while the federal government has the responsibility for the quality of water in our rivers and watersheds, state governments have come to have the legal oversight over water quantity or water resources. States traditionally have had the responsibility for allocating the water within their borders among competing water uses. Two common law systems have evolved to govern this allocation. In the eastern part of the country the riparian doctrine predominates. This means that those who own property that borders a river have the use of water from that river. West of the 100th meridian, where annual rainfall is less than 20 inches per year (with the exception of the area west of the Cascade Mountains in the Pacific Northwest), the prior appropriation doctrine came into use. "Prior appropriation" essentially means that the first person who diverts water from the river or stream and puts it to beneficial use (irrigation, stock watering, household water, etc.) has the right to that water. This way of allocating water grew out of the settlement of the arid west, the need for water for irrigation, and early mining law. Miners' claims were based on "first in time, first in right." The riparian doctrine did not make sense in the west, so early court decisions regarding water rights were based on this: the first one to use the water had the legal right to that water. These are called senior water rights. Subsequent users were ranked in order of when they started diverting water for use. Junior water users could use only that amount of water that would not impact the senior users amount of water. Water rights are permanent, as long as the water is put to "beneficial use."

Discussion questions: Why is the federal government responsible for the quality of our water and the state government responsible for water rights (water quantity)? If this is, in reality, a single issue, how should the X Indian Nation address water issues if it joins the watershed planning process?

Section IV: Federal Indian water rights

Winters Doctrine Rights

Jane is now ready for a critical piece of her research. She needs to know about Federal Indian reserved water rights. She finds that the recognition that Indian tribes and their reservations had reserved water rights came out of a 1908 U.S. Supreme Court decision, Winters v. United States. Non-Indian farmers upstream from the Fort Belknap Reservation, in northwestern Montana, diverted water from the Milk River to irrigate their crops. This meant that there was not enough water in the stream for tribal members to use for their crops on the reservation. The up-stream farmers cited the prior appropriation doctrine because they were the first to divert the water and put it to use. They said they had senior water rights to the Milk River. The decision that ultimately was handed down by the Supreme Court stated that when the reservation was established, the tribes and the U.S. government implicitly reserved sufficient water to meet the needs

of the reservation. The priority date for these water rights was the date the reservation was established. These reserved water rights are not subject to state law, therefore they exist whether the tribe has put the water to beneficial use or not. A much later U.S. Supreme Court decision, Arizona v. California, 1963, stated that executive order tribes and federal lands such as national parks and forests also possessed similar reserved water rights. This decision created the "practicably irrigated acreage" (PIA) standard. The amount of water reserved was enough to meet the present and future needs of the reservation. This meant the amount of water needed to irrigate the lands on the reservation suitable for irrigated agriculture. As Jane knows, state courts ordinarily do not have jurisdiction over Indian tribes and reservation lands. These issues go to the federal court system. One exception is water. In 1952 Congress passed the McCarran Amendment. This federal law allows state courts to adjudicate federal Indian reserved water rights. The concept of federal Indian reserved rights remains, but the state courts can determine the extent of these rights.

As Jane learns more about federal Indian reserved water rights, she comes to realize that the Indian tribes in the Pacific Northwest have off-reservation "instream" water rights that are associated with their treaty fishing rights.

Off-Reservation Water Rights: From Time Immemorial

As American settlers moved westward into the Pacific Northwest (what is now Washington, Oregon, Montana, and Idaho) the federal government decided it was time to make treaties with the tribes in these areas. This was during the time of Indian removal, i.e., the federal policy to remove the Indians to reservations in order to open the land for white settlement. Isaac Stevens was sent to the Washington territory in the early 1850s to do this. During the treaty councils that he called with the Indian groups and tribes in the area, he heard, through his translators, many of the native people speak about the importance of fishing to their way of life. Though Stevens knew very little about the native people he was negotiating with, he did know that white settlers and members of his party depended on buying salmon from them for an important part of their food supply. It was clear that the Indians would not sign the treaties without provisions in them to reserve their right to fish, hunt, and gather. Thus, the treaties contained a clause that said "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the territory…" (Treaty of Point Elliott, Article IV. 12 Stat. 97. Wilkinson and AIRI, 2004). The important thing about this treaty clause is that the tribes' "usual and accustomed" fishing grounds were not on the newly established reservations, but were the locations where the Indians had fished historically. Thus the tribes reserved in the treaties they signed the important right to fish off-reservation in their historic fishing sites.

In the early 1970's at the request of tribes in the area, the federal government went to federal district court to force the state to recognize treaty fishing rights. After three years of careful consideration of the testimony and evidence, Judge George Boldt issued his decision in U.S. v. Washington, 1974. He stated that "in common," in the treaties meant that the tribes were entitled to catch 50 percent of the salmon returning to the tribes'

historic fishing grounds.(384 F. Supp. 312) U.S. v Oregon, 1969, was a similar case that recognized Indian treaty fishing rights on the Columbia River. A subsequent decision, called Boldt Phase II, though never fully litigated at this point in time, established that an "environmental right" accompanies the treaty right to take fish. This means that the tribes have a legal interest in having fish habitat maintained throughout the migratory range of the salmon. An essential part of this is having water in the streams and rivers for the fish. The right to take fish carries with it the right to have fish habitat protected from human caused degradation, including water diversion

Thus off-reservation water rights mean the right to have sufficient water in the streams and rivers for salmon. These water rights date from "time immemorial" and thus, theoretically, predate all other water uses. Winters doctrine and off-reservation water rights are senior water rights. Western Washington 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. (NWIFC, 1990, p. 15)

Discussion Questions: How are Indian reserved water rights on-reservation different than off-reservation reserved water rights? Can the X Indian Nation protect its water right if it joins the watershed planning process? How will the tribe do this?

Section V Watershed Planning in Washington State

Finally, Jane has come to the critical issue of watershed planning. She now knows that in Washington State, the Department of Ecology (DOE) is responsible for granting water rights under Washington state law. But she realizes that she needs to know more about how the state allocates water in order to understand what the tribes can accomplish in the watershed planning process.

The Department of Ecology (DOE)

She learns that as the early non-Indian settlers came to the region as a result of the federal Homestead Act and related legislation. As they began to farm the fertile valleys, such as those of the Yakima River basin, they diverted water from the rivers and streams to irrigate their fields. In order to establish their right to this water, they would post a notice on a tree or post near the diversion. This practice continued when Washington became a state in 1889. In 1917 the first Water Code was passed. This code recognized existing rights but made appropriation through a state permit system the exclusive way to establish new rights. This 1917 law is still the basis for water law in Washington, although many subsequent statutes have been passed. In 1945 the Legislature enacted the Ground Water Code, establishing the same permitting process used for surface water.

During this period there was little regard for the amount of water left in the rivers and streams for fish, wildlife, or other instream uses. Indeed, many thought that water allowed to flow freely to its outlet, such as an estuary, lake, or ocean, was wasted water. This began to change in 1949 when the legislature declared it to be state policy …"that a flow of water sufficient to support game fish and food populations be maintained at all times in the streams of this state." This was formalized by the Minimum Water Flows and Levels Act of 1969. Under this law, the Department of Ecology may, upon request of the Washington Department of Fish and Wildlife or of its own volition, establish minimum flows by administrative rule to protect fish, wildlife, water quality, and other instream values. Under current law the DOE must consult with the affected Indian Tribe before instream flows are set.

A milestone in Washington water law was the Water Resources Act of 1971 which was to protect and manage the state's water resources for "the greater benefit of the people." This legislation is important because it recognized the values of having water left in the stream as well as the usual out-of-stream uses. The 1971 Act is the present instream flow law used to protect fish and other instream values by setting minimum instream flow levels basin-wide before issuing new water rights. Instream flows adopted as rules are considered a water right and have a priority date of when the rule was adopted. Instream flows are junior water rights. They do not put more water in the stream unless additional measures are taken. They are set to prevent water being withdrawn from a river or stream below the set level. The actual setting of instream flows has been a long and contentious process. Though the process began with the 1971 legislation, as of 2006 there have been only 20 instream flow levels established, which is 32% of the Water Resource Inventory Areas (WRIAs) in Washington State.[6] The process of setting instream flows has been controversial, both as to the priority of these water rights and the levels at which they are set. Clearly the State Legislature considered the Watershed Planning Act of 1998 to be another solution to this on-going dilemma.

Chelan Agreement, 1990-1995

As her research continues, Jane learns that the tribes have been actively involved in water resource planning since the late 1980's. She realizes that by the early 1980's the State of Washington had stopped its court fights against the U.S. v. Washington, 1974 decision and was beginning to recognize the need to work with the tribes on natural resource issues.[7] The agreements and mechanism to co-manage the salmon resource date from

[6] The Washington state Department of Ecology and other state resource agencies use a system of 62 "Watershed Resource Inventory Areas" or "WRIAs" to refer to the state's major watershed basins. These are composed of multiple drainage basins. See Figure 3.

[7] As noted above, the U.S. v. Washington, 1974 (Boldt) decision reaffirmed the tribes' treaty rights to fish and ruled that the tribes were entitled to the opportunity to catch half the harvestable salmon and steelhead returning to their traditional off-reservation fishing grounds. The State of Washington, primarily the Attorney General and the Departments of Fishing and Hunting, did not want to accept this decision and fought it in court throughout the 1970's, losing most of the cases. In 1979 the U.S. Supreme Court upheld U.S. v. Washington. During the early 1980's the State government began to recognize that the court battles were not producing any fish. Both state officials and some business and industry leaders began to move

this period. First the structure to co-manage the fishery resource was set-up, this was followed by the Timber/Fish/Wildlife (TFW) agreement of 1987 about state and commercial timber lands in the State. Indian tribes were active participants in drawing up and implementing this agreement. They were active participants because of the recognition of the tribes' right to have fish habitat protected. TFW was a process to rewrite forest practices rules to protect riparian zones and habitat in order to improve the survival of fish and wildlife. Tribes have continued to be active in shaping forest practices, including the Forest and Fish process in 2000.

Having sufficient water in the rivers and streams for salmon was obviously the next habitat issue. Even a Joint Select Committee on Water Resource Policy of the State Legislature recognized in 1988 that any discussion of water policy must include a dialogue with Indian tribes. This dialogue began to occur in 1989 when representatives of the tribes, state and local government, environmentalists and others gathered at a resort at Lake Chelan to draft a water resource planning process. This was the first time tribes were part of a water planning process in Washington State. Out of this initial meeting came the Chelan Agreement to make recommendations to the Department of Ecology on managing the state's water resources.

A Water Resources Forum was set up with three governmental entities: state, tribal and local governments, and members from the various stakeholder groups. Its role was to shape state water policy, clarify existing state law and policies, recommend new laws as needed, and provide guidance to the Department of Ecology on critical issues. Decision-making was by consensus and the three governmental entities on the Forum: State, tribal, and local had to agree for a policy or plan to be adopted. Thus the tribes had a pivotal role in this policy making. A Northwest Indian Fisheries Commission (NWIFC) publication about this process noted:

> The Chelan Agreement is a model for comprehensive water management planning nationwide….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. (NWIFC, 1990, p. 29)

The Water Resources Forum met for five years. Turnover of membership meant new participants had to be continually re-educated about the principles and issues of the Agreement, including tribal treaty rights. Budget cuts occurred in the Department of Ecology during this period. The State Legislature did not endorse the Chelan Agreement with legislation or funding. People in the agriculture and business community did not feel their representatives spoke to their interests, and these representatives withdrew in 1994. The group as a whole adjourned in 1995.

Nonetheless, the Forum had worked extremely hard and drafted two important policies on instream flow and hydraulic continuity. It also launched two watershed planning pilot

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toward working with the tribes rather than continuing to fight them. The era of comanagement of the fishery resource was starting. (Brown, 1994)

projects: the Dungeness-Quilcene watershed on the Olympic Peninsula, and the Methow River in northeast Washington. Most important it established the precedent of tribes participating in water resource planning on a government-to-government basis. Although the Chelan Agreement ceased to exist in 1995, the two watershed planning pilot projects continued.

The Watershed Planning Act

As Jane begins to study the Watershed Planning Act of 1998 she discovers that a related bill was also voted into law in the 1998 legislative session. She understands that the continuing controversies about water resources, the impending ESA listing of salmon as threatened and endangered led to both these bills being passed in the Washington State Legislature in 1998. One was ESHB 2514, the Watershed Management Act and the other the Salmon Recovery Act.

The Salmon Recovery Act, HB 2496, established the Governor's Salmon Recovery Office to coordinate state and local salmon recovery efforts. "The Salmon Office's role is to coordinate and produce a statewide salmon strategy; assist in the development of regional recovery plans; secure current and future funding for local, regional, and state recovery efforts; and provide the Biennial State of Salmon report to the Legislature." (Washington, Governor, Salmon Recovery Office, 2006) This plan was adopted to meet ESA and CWA requirements. The Governor's Office issued its *2004 State of Salmon in Watersheds Report* with another one due in 2006. As the coordinating entity for the tribes, the NWIFC has been an active partner in the Shared Strategy for Puget Sound salmon recovery and has issued its own *State of Our Watersheds Report, WRIAS 1-23* as part of the Salmon and Steelhead Habitat Inventory and Assessment Program (SSHIAP).

The Watershed Management Act of 1998 provides a framework to collaboratively solve water quantity issues. The Department of Ecology had previously divided Washington State into 62 administrative units called "Water Resource Inventory Areas" (WRIAs) based on watershed and topographic boundaries rather than political units such as counties.(See figure 3) Planning is done within these WRIAs. The act is designed to allow local governments to join with tribes and state agencies together with local citizens to form planning units to develop watershed management plans. "These planning units shall assess each WRIAs water supply and use, and recommend strategies for satisfying minimum instream flows and water supply needs. The planning units may develop strategies for improving water quality and protecting or enhancing fish habitat, and in collaboration with Ecology, set instream flows." (Washington, DOE, 1998)

The planning process is to be initiated by local governments including, in some WIRA's, Indian tribes. The resulting plans need only address water supply and use. Issues of instream flows, water quality, and habitat requirements are optional. The legislature supplies funding to these local planning efforts. This process is an attempt to blend a top-down, country government dominated approach with a more collaborative process involving genuine stakeholder participation and collaboration

The Washington Department of Ecology's (DOE) web page on "Indian Tribes: Role in Local Watershed Planning (ESHB 2514)" states that Indian tribes with reservations within the WRIAs must be invited to join the process as "initiating governments." (www.ecy.wa.gov/watershed/misc/indian_tribes.htm) The role of the initiating governments is to choose a lead agency, establish a planning process, and decide whether or not to add additional components such as instream flow. Tribes can act as the lead agency. The Nisqually Tribe has acted as lead agency in their watershed, i.e., WIRA 11. Adding instream flow requires a majority vote of the initiating governments. In addition to tribes that have reservation lands within the WRIA, there is a category called "affected tribes." This includes tribes with treaty fishing rights within the WRIA, tribes with federal reserved water rights claims on waters in the WRIA, and tribes that have federally approved water quality standards in the WRIA or are affected by the waters of the WRIA. The "affected tribes" must be consulted by the initiating governments in setting up the planning process. Several decisions require the agreement of all the government representatives, including all tribal governments on the planning unit. These are the final watershed plan, adoption of instream flows, and whether to request DOE to modify instream flows.

The watershed planning process is currently well underway. Forty-five of the 62 watersheds (WRIAs) have initiated some part of the process. Thirty-seven watershed planning groups have been formed to develop watershed plans for the forty-five watersheds (some groups plan for contiguous watersheds). The DOE's 2004 Report to the Legislature on the implementation of the Act states that: "local watershed planning groups consist of representatives from county, city, tribal and state governments, as well as local stakeholders including developers, farmers, water purveyors, environmental groups and local citizens."(Washington, DOE, 2005) By the end of 2005 fifteen watershed plans have been adopted by county governments and eight of those are beginning to be implemented. Six of the fifteen will have recommendations for instream flows.

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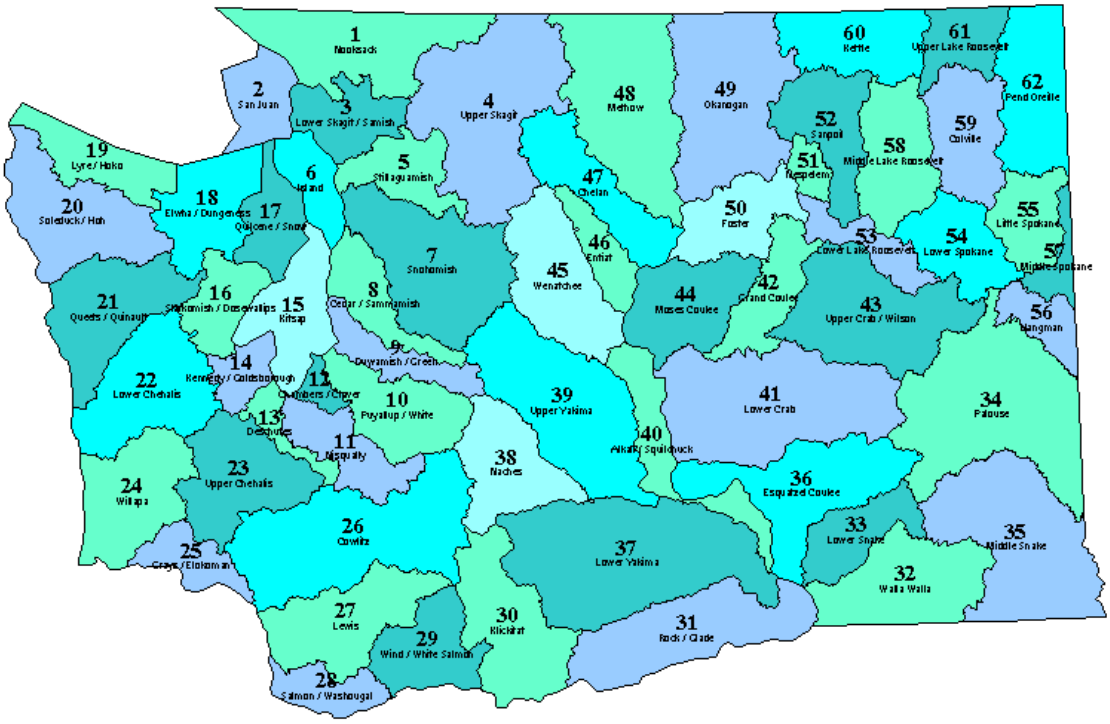

Figure 3
Washington State Water Resource Inventory Areas (WRIAs):
Watershed Planning Units in Washington State

Discussion Questions: Does the Watershed Planning Act of 1998 accord the tribes the same government-to-government status as did the Chelan Agreement? If X Indian Nation joins this planning process can it be an initiating government? Should the X Nation bring the issues of instream flows, water quality, and habitat requirements to the table?

Section VI Conclusion

Jane has learned that tribes participate in these processes as governments and not as interest groups or stakeholders. As she reads more about watershed planning she realizes that the "collaborative" approach often does not recognize the unique status of tribes. Tribes do not want to compromise their sovereign rights by acting as though they are just another stakeholder. The tribes that participated in the Chelan Agreement's Water Resource Forum did so because they felt that they were in the process as sovereign governments and were participating on a government-to-government basis. The tribes in

Washington State have taken different positions on the Watershed Management Act and the resulting watershed planning process. Some feel that this provides them with a process that can function for them, they see it as a pathway to move forward. Other tribes feel that this process only provides for "consultation" and not for government-to-government participation in a way to shape policy making and therefore do not choose to participate. What does Jane conclude from this about her Tribe's participation in the watershed planning process?

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