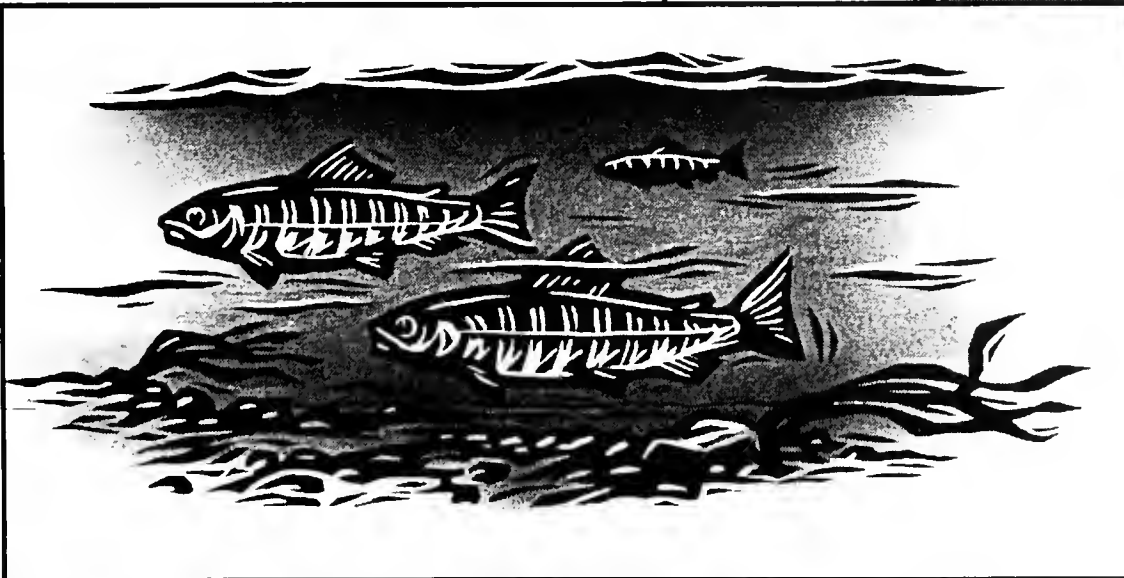


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REPORT TO THE NORTHWEST POWER PLANNING COUNCIL FROM THE WORKSHOP ON FISH AND WILDLIFE GOVERNANCE

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REPORT

to the Northwest Power Planning Council

from the Workshop on Fish and Wildlife Governance

by

**David H. Getches, Facilitator
University of Colorado School of Law
Boulder, Colorado**

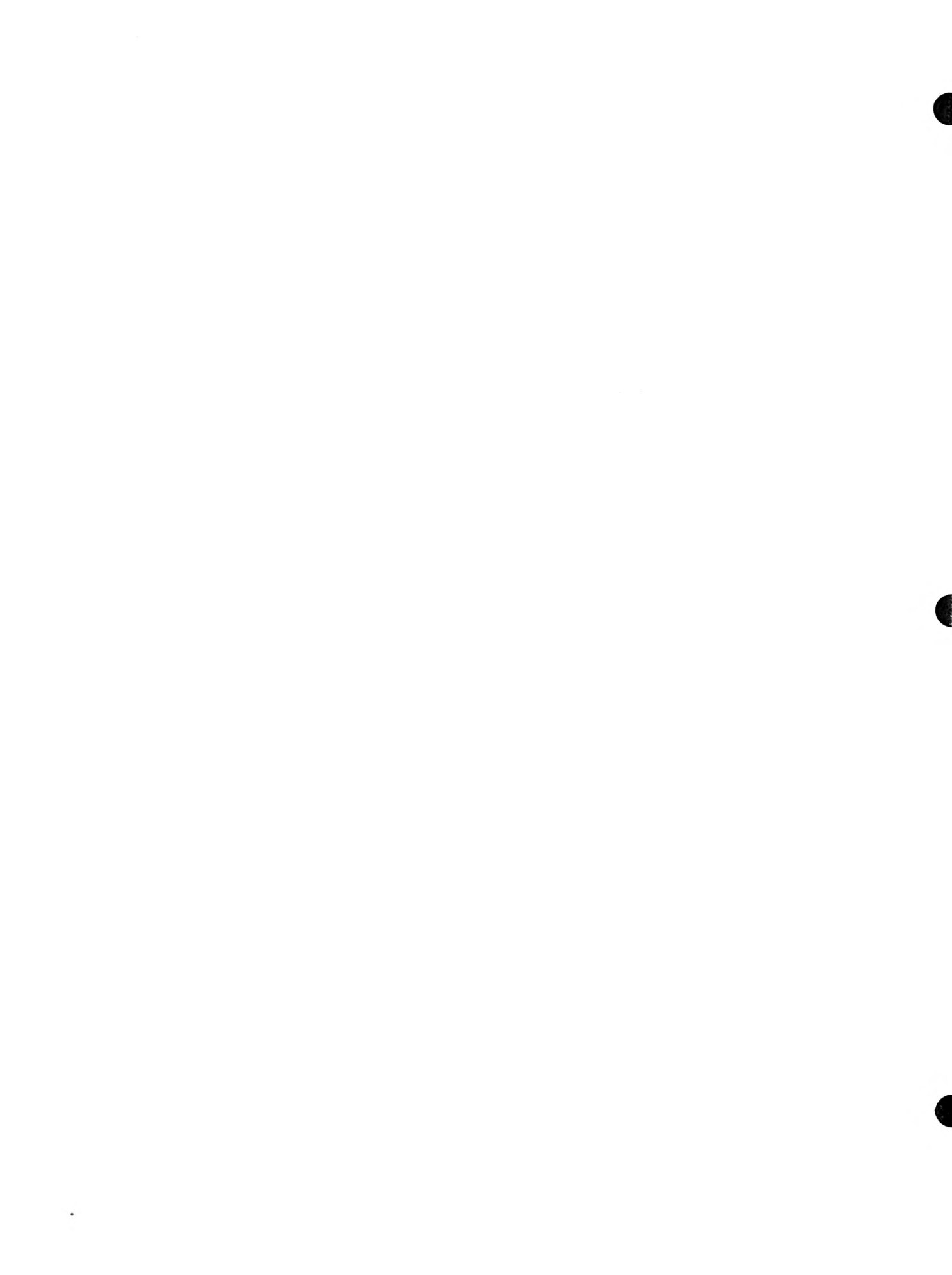
February 12, 1996

This report summarizes the work of the February 1-2, 1996 Workshop on Fish and Wildlife Governance. The views expressed are those of the workshop and the workshop facilitator, not the Northwest Power Planning Council



Within 180 days of enactment of this Act, the Council shall review and report to Congress regarding the most appropriate governance structure to allow more effective regional control over efforts to conserve and enhance anadromous and resident fish and wildlife within the Federal Columbia River Power System.

- Fiscal Year 1996 Energy and Water Appropriations bill.



February 9, 1996

To the Northwest Power Planning Council:

It is my pleasure to transmit this Report from the Workshop on Fish and Wildlife Governance held in Portland February 1-2, 1996.

As the Council knows, the idea of the workshop was to invite knowledgeable people from throughout the region to focus their attention on several possible approaches to improving regional fish and wildlife governance. These alternatives were developed by the staff in consultation with interested parties, the Council and with me. It was reasonable to expect the workshop to produce useful comments on each of the alternatives that would assist the Council in formulating a response to Congress.

In fact, the workshop went beyond that expectation. It generated remarkable agreement on criteria for judging any alternative (see Part IV). Moreover, by eliciting several common themes without embracing wholesale any of the proposed alternatives, the workshop enabled us to develop a menu of actions from which the Council can compose an overall strategy. By drawing on this menu—which reflects the best features of each alternative—the Council may be able to pursue a strategy that is superior to any one of the alternatives considered.

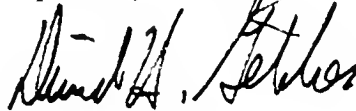
These actions, which are summarized in Part VI of this Report can, in many cases, be initiated by the Council itself. Most require broad cooperation of diverse interests in the basin, especially the sovereigns, and the Council can choose to exercise leadership in convening these interests to facilitate their joint efforts. An Executive Order and minor legislation may be needed to expedite and enable some of the actions. The overall strategy, however, need not await congressional action.

While many improvements can commence at once, the strategy may include steps that will be the precursors of more fundamental changes in governance that will eventually be embodied in legislation. This longer-term strategy can be developed in conjunction with the multiple interests in the region. In any event, a successful short-term strategy will make progress in fulfilling the intergenerational responsibility for natural resource protection that was assumed by workshop participants and that underlies this Council's mission.

So the workshop Report includes not only essential material for the Council's report to Congress but also the components of a strategy that the participants felt would begin immediately to produce improvements in regional fish and wildlife governance. I commend to you the conclusions reached by this hard-working group of experts.

Finally, your staff deserves credit for the smooth, well-administered meeting. They dedicated long days and evenings to planning and organizing the meetings, writing materials, and attending to every detail, then spent the weekend after the workshop pulling the record together. Thanks to these highly professional people!

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David H. Getches". The signature is written in a cursive, somewhat stylized script.

David H. Getches

Enclosure

DHG:ls

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I. Introduction

In the energy and water appropriations legislation for 1996, adopted November 13, 1995, Congress directed the Northwest Power Planning Council to report to Congress within 180 days “regarding the most appropriate governance structure to allow more effective regional control over efforts to conserve and enhance anadromous and resident fish and wildlife within the Federal Columbia River Power System.” The Council convened a workshop in early February and asked diverse interests to analyze alternative approaches to the governance of fish and wildlife in the basin. This is a report on that workshop.

II. Background

One of the most frequently heard criticisms of Columbia River fish and wildlife policy is that no one is “in charge.” No single entity has comprehensive power to act, knowledge to act sensibly and the ability, over time, to perceive the consequences of action. Almost as frequently heard is the criticism that the federal government dominates decision making to the exclusion of other interests and other levels of government. The fact that these criticisms seem to point in opposite directions hints at the complex governance of fish and wildlife in the basin. Over the past several decades a constellation of agencies, courts and other entities have been “in charge” to one degree or another, and authority has shifted among them with the passage and interpretation of various laws and treaties.

Federal dominance. Since the 1930s, one of the largest influences on the river has been the construction and operation of dams owned or licensed by the federal government. During the dam-building era, impacts to fish and wildlife were considered primarily in determining to what extent the dams’ impacts should be mitigated. Mitigation came in the form of adult fish ladders and fish hatcheries. Federal agencies such as the U. S. Forest Service and Bureau of Land Management also managed a large share of the fish and wildlife habitat in the basin.

Others also played significant roles. The states regulated fish and wildlife harvest, hatcheries, and water use. Private dams were also built and landowners modified habitat and water quality. Fish harvesters depleted stocks.

During the late 1960s and 70s, salmon policy in the Northwest was strongly shaped by a series of federal court decisions interpreting the United States’ treaties with four Columbia River tribal groups, the Yakama, Nez Perce, Warm Springs and Umatilla. This litigation aimed primarily at identifying an equitable balance between Indian and non-Indian harvesters. Salmon harvest management in the river remains rooted in processes developed by the ongoing federal court litigation, *United States v. Oregon*. In the late 1980s, the federal court approved a negotiated settlement in the litigation, called the Columbia River Fish Management Plan, addressing harvest allocation and production strategies. Environmental conditions affecting salmon populations have been at issue in this litigation, and federal hydropower and other activities have been a concern insofar as

they impinge on fish passage and habitat. However, the treaty litigation did not develop processes for river and dam operations.

By 1980, it was fair to say that Columbia River fish and wildlife policy was in large part federal. Although not necessarily a coordinated policy, it was driven by federal decisions on dam construction and operations, harvest management, and mitigation policy. Crucial decisions, and especially decisions involving the Columbia River hydropower system, were made by Congress, federal agencies and the federal courts, each acting from different sources of policy and power. States and tribes played key roles, certainly in harvest and hatchery management and in managing tributary water, but the dominant processes were federal.

Greater regional participation. In the late 1970s, Snake River anadromous fish had declined to the point that Endangered Species Act petitions were filed. The Act was passed in 1973 in response to national concerns about declines in species. Several new fish and wildlife protection statutes were also passed, including the 1980 Northwest Power Act and the Salmon and Steelhead Conservation Act. Together with ocean harvest reforms adopted in the Magnuson Fishery Conservation and Management Act and the U.S.-Canada Pacific Salmon treaty, and in-river harvest settlements in the Indian treaty fishing litigation, these laws created a promising but diverse set of tools with which to protect and enhance fish and wildlife, particularly Columbia River salmon.

With the passage of the Northwest Power Act in 1980, the states and the 13 Indian tribes in the region took greater responsibility for decisions on the Columbia River beyond harvest management. For the first time, a nonfederal entity had authority to plan for the region's electric power system, and, as an element of that plan, a program to mitigate the effects of the Columbia Basin dams on fish and wildlife. The region's four states, through their membership on the Council, thus acquired a significant voice in management of the Columbia River hydropower system and in fish and wildlife restoration, while the tribes gained another avenue of influence through their recommendations for the Council's program. The Northwest Power Act requires the Council, in carrying out the Act's planning provisions, to consider anadromous fish, resident fish, wildlife and energy needs in a systemwide setting that includes the Columbia River ecosystem and its uses, especially power production.

The Act commits revenues from the Columbia River hydropower projects to pay the full cost of producing electric energy, including the cost of fish and wildlife rehabilitation. It is clear that the Act's commitment of hydropower revenues has played an important role in financing fish and wildlife mitigation activities.

The Act requires the Bonneville Power Administration to use its fund and other authorities "in a manner consistent with" the Council's fish and wildlife program. It also requires all federal agencies that manage, operate or regulate hydroelectric facilities on the river, which includes at least the Corps of Engineers, the Bureau of Reclamation, Bonneville and the Federal Energy Regulatory Commission, to take the program into account "at every stage of decision making to the fullest extent practicable." These

obligations can help integrate federal agency activities in support of a regionally supported fish and wildlife program.

Critics of the Northwest Power Act make a number of points. Some argue that increasing regional participation in fish and wildlife policy and river operations was part of a general fragmentation in decision making authority. While the region had more authority in decisions affecting the river after 1980, so did others. Federal agencies (Bonneville, the Corps of Engineers and the Bureau of Reclamation) retain discretion regarding implementation of the Council's program, so implementation can become confused, frustrating effectiveness and agency accountability. Most state and tribal agencies are not bound by the Council's program. Neither the Council nor anyone else has enough legal authority to unite diverse actors behind a single policy for the river and its fish and wildlife. Those dissatisfied with a federal agency decision could turn to the Council, the Congress or the federal courts. Those dissatisfied with a Council decision could turn to the federal agencies, the governors, Congress or the courts. In many instances, a dissatisfied party could prevent an action simply by not cooperating. No single entity could develop a comprehensive strategy and make it stick.

It can also be argued that the Northwest Power Act's commitment of Bonneville Power Administration electric power revenues creates a disproportionate reliance on ratepayer financing for species conservation efforts. The concern has two aspects: Bonneville customers are concerned that they may be paying too much. Fish and wildlife interests are concerned that others who contribute to the salmon declines are not paying their fair share toward salmon recovery.

Refocused federal control under the Endangered Species Act. In 1990, a conservation organization and an upriver Indian tribe filed new Endangered Species Act petitions to list Snake River salmon. When these populations came under the Act's protection, much of the responsibility for salmon policy shifted back to the federal government. Under the Endangered Species Act, federal agency activities cannot jeopardize the existence of listed populations unless an exemption is granted by a rarely convened cabinet-level committee. In the four years that followed the decision to list Snake River salmon more and more federal decisions -- critical decisions on dam operations, forest management (driven in part by independent efforts to protect another endangered species, the northern spotted owl), grazing, mining and salmon production -- have been focused on complying with the Endangered Species Act.

Whatever else may be said about the Endangered Species Act, it can help force coordination of fragmented government activity and focus efforts on the protection of threatened resources. All of the federal agencies -- those involved in Columbia River operations and in federal land management -- are faced with the same, preeminent mandate: to avoid jeopardizing the continued existence of Snake River salmon. To this extent, the Endangered Species Act listings helped to consolidate fragmented policy.

Critics of the Endangered Species Act make a number of points and for our purposes three criticisms are especially important: First, the Act does not give much

weight to economic values and the needs of local communities. Because it neglects these values the Act can generate its own opposition both from local interests and from some federal agencies whose primary missions may be at odds with species protection measures. Second, the Act's focus on listed species can divert attention from the broader and possibly more important task of protecting biological diversity and ecosystem functions. Interests that are important under the Northwest Power Act, such as unlisted anadromous and resident fish and wildlife, cannot easily be accounted for in Endangered Species Act processes. Third, some of the lack of political support for Endangered Species Act programs can be traced to ostensibly technical and scientific decisions made solely by the responsible federal agency without significant participation by nonfederal parties, the Council, the tribes and state fish and wildlife agencies.

This is the context in which Congress directed the Northwest Power Planning Council to prepare a report "regarding the most appropriate governance structure to allow more effective regional control over efforts to conserve and enhance anadromous and resident fish and wildlife within the Federal Columbia River Power System."

III. Process

To respond to Congress's charge the Council adopted a process with the following phases: 1) Seeking advice on alternative approaches that might be taken to fish and wildlife governance reform; 2) conducting a facilitated workshop in which key alternatives were probed, elaborated and evaluated; 3) Council consideration of a report and the recommendations resulting from the workshop; 4) formulating a proposed Council response; 5) inviting public comment and consultation on a Council alternative formulated after reviewing the results of the workshop; and 6) preparation of a final report. The schedule for accomplishing the work is as follows:

November 30, 1995 to early January, 1996: Discussions with interested parties on a range of approaches.

February 1-2, 1996: Workshop on alternative approaches.

February 9: Transmit workshop report to Council.

February 20-22, 1996: Council draft proposal(s).

February 23-April 4: Circulation of proposal and public comment and consultations on Council proposal(s).

April 5 - May 14-16: Preparation of final report to Congress.

During the first phase of this process, discussions were held with a number of interested parties in December, 1995. Five different approaches to fish and wildlife governance emerged. These approaches are summarized in the following table:

| Approach | Authority/structure | Standards to guide decision making |
|--|--|--|
| Approach 1 - No legislation; inter-agency agreement; Council program as baseline for implementation | No legislative change; federal agencies implement program or explain why not; inter-agency agreement creates management structure that facilitates implementation. | No change in current law. |
| Approach 2 - All federal agencies act consistent with Council program | Federal agencies must act consistent with Council program; disputes referred to Congressional committees | Northwest Power Act changed to require federal agencies to act consistent with Council program; no change in standards used to develop Council program (sections 4(h)(5) & (6)). |
| Approach 3 - State/tribal/federal council with ESA and Northwest Power Act responsibilities | Northwest Power Planning Council is replaced. An expanded state, federal and tribal council exercises Endangered Species Act and Northwest Power Act responsibilities; and administers and prioritizes hydropower fish and wildlife funds. | Expanded council's program is based on both Endangered Species and Northwest Power Act standards. |
| Approach 4 - Watershed, not species focus for decisions | Endangered Species Act and Northwest Power Act focused on watershed conditions needed by fish and wildlife. | Rehabilitate watersheds' biological functions measured by needs of key species; satisfy ESA habitat conservation stds. Unclear whether this could be accomplished under current law. |
| Approach 5 - Management by fish and wildlife managers aimed at sustainable harvest | Fish and wildlife managers coordinate activities to manage fish and wildlife resources, funds and programs in groups appropriate to the resource being managed; disputes resolved by courts, Council or other processes. | ESA and Northwest Power Act are not amended, but are interpreted to achieve sustainable harvest objectives. |

To explore the strengths and weaknesses of these approaches, the Council invited 40-50 representatives of federal, state, tribal, industrial, agricultural, environmental and other sectors to meet in Portland, Oregon on February 1 and 2. The full list of workshop attendees is attached as Appendix 1 to this report. The Council provided attendees with background on the task assigned by Congress, the fish and wildlife governance problem, the alternative approaches outlined above, and a proposed list of criteria with which to evaluate these alternatives.

At the workshop, a point-counterpoint presentation and critique of each alternative was conducted. Next, the group developed a list of criteria with which to evaluate the alternatives presented to the group as well as any other approach to regional governance of fish and wildlife (see section IV, below). Following this, small groups were formed to consider each alternative extensively. The small groups discussed strengths and weaknesses of the alternatives and determined what changes should be made in the alternative to make it better fit the criteria and to respond to the region's needs. The five alternative approaches as they were revised by workshop participants are found in Appendix 2. Following the small group sessions, the full group of participants reviewed the work of the small groups and discussed the merits of the revised alternatives. Finally, the workshop identified several themes that pervaded the conclusions of the small groups and recurred throughout the workshop. These common themes should be considered along with the criteria in the following section as the workshop participants' advice to the Council. Based on this advice, the work of the small groups and the workshop discussions, I have summarized several short and long-term strategies in Section VI.

IV. Criteria for evaluating alternatives

The workshop participants first developed a list of criteria by which any approach being considered should be evaluated:

1. **The long view:** Does the governance structure facilitate a long-term sustainable vision, not just for the current generation, but for generations far into the future?
2. **Holistic:** Does the process address the needs of all species and the whole Columbia River Basin ecosystem?
3. **Cooperation:** Does the governance structure encourage cooperative action and avoid unnecessarily divisive processes?
4. **Clear goals:** Is it clear who is in charge and what goals are being pursued?
5. **Appropriate representation:** Do the bodies exercising authority have appropriate membership drawn from sovereigns in the basin? Is there an appropriate connection with interest groups and Canada?

6. **Public participation:** Presumably the public involvement and open meetings provisions of the Northwest Power Act will continue in effect. Is the overall decision-making process sufficiently open, understandable and inclusive of all interested members of the public?

7. **Appropriate authority:** Do the entities with responsibility for fish and wildlife decisions have authority that is appropriate to their responsibility? Can legal commitments and requirements be met while pursuing planning and holistic management?

8. **Scientific foundation and management:** Are appropriate scientific standards built into policy planning and implementation decision making? Are research, monitoring and evaluation part of the organizational structure, so that decision makers can tell whether recovery measures are working?

9. **Adaptability:** Is there appropriate accountability for results? If a strategy for recovery and management of multiple species does not deliver what it promised, is there a way to adjust it in light of new information?

10. **Accountability:** Are there ways to ensure that actions and program plans are implemented effectively? Is responsibility for implementation clearly defined?

11. **Implementation time:** How long does it take to implement governance mechanisms? Is this time frame appropriate to the nature of the problems?

12. **Financing:** To what extent do the alternatives appropriately spread financial responsibility for species conservation? Does the alternative provide a mechanism by which budget constraints and tradeoffs can be made clear? Does it encompass the full range of interests and resources among which tradeoffs can be made?

13. **Dispute resolution:** Is there an effective means of resolving disputes?

V. Common Themes and Conclusions

During the workshop, participants representing a variety of perspectives gravitated to several common themes. The group agreed that it is important for the Council to keep these themes in mind as it formulates a response to Congress's inquiry. Any governance structure used for the conservation and enhancement of fish and wildlife within the Columbia River Basin will be more effective if it is designed in a manner consistent with these conclusions.

- **There is a Shared Commitment to Preserve and Enhance Fish and Wildlife.**

Workshop participants shared a common commitment to using the financial and human resources available in the Northwest to resolve fish and wildlife issues in the Columbia River Basin. The economic, environmental and social impacts of those

problems are felt broadly throughout the region and so virtually everyone has a stake in solving them. There was agreement that improvements depend on cooperative, concerted efforts.

- **Regional Control of Resources Should be Continued and Strengthened.**

Whatever concerns were expressed over imperfections in present forms of regional governance, there was a consensus among workshop participants that these efforts have provided valuable experience, linkages, and knowledge that furnish a basis for improved planning and management.

- **Convene Sovereigns**

Effective basin governance must be premised on bringing together all sovereigns -- state, tribal, and federal -- to work collectively in a relationship of equality. Whether convened by mutual agreement to work together in the short term or through legislation, the sovereigns should collaborate closely in fish and wildlife management. In addition to including sovereigns with authority in the United States, it would be highly desirable to formalize a consultation role for the Canadian government.

- **Implementation of Plans is Paramount**

The greatest failing in regional governance of fish and wildlife, expressed repeatedly by workshop participants, has been the failure to implement plans. It was generally agreed that *actions* must be taken if salmon recovery is to be effective. For this to occur, the objectives of plans must be *simplified*. Those charged with carrying out plans should be *accountable* for doing so promptly and effectively.

- **Accountability for Fish and Wildlife Investments is Needed**

One of the frustrations with current governance is the lack of accountability for results. Policy planners lack authority to implement plans; implementers are not responsible for policy planning. As a result, neither planners nor implementers can be held accountable for results.

- **Combine Plans**

There are now at least three major plans that address salmon management throughout the Basin (the Council plan, National Marine Fisheries Service and Lower River tribes). These should be fully coordinated, ideally being combined into a single fish and wildlife plan that allows recovery of endangered species and the full range of interconnected fish and wildlife resources that depend on the ecosystem of the Columbia River Basin. Regional governance will not be effective if goals, objectives, and programs are fragmented.

- **Resource Managers Should Act Consistently with a Single, Basin-wide Fish and Wildlife Plan.**

There are multiple managers and programs within the Basin. To the extent that they are pursuing basin-wide goals they should act consistently with a single plan. For instance, federal law does not now require that agencies other than Bonneville Power Administration be consistent with the plan of the Power Planning Council (although federal agencies responsible for the hydropower must take the Council's plan into account to the fullest extent practicable). Without consistency the plan may not achieve maximum effect because the Corps, National Marine Fisheries Service, Bureau of Reclamation, Environmental Protection Agency, U. S. Fish and Wildlife Service, and other agencies may exercise their respective authorities independently of one another and of the Council's plan. This concern for coordination extends to state and tribal resource management agencies.

- **Dispute Resolution Mechanisms are Needed**

Implementing plans for fish and wildlife management must be effected through better coordination and mutual understanding among resource managers. While common ground is frequently found among scientists working with various sovereigns and interests, there are multiple opportunities for disagreement. There are also conflicts where technical issues and policy intersect. Fair and efficient means of dispute resolution are necessary to avoid paralyzing planning and implementation of fish and wildlife mitigation.

- **Work With Watershed Organizations**

Local watersheds throughout the region have begun to organize to deal with a variety of problems, often but not always as part of state watershed programs. They have been able to respond flexibly and creatively to particular problems of sub-basins of the Columbia River watershed. They have involved citizens, businesses, local governments, environmental groups, and representatives of state, tribal, and federal agencies. Their projects and plans are aimed at improving water quality, curtailing soil erosion, rebuilding habitat, and generally taking civic responsibility for better local resource management. These efforts are essential to effective implementation of a basin-wide fish and wildlife management program. At the same time, watershed efforts must be compatible both with other watersheds and with the Basin's overall strategies. Incentives and funding should promote the *coordinated efforts* of these local organizations to achieve basin-wide goals.

- **Pursue Short-Term Approaches Immediately**

Addressing regional governance of fish and wildlife ultimately requires a comprehensive long-term strategy. Improvements in the present system, however, need

not and must not await such a strategy. In fact, many elements of reformed basin governance can be made at once with little or no legislative action. By initiating these reforms in the short term the region can lay the groundwork for and test the efficacy of a long-term strategy.

VI. Action Strategies

A. Short Term

Short-term strategies are now available to the Council, to Congress, and to the sovereigns in the region. There was a consensus among the workshop participants that several measures can and should be pursued at once. They may be precursors for longer range changes, some of which may require broad federal legislation. Some can be effected by administrative decisions of the Council; others are possible with cooperative efforts among the sovereigns in the region; a few federal measures may be accomplished with an Executive Order; perhaps modest legislative changes would be desirable. The Council can take leadership in pursuing and promoting all of these short term strategies.

- **Bring Together Sovereigns to Coordinate Fish and Wildlife Governance.**

Sovereigns could be convened to achieve coordination of technical and policy aspects of fish and wildlife governance. The fact that sovereigns will come to the table with different legal authorities and responsibilities poses a special challenge, especially in light of the Endangered Species Act. The National Marine Fisheries Service in particular must seek ways in which its primary responsibilities under the Act can be satisfied consistent with the region's need for collaborative decision making. A technical panel should review current recovery plans, identify points on which there is agreement or disagreement, and develop a process aimed at agreement on a single, coordinated plan. Final decisions on a single plan, as well as resolution of substantial differences could be referred to a multi-sovereign policy level panel. This policy level panel could also be used to consider other elements of a short-term strategy. It would help to have a Canadian representative attend both the technical and policy-setting groups. The sovereigns could also explore broader participation in governance, such as altering the composition of the Council (or other governing body), which would require a change in statute.

- **A System for Resolving Disputes Concerning Technical Matters and Program Implementation Could Be Established.**

Technical disputes could be addressed by setting up peer review panels. The Council and other sovereigns could also agree to establish a mediator, special master or an administrative law judge to evaluate technical issues in light of governing law and policy. Such a judge could recommend decisions to the Council and other sovereigns as they take a more active role in coordinating implementation efforts. It may require an Executive Order for federal agencies to accept this approach.

- **Seek an Agreement or Executive Order Requiring Federal Agency Consistency With a Single Fish and Wildlife Plan.**

An interagency agreement would help ensure that federal implementing agencies take full advantage of existing laws to act consistently with a single salmon recovery program and other aspects of fish and wildlife management. Presumably this would be the Council's plan (modified through the cooperative process of convening sovereigns as suggested here). If there is doubt about the legal capacity of the agencies to enter such an agreement, or if any of the agencies is reluctant, an Executive Order should be sought.

- **Initiate Coordination with Watershed Programs.**

Habitat improvements should be coordinated as much as possible through local watershed efforts. The Council's model watershed program and watershed programs of basin states and some federal agencies are good examples. Without legislation, the Council and others could agree to coordinate these activities to promote and enhance basin-wide compatibility.

- **Establish a Combined Approach for the Distribution and Programming of Available Funding.**

The recent budget agreement between Bonneville and the National Marine Fisheries Service is a first step toward a coordinated approach to planning and administering fish and wildlife funding. The broad commitment of all affected sovereigns is needed to ensure that this agreement is implemented, and to pursue further coordination of budgeting and accounting. One possibility is the establishment of a cost-sharing account to include all the Bonneville Power Administration, federal, state, tribal and private funds available for salmon recovery, enhancement and habitat mitigation.

- **Use an Independent Science Entity.**

Independent scientific advice should be available to provide decision makers with an unbiased foundation for recovery efforts. A scientific advisory entity should be established by agreement of the sovereigns.

- **A Monitoring Program for Plan Implementation Should be Established.**

The Council could establish a program to monitor all necessary aspects of implementation of its plans (presumably a combined plan as agreed by all parties). It could utilize annual performance audits. The results of this monitoring should lead to plan revisions and changes in the funding and delivery of implementation efforts.

B. Long-Term.

The workshop participants stressed the practical, political, and legal feasibility of improving Basin governance of fish and wildlife without the inevitable delays and uncertainties inherent in developing and pursuing broad, systemic changes. Thus, the group, sometimes sub-groups or individuals, suggested several short-term strategies, as reflected in the preceding section. This does not imply a negative attitude toward all long-range or fundamental changes. Indeed, most people felt that the best way to identify and develop significant legislative changes would be through further debate. These concepts could be tested through incremental changes in the short term and effected so far as possible within existing legal authority.

Longer term issues to be considered include expansion of the Council, merging the legal requirements for planning and species recovery into a single plan, and establishing a dispute resolution mechanism. One of the major issues regarding systemic change in legal authority is in the composition of the Council: should it include representatives of the tribes and federal government? Should there be a role for Canada? For the time being this widely perceived issue can be addressed through voluntarily convened technical and policy groups.

APPENDIX 1 -- ATTENDANCE LIST

Workshop on Fish and Wildlife Governance February 1-2, 1996 Portland, Oregon

Jim Abbott
Member of the Canadian Parliament

Gail Achterman
Stoel, Rives, Boley

Rick Applegate
Trout Unlimited

Bill Blosser, Vice President
CH2M Hill

Professor Michael Blumm
Lewis and Clark Law School

Bernadine Boychief
Kootenai Tribal Council

Ric Brown
Ravalli Co. Elec. Coop

Sherl Chapman
Idaho Water Users Association

Tom Cooney
Washington Dept. of Fish and Wildlife

Larry Craft
Aluminum Workers Trade Council

Michael Crouse
Chief, Branch of Biological Services
U.S. Department of Interior
Bureau of Land Management

Dave Cummings
Nez Perce Tribe

Steve Eldridge
Umatilla Electric Coop

David Geiger
Chief, Salmon Coordination Office
U.S. Corps of Engineers

Jim Goller
Consultant

Pat Graham
Montana Dept. of Fish, Wildlife & Parks

Cal Groen
Idaho Dept. of Fish and Game

Tim Hall
Montana Dept. of Natural Resources and Conservation

Liz Hamilton
Northwest Sportfishing Industry Association

Keith Kutchins
Shoshone-Bannock Tribes

Kelly Lillengreen
Coeur d'Alene Tribe

Brian Lipscomb
Salish-Kootenai Confederated Tribes

Rob Lothrop
Columbia River Inter-Tribal Fish Commission

Matt McKeown
Idaho Attorney General's Office

John Ogan
Confederated Tribes and Bands of the Yakama Indian Nation

Drew Parkin, Consultant

Ken Pedde
Deputy Regional Director
U.S. Department of Interior
Bureau of Reclamation

Joe Peone
Colville Confederated Tribes

J. Mark Robinson
Director, Division of Project Compliance and Administration, Office of Hydropower
Licensing
Federal Energy Regulatory Commission

Professor Bill Rodgers
University of Washington School of Law

Dan Rohlf, Esq.
Northwest Environmental Defense Center

Dennis Rohr
Mid-Columbia Public Utility Districts

Roy Sampsel
Sampsel Consulting, Inc.

Donald Sampson, Chairman
Umatilla Confederated Tribes

Warren Seyler, Chair
Spokane Tribes Business Council

Josh Smienk
Columbia Basin Trust
British Columbia

Alex Smith
Group Vice President for Environment, Fish and Wildlife
Bonneville Power Administration

Michael Spear
Regional Director
U.S. Fish and Wildlife Service

Alan Stay
Tribal Attorney
Colville Business Council

Tim Stearns
Save Our Wild Salmon

Will Stelle
Regional Director
National Marine Fisheries Service

Bill Towey
Kalispel Business Committee of the Kalispel Tribe of Indians

Bud Tracey
Raft River Rural Elec. Coop

Robert Williams
Associate Regional Forester
U.S. Department of Agriculture
Forest Service

Rita Windom
Libby Area Chamber of Commerce

Bill Young
Department of Environmental Quality

APPENDIX 2 -- REVISED ALTERNATIVES AND COMMENTARY

Revised Approach No. 1: No Legislative Change; Interagency Agreement

Summary: The Northwest Power Planning Council would convene a forum of all the sovereign entities in the Basin to reconcile conflicts in existing fish and wildlife plans and programs, provide for dispute resolution of differences, and coordinate implementation of a reconciled plan.

Analysis: The Council can act immediately to identify disagreements among the various regional fish and wildlife plans and convene a dispute resolution process. To begin, the Council should sponsor an analysis of the existing plans to clearly identify points of agreement and points of disagreement. For points of agreement, the Council should convene the sovereigns (meaning single representatives of each involved state, tribe and federal agency) to agree on an implementation plan with funding allocations.

A dispute resolution mechanism is possible if the federal operating agencies agree to participate. An executive order could provide the authority and mandate for participation. Similarly, involved tribes and state agencies can agree on terms for participation through a memorandum of agreement. The dispute resolution process would be triggered by disagreement about implementation of the plans. This process would incorporate review and consultation at both the technical and the policy levels. All appropriate sovereign parties could be represented if they wish to be. Disputes that continue beyond the convened representatives of the parties would face some "decision-forcing" mechanism, as yet to be determined.

The role of the Council's planning process should be to reconcile differing goals and objectives among the sovereign authorities. A regional plan should provide the structure to balance competing local fish and wildlife objectives. The plan should be general, however, leaving the details of local management to subbasin-based watershed planning.

Commentary: Group members felt that this alternative should focus on implementation, that developing an alternative planning process isn't necessary. Much of the discussion about the current problem focused on the lack of implementation of the Council's plan and the sense that federal agencies do not feel accountable for implementing the Council's plan. Yet federal officials feel caught by conflicts between the Council plan, the Biological Opinion and other plans, and even by conflicts within the Council plan itself.

At the same time, several group members pointed out the significant degree of common approaches among the Council's program, the draft recovery plan and the tribal restoration plan. The disagreements are chiefly confined to a few -- but very significant -- issues in hydro operations. Group members discussed alternatives for resolving these disputes, including:

- the FERC model (such as that used on the mid-Columbia). While the group saw appeal in having a judge as the last alternative for resolving a dispute, there was general concern

about the necessary preliminary litigation and the amount of time required to initiate a formal legal process.

- the U.S. v. Oregon process. The group expressed concern about complete representation in that process and also about compromising tribal rights.

The group agreed to broad principles for resolving disputes in implementation:

- Form technical panels capable of review and analysis of disputed issues (or utilize existing bodies). All interested sovereign authorities could participate. If the technical panel can reach a decision, the dispute ends there.
- Establish a policy panel to consider disputes chiefly of a policy nature and also appeals from the technical panels. The policy panel would be open to all interested sovereign authorities.
- Establish a final decision point - possibly an administrative law judge - to hear and rule on issues that cannot be resolved at the policy level.

Group members believed there is a need for regional fish and wildlife planning. Local management goals often conflict with regional objectives. For example, sturgeon requirements on the Kootenai River conflict with salmon flow requirements. Regional planning should bring the management authorities together to resolve such conflicts. Regional plans should be general, allowing flexibility in implementation at the local watershed level.

Revised Approach No. 2: All Federal Agencies Act Consistent With Council Program

Summary: This approach would require an amendment to the Northwest Power Act mandating that all federal agencies must “act in a manner consistent with” the Northwest Power Planning Council’s fish and wildlife program, a consistency requirement to be facilitated by an executive order or some other sort of administrative directive. The Council would establish a standing committee composed of the state and federal fish and wildlife agencies and the Basin’s Indian tribes to provide recommendations to the Council for program measures and oversee implementation.

Analysis: This approach calls for minimal amendments to the Northwest Power Act that would require all federal agencies to “act in a manner consistent with” the Council’s program, as is currently required of the Bonneville Power Administration. A dispute resolution procedure would address issues regarding the consistency between the Council’s fish and wildlife program and other federal laws, and would include a requirement that a federal agency explain, in writing, why it is acting inconsistent with the program.

Under this approach, the Northwest Power Act’s obligations would extend to all federal agencies responsible for federal river, habitat, harvest and production management, including the Corps of Engineers, Bonneville Bureau of Reclamation, Federal Energy Regulatory Commission, Forest Service, Bureau of Land Management, National Marine Fisheries Service, Environmental Protection Agency and U. S. Fish and Wildlife Service. An Executive Order or other administrative order would be needed to facilitate and implement the consistency mandate to the federal implementing agencies in the revised Northwest Power Act. Because the Council’s program would consist of measures which are expected to be implemented by the federal agencies, the Council’s program would have to take into account the major federal laws that govern these agencies: the Endangered Species Act, the Clean Water Act and other federal laws. Federal agencies would continue to implement these laws and processes, together with the Council’s program.

As part of this approach, the Council would establish a standing committee composed of all regional state and federal fish and wildlife agencies and tribes, similar in composition to the existing Columbia Basin Fish and Wildlife Authority. This standing committee would develop a single set of fish and wildlife program recommendations for Council review, consideration and adoption. The Council would provide policy and planning guidelines to ensure that the committee acted within the standards of the Northwest Power Act. These guidelines would assist the committee in developing program recommendations, such as through setting funding constraints for each area of the program and providing a systemwide goal and framework for the program. The Council in turn would give a high degree of deference to the fishery agency and tribal committee recommendations. If the standing committee could not reach agreement on a single set of program recommendations, the Council would decide among alternative recommendations. The Council would establish an independent scientific advisory board to advise it in making a decision among competing recommendations. After public hearings and consultations, the Council would adopt such measures into its fish and wildlife program, or be required to explain in writing why it did not, based on the existing provisions in the Northwest Power Act.

The standing fish and wildlife committee would also oversee the implementation of the adopted fish and wildlife program measures, including allocation of Bonneville and federally appropriated funds. Research, monitoring and evaluation would be provided as under the Council's current fish and wildlife program, including the assistance of the independent scientific advisory board. In implementing the Council's program, the federal operating and resource agencies would have to act consistent with the program or explain in writing before an action is taken why it did not. The Council could then undertake mediation or non-binding arbitration with the respective federal agency to attempt to resolve the dispute. If the Council and the federal agency still could not resolve their differences, a single federal judge or special master would be assigned to resolve such disputes on an ongoing basis.

The membership of the Northwest Power Planning Council would be unchanged, and the Council would continue to be guided by the substantive standards in the Northwest Power Act, including Sections 4(h)(5) and (6). The purpose of the Council's program would remain the protection, mitigation and enhancement of fish and wildlife in the Columbia River Basin, but would apply to all federal river, habitat (land and water), production and harvest management.

Commentary: The group concluded that this approach is feasible in the near-term from a technical, institutional and legislative standpoint, requiring only minimal amendments to the Northwest Power Act, coupled with an Executive Order or some other administrative solution. One concern expressed was how to address the Endangered Species Act and the obligations it places on NMFS and USFWS vis-à-vis the Council program. The group concluded that since the Council's program would consist of measures which are expected to be implemented by the federal agencies, the Council's program would have to anticipate or take into account the major federal laws that govern these agencies, including the Endangered Species Act, the Clean Water Act and other federal laws. Federal agencies would continue to implement these laws and processes together with the Council's program, and thus NMFS would be required to explain to the Council and the region in writing why a Biological Opinion for river operations or a salmon recovery plan differed from the larger fish and wildlife program.

Another question was raised in both the small and large group discussion concerning state agency consistency with the Council's program. A suggestion was made that the four state governors could issue similar executive orders to require state agency consistency with the program. This issue was not resolved, as some felt that state consistency would not be needed because the states would have no incentive to act inconsistently with the program. This would be because the fish and wildlife program would be based on the recommendations of the fish and wildlife agencies and Indian tribes, because the Council would defer largely to these recommendations, and because the Council remains a state-appointed body. Also, some expressed concern that a state consistency requirement could affect natural resources management beyond fish and wildlife, such as water, mining, grazing, timber harvesting, etc.

Another concern expressed in the large group was that non-governmental entities and groups interested in river management would not be adequately represented in the decision making process in this approach. It was pointed out in response that the various river interests and groups would have the same access to the fish and wildlife program decision making process as they do presently. That

is, other user groups and the public could still submit program recommendations for the Council to consider, they could provide written public comment on the draft program and participate in the public hearing process as they do now, and they could continue to seek judicial review of decisions that they believe are inappropriate.



**Revised Approach No. 3:
State/Tribal/Federal Council with Endangered Species Act
and Northwest Power Act Responsibility**

Summary: The federal, state and tribal sovereigns acting together would create a decision-making forum to make decisions under the Northwest Power Act and the Endangered Species Act regarding fish and wildlife affected by hydropower facilities in the Columbia River Basin. No changes in existing legislation would be required. This forum would manage the Bonneville and federally appropriated fish and wildlife funds and provide an accounting of all funds -- federal, state and tribal -- expended for fish and wildlife in the Basin. Decisions would be made on a consensus basis, using a dispute resolution process when consensus cannot be reached. In the longer term, if necessary, Congressional legislation could supplant the Northwest Power Planning Council and federal decision making entities with a broad state/tribal/federal council having these responsibilities. (See the attached figure.)

Analysis:

Short-term/no legislation. Without the need for legislation, all the sovereign entities in the Columbia River Basin develop and participate in a single, consensus decision making forum to make all necessary decisions under the Northwest Power Act and the Endangered Species Act regarding fish and wildlife in the Columbia River Basin. Existing authorities would not be altered, which means that the decisions of this combined-sovereign forum would have to be consistent, where relevant, with the Northwest Power Act, the Endangered Species Act, the National Environmental Policy Act, other Congressional authorizations and obligations, tribal treaty rights, the Pacific Salmon treaty, and appropriate state statutes. The Northwest Power Planning Council, the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, Bonneville, and other federal and state agencies would defer to the decisions of the combined-sovereign forum when exercising these authorities, insofar as legally permissible. Memoranda of agreement and state and federal executive orders would probably be necessary to allow for this type of decision making structure. Canadian interests would be represented through formal consultation procedures or through the establishment of an ex-officio, non-voting, membership.

The combined-sovereign forum would integrate existing fish and wildlife plans into a single regional restoration plan, and then oversee the implementation of that plan. This would include managing and accounting for Bonneville's fish and wildlife funds and the funds federally appropriated for fish and wildlife in the Basin. In the short-term, financing would be shared between hydropower revenues and federal appropriations in the same proportion as currently exists. The forum would also track and account for all funds expended in the Basin for fish and wildlife, even state and tribal funds not managed directly by the forum, and would conduct a yearly performance audit, to be made public, which would review the decision processes, implementation and biological results. Independent scientific review of policy, research and monitoring and evaluation would be provided as under the current fish and wildlife programs.

Included among the combined-sovereign forum's responsibilities would be habitat conservation planning under the Endangered Species Act and administering Bonneville funds consistent with the current Council program's emphasis on local, watershed-based habitat restoration programs.. The forum would facilitate and coordinate the local watershed planning process and integrate these local watershed planning processes with Endangered Species Act and other requirements.

All decision making and implementation oversight would occur in an open and public process, designed to take advantage of the best processes developed in the region to date. Decisions of the combined-sovereign forum would be by consensus, with resort to a dispute resolution process when consensus cannot be reached. In the short-term this would likely take the form of technical review panels and non-binding arbitration. Judicial review of decisions would be available to those with legal standing. The sovereign entities represented in the forum would not be precluded from filing legal challenges.

Long-term/legislation. Efforts to integrate decision making to the degree outlined here may turn out not to be fully successful. If so, legislation developed over the longer term could create a federal/state/tribal Council and assign to it the powers and responsibilities described here, including full planning and implementation responsibilities under the Northwest Power Act and the Endangered Species Act. The composition of this Broad Council would be negotiated in the legislative process. The legislation would assign to the Broad Council responsibility for all federal fish and wildlife funding and develop methods for cost-sharing with states, tribes and other parties. Legislation or other longer-term processes could also establish an effective dispute resolution mechanism, such as by a Congressionally or judicially appointed master or administrative law judge.

Commentary: The attached figure graphically illustrates the approach outlined here. The small group came to a consensus that better and more coordinated decision making is needed and that it needs to encompass the current multi-jurisdictional situation. Many questions regarding this approach were not settled upon, however. The group did not favor immediate legislation, preferring instead the successive short- and then long-term approach. The group recommended exploring the use of executive orders by the governors and the president as a non-legislative means of ensuring that the appropriate state and federal entities will meaningfully defer to a combined sovereign group. The benefit of this approach is that it would bring the decision making under one umbrella, which could speed up implementation. Some were concerned, on the other hand, that we would be creating another layer of bureaucracy, while others were concerned that a single decision forum with real authority could not be created without legislation.

Discussion also centered around questions of membership and representation in the forum and on the Broad Council. The group did not address legal issues regarding membership, which would have to be faced as part of the long-term legislative package. Some in the group believed membership should be limited to one participant from each of the sovereigns, and some believed that the Broad Council should provide for the inclusion of non-sovereign groups such as utility or environmental groups.

A majority of the group made clear that they do not favor the decision making that takes place under the Endangered Species Act, preferring instead the more open, public review approach used by the current Council. Development of a dispute resolution process of some type was also strongly supported, with discussions focusing on the type of process that would be most effective. One model that received a considerable amount of discussion was the approach used in the Mid-Columbia FERC proceedings. No agreement was reached on a process.

There was a strong feeling in the group that the decision making body needed to have control of the funds and to be accountable for their expenditure and that to date there has been no accountability. The group endorsed developing a yearly performance audit to assess results.

Most of the group appeared to support continued use of independent scientific review, although there was little discussion about the subject directly. Some raised concerns over too strong a reliance on science in answering some questions; others on how to develop a dispute resolution process for scientific questions. There was no agreement on these issues.

Revised Approach No. 4: Focus Decisions on Watershed Conditions Rather Than Species

Summary: The watershed approach focuses on restoring and maintaining watershed health, and should be recognized as a fundamental building block of any governance strategy. No legislative changes are needed to begin implementing this approach, and it should not be considered a new form of government. A watershed approach must combine local watershed implementation efforts with a systemwide level of governance to facilitate, coordinate and ensure financing for watershed efforts.

Analysis: An appropriate watershed approach has two levels -- local watershed implementation by watershed groups that include all affected interests and systemwide coordination by the sovereign entities.

Watershed level efforts. Watershed groups would focus on implementation and not on planning. A number of plans exist for the various watersheds, and it would be a waste of time and resources to redo these efforts. The existing subbasin and tribal, forest, state, local and other plans should be the baseline for action, and updated where necessary. The watershed groups can use existing plans to identify agreement on what can and should be done and to identify conflicts that need further consideration in the group.

The watershed groups would focus instead on coordinating funding, developing funding priorities and implementing activities for improving the health of the watersheds. Funding coordination would include combining and coordinating the use of Bonneville hydropower mitigation funds with other funds available for the watershed. The watershed groups would develop watershed objectives and goals to be used to guide implementation and to measure whether watershed efforts are successful, objectives and goals that would address general systemwide policies and goals. Performance audits, with results made public, would help ensure accountability for activities.

All public and private interests in the watersheds would be offered the opportunity to participate in the implementation and funding decisions, and all watershed decisions need to be made in open, public processes. In watersheds that cross state and national boundaries, the watershed approach needs to be compatible with, allow for, and even encourage a single watershed group and implementation effort. Watershed groups need to be encouraged to apply different approaches in different watersheds to respond to local conditions and promote experimentation. The watershed groups and efforts also need to be able to link to other processes that are in and affect the watershed, such as FERC licensing and re-licensing efforts. Watershed efforts should not affect or undermine sovereignty or property rights.

Systemwide efforts. The watershed approach will not work without the appropriate systemwide structure and activities to implement the approach. A systemwide body or group of some type is needed to: facilitate, coordinate and provide incentives for the development of watershed groups; develop systemwide goals, policies and guidelines; ensure that decision making is targeted at the appropriate level (e.g., making sure that the critical implementation decisions for watersheds are made at the watershed level); ensure that watershed

interests are taken into account in balancing issues and needs throughout the Basin; facilitate multi-state or international watershed efforts where necessary; ensure that adequate funding exists for watershed efforts; prioritize funding between watershed efforts and other Basin activities; and give priority in funding habitat and watershed measures to subbasins that are prepared to develop or implement a watershed approach, that provide the greatest benefit for the cost, and/or that address species of concern. The systemwide body is not to be a regional watershed council or river basin commission that decides on what watershed activities will be implemented or prescribes specific objectives that determine local watershed activities.

This systemwide body needs to allow for the representation of the state, tribal and federal sovereign entities in the Basin, and to have the authority to carry out the responsibilities described above, so as to promote consistency, efficiency and accountability in watershed efforts and prevent the forum shopping that paralyzes decision making and implementation. The federal agencies and the states need to defer to and use this body to shape the overall watershed approach, and act consistent with that approach. Developing a dispute resolution process or processes is essential to the functioning of the systemwide body.

The approach assumes that full representation and participation of all interests will occur at the local level and that sufficient representation to address regional issues will occur at the systemwide level. Effective and efficient decision making will not happen if every entity, agency, and interest must have a representative in every phase of the management process at the systemwide level. For just one example, the Basin's tribes would need to decide, and are in the process of discussing, how they might select fewer than thirteen representatives for an on-going, systemwide body.

In the short-term, the region needs to start working toward this approach by developing better coordination and representation in the present process. Implementing a viable systemwide approach over the long term may and probably will take federal and possibly state legislation.

Commentary: The small group concluded that the systemwide aspect of the watershed approach requires expanding beyond the state representation of the Council to include all three types of sovereign entities -- tribes, states and federal agencies. The current arrangement encourages interests to lobby federal agencies separately for funding and activities. The region needs to act together in a combined forum that agrees on how to approach basin-wide or systemwide issues, a process or forum in which no entity, including the federal agencies, may ignore and act independently. The group agreed that this systemwide/watershed approach could be pursued without changes in the substantive obligations of the Northwest Power Act, although legislative changes in governance structure and implementation may turn out to be necessary to produce an effective systemwide body.

The group agreed that a systemwide body would be needed to coordinate activities, ensure funding to watershed groups and determine the appropriate investment levels for the program as a whole and among the watersheds. Without the systemwide body, one problem, for example, is the risk of over-investment of system funds in specific watersheds. But while specific watershed funding levels should be set at the systemwide level, the local watershed groups should decide how to spend their allocation. The group tentatively agreed to the concept

of requiring a watershed approach to be in place before access is allowed to Bonneville or federally appropriated funds for habitat restoration activities in the watershed. However, the systemwide body should focus on system issues; it should not address watershed-specific issues or be directly involved in implementation. Implementation needs to be centered in the watersheds.

Some in the group worried that without good coordination this approach could result in gridlock, failing to build necessary trust and promoting divisiveness, and that it may prove impossible to coordinate watersheds, resulting in dueling processes. Others were concerned that the sovereigns will find it difficult to agree on systemwide goals and policies, as the sovereigns currently do not agree on the proper approach to goals and policies for watersheds.

With regard to the interaction of the watershed approach and the Endangered Species Act, the group believed that assurances need to be given that once watershed approaches are endorsed by a systemwide body, Endangered Species Act considerations will not subsequently require more. The need is for people to have reasonable assurances (a guarantee may be infeasible) that goals will not change and that what will be done will be sufficient. Goals should change through a collective, not unilateral, process that incorporates an adaptive management process. The group also agreed that it may be advisable and even desirable to coordinate watershed processes with habitat conservation plans under the ESA, which could allow for a degree of stability and certainty under the ESA before watershed activities are initiated. At the same time, members of the group expressed a concern that subbasins not be excluded from being recognized as legitimate watershed approaches simply because they do not meet requirements of an HCP. HCP processes can be too prescriptive; more flexible approaches are needed for specific situations. The group also supported state approaches that address weak populations before listing occurs.

The group disagreed as to what degree of watershed restoration is sufficient. The group recognized the need for agreed-upon goals in this regard, whether it be historical levels of populations or some other level. The watershed approach will need to establish how to determine this level and who makes this decision.

Some in the group felt that participation in local watershed groups should occur at two levels. The first level would be those on the watershed council as voting members, limited to citizens in the watershed who are not paid to attend meetings. The other level would include government employees who are paid to attend meetings, who would be limited to observing and providing technical/policy advice. A government employee could sit on the council only if they were not representing their employer in that position. It was believed that this would protect sovereign and property rights.

Others in the group noted that the tribes want to be intimately involved in the watershed groups and not be out-numbered. The tribal goal at a minimum will be to protect treaty and trust responsibilities and ensure that cultural resource issues are addressed in plans. Others in the group noted that utilities and other industry groups will want to be part of the groups, not just funding the activities, and that representation by non-river users in the watersheds is also needed. Activities in upland areas are important to this approach.

Revised Approach No. 5: Appropriate Management by Fish and Wildlife Managers

Summary: State, tribal, and federal fish and wildlife managers would coordinate their activities with a goal of reestablishing sustainable populations of fish and wildlife for harvest. The fish and wildlife managers would manage implementation of a significant portion of the fish and wildlife mitigation measures and funds, and make recommendations to the sovereign entities concerning the other measures. Courts or other adjudicative processes would be asked to oversee and resolve disputes among the fish and wildlife managers and among the sovereigns.

Analysis: The central focus of fish and wildlife planning and implementation would become reestablishing populations of fish (and wildlife) that can be harvested in sustainable but significant numbers. This focus would reach all aspects of fish and wildlife management, including watershed habitat activities, harvest, river management and operations, artificial and natural production, etc.

At all the relevant levels of fish and wildlife management -- local, subregional and regional -- the different management entities with authority over the resource or area at issue would coordinate their activities and reconcile the different programs, plans and activities into appropriate action plans, and manage the implementation of the plans. No particular fish and wildlife agency or manager would claim primacy or act unilaterally, including NMFS and USFWS under the Endangered Species Act. Instead, decisions would be made by coordination and reconciliation among all managers with authority, referring disputes to dispute resolution processes.

Certain aspects of fish and wildlife management primarily or wholly affect only fish and wildlife resources. In these situations, existing decision and implementation processes would be altered or eliminated so that most of the management decisions to achieve this goal would be made by the state, tribal and federal fish and wildlife management entities that have statutory or other legal authority to manage particular regions and the fish or wildlife in those regions. This is particularly true of decisions made in the context of a stable Bonneville budget for fish and wildlife. For example, when to call for spill for fish becomes an issue for the fish managers to decide based on the needs of fish, the availability of funds within the budget and decisions on how best to prioritize those funds for fish. The same is true of a number of other issues, such as the identification of and allocation of the fish and wildlife budget to the appropriate fish passage measures for anadromous fish, or determining the appropriate production and habitat measures to benefit anadromous fish, resident fish or wildlife. In these areas, the fish and wildlife managers should make and directly implement the basic decisions, in open public processes and employing dispute resolution processes to resolve disagreements.

Many of these types of decisions can be made and implemented in local watershed forums, especially decisions concerning habitat planning and implementation, or in subregional forums, especially including the development of production and habitat goals and objectives. Not all fish and wildlife managers would participate in these forums and processes -- only the fish and wildlife managers with management authority in the relevant watershed or subregion

would participate. On the other hand, these watershed and subregional forums would include the other public and private interests that are affected.

Other aspects of current fish and wildlife management are far broader than fish and wildlife management, especially the issues concerning flows and reservoir levels. These are also the areas where the fish and wildlife managers have historically had the most trouble translating plans into implementation. In these instances the fish and wildlife managers would need to coordinate and reconcile their views, resolving differences by dispute resolution mechanisms and not by asserting primary authorities. The managers would then provide technical recommendations to the sovereigns as to the needs of fish and wildlife. These recommendations would go to a coordinated body of the state, tribal and federal sovereigns relevant to the resource at issue. The sovereigns, acting as equals, would make the relevant decisions, using dispute resolution processes to resolve differences.

To reduce management layers, reduce administrative spending and time, and provide for direct management and accountability by the fish and wildlife managers, Bonneville would transfer the administration of its fish and wildlife funds and program to an entity or trust composed of the sovereigns, with the expectation that the fish and wildlife managers would primarily act for the sovereigns. To this entity or trust, Bonneville would transfer the agreed-upon budget for fish and wildlife activities in the Basin. It would be used to meet specified goals and objectives for fish and wildlife developed by the co-managers, including monitoring and evaluation plans. The agencies and tribes would report annually to the region on progress toward the goals and objectives, which would be refined by the knowledge gained in implementation, and would provide for an annual independent audit of the use of the funds. Included within this framework would be the process for funding local watershed activities tied to goals and objectives and to progress in meeting those objectives. Budgeting and allocation would function in a combined bottom-up/top-down, iterative process corresponding to the levels of management integration. That is, a comprehensive group of the Basin's fish and wildlife managers would make broad divisions in the allocation of the available funding among regions and types of activities, and actively decide on the allocation of the amount of money slated for systemwide mainstem operations and system configuration, etc. Local watershed and subregional management groups, as part of local action plan development, would decide how to prioritize activities and allocate the money available to those activities, while providing information and evaluation back to the broader group of managers to be used in reviewing the broader divisions of the available resources.

Dispute resolution mechanisms would also vary with and be appropriate to the resource and activity level managed. Using the existing *U.S. v. Oregon* and *Mid-Columbia FERC* processes as models, federal courts and administrative law judges would be called upon to help oversee and, if necessary, resolve the more fundamental and system-wide disputes the sovereign parties could not resolve themselves. At local watershed and subregional levels, it may be more appropriate to create advisory panels, non-binding or binding arbitration processes and similar dispute mechanisms. Independent science review or peer review would be integrated into this management approach as a part of dispute resolution. The managers could also, when appropriate, ask the independent scientific group review and comment on more foundational issues.

Shifting the current management structure toward this approach should be possible without significant legislative changes, through memoranda of agreement and specific planning and implementation actions. The Council, in its program planning, and the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, in their recovery planning and biological opinions, would call for this management focus and structure, and would recognize that actions and authorities to avoid jeopardy and recover listed species would be a sub-set or part of the broader goal to restore harvestable populations of all types. As revisions to the Power Act may be likely in two or three years due to changes in the energy system and energy planning, one primary goal of the sovereigns and their fish and wildlife managers would be to create an effective and responsible management structure in the interim so that legislative changes to the Act concerning fish and wildlife could focus simply on codifying and facilitating this management focus.

The Council would continue to have its existing statutory responsibilities, and would fill the following roles: (1) facilitate system-wide and general planning; (2) provide institutional mechanisms and processes for public input, public review and public involvement in the activities of the fish and wildlife managers and the sovereigns; (3) provide a key legal mechanism -- through the existing implementation provisions of the Act, supplemented as needed by an Executive Order -- to get the federal project operators, water managers and even land managers to act consistent with the reconciled fish and wildlife plans and programs of the fish and wildlife managers and sovereigns; and (4) provide for annual reporting to the Congress and the public as to the activities underway and the progress of those activities toward meeting goals and objectives.

APPENDIX 3 -- ADDITIONAL READING

There have been a number of reports and articles on the institutional issues involved in the Columbia River over the past several years. A selected and, it is hoped, representative list:

Naiman, Magnuson, McKnight and Stanford, eds., *The Freshwater Imperative: A Research Agenda* (Island Press, 1995), chapter 5 (a broad discussion of institutional and governance issues associated with river basins).

National Research Council, *Upstream: Salmon and Society in the Pacific Northwest* (1995) (contends that the biological range of salmon is too diverse to be manageable as a unit; stresses the importance of vesting adequate resources in any management structure, but notes that management also must be decentralized because decisions must be carried out by parties whose responsibilities are narrower; urges development of an ecosystem approach to management and ways to link the interests of stakeholders to biogeography as well as economics; and stresses the importance of an adaptive approach, which is designed from the outset to test clearly identified hypotheses about an ecosystem being changed by human use).

Nez Perce, Umatilla, Warm Springs and Yakama Tribes, *Wy-Kan-Ush-Mi-Wa-Kish-Wit, Spirit of the Salmon*, Volume 1, Sections 4 and 5 (review draft, June 15, 1995) (four Columbia River Treaty tribes' recommendations for institutional changes needed to respond to the tribes' treaty rights, focusing on managing production and harvest through the *U.S. v. Oregon* and the Northwest Power Act processes, transfer of certain federal hatcheries to the tribes, and limiting policy barriers to the use of artificial propagation as a tool for salmon restoration).

National Marine Fisheries Service, *Proposed Recovery Plan for Snake River Salmon*, Chapter III (March 1995) (proposed Snake River salmon recovery plan whose implementation would be overseen and coordinated by the National Marine Fisheries Service).

Duncan, et al., discussing the merits of a "Columbia Basin Watershed Planning Council," 10 *Illehee* (Winter 1994) (Duncan proposes that the Northwest Power Planning Council be expanded to account for watershed-wide issues relating to fish and wildlife habitat; responses raise various advantages and disadvantages of such an approach).

Bonneville Power Administration, U.S. Army Corps of Engineers and U.S. Bureau of Reclamation, *Columbia River System Operation Review, Draft Environmental Impact statement, Appendix Q, Columbia River Regional Forum* (July 1994) (analyzes several alternative governance structures for operating the Columbia River system).