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Program Document
Third Draft

Klamath River Basin Conservation Implementation Program

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Third Draft
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EXECUTIVE SUMMARY

In 2002 the Bureau of Reclamation prepared a biological assessment on the operation of the Klamath Project. One item proposed in the BA was that a basin-wide program, known as the Conservation Implementation Program (CIP), be developed to recover Endangered Species Act listed species. The Biological Opinions issued by NOAA Fisheries and the Fish and Wildlife Service in response to the BA concluded that actions to protect the listed fish would best be addressed through a comprehensive plan. Reclamation has since been working to develop a comprehensive plan in conjunction with other stakeholders and governments. A basin-wide approach has also been called for as a result of several other events, including an August 30, 2004 public meeting held by Congressman Mike Thompson; a July 17, 2004 Endangered Species Act hearing held in Klamath Falls, Oregon; the June 7-10, 2004 Lower Basin science conference and the February 3-6, 2004 Upper Basin science conference; a 2004 National Research Council Report; and, the Secretaries of the Interior, Commerce, and Agriculture, the Governors of California and Oregon, and the Administrator of the Environmental Protection Agency signed an agreement which endorsed the development and implementation of the Klamath Basin Conservation Implementation Program concept.

Reclamation produced an initial draft Program Document describing one possible approach to a basin-wide process which was made available to the public. Reclamation staff also introduced the concept by attending numerous meetings of existing restoration efforts (Klamath Basin Taskforce, Trinity River Restoration Council, Upper Basin Working Group and others), visiting with the county supervisors of the six basin counties, meeting on a government to government basis with the Hoopa, Yurok, Karuk, and Klamath Tribes, and compiling an e-mail list to distribute the document. Comments were requested and a large amount of constructive input was received. A second draft, incorporating the feed back, was prepared and distributed for further comment. Newspapers, e-mail, and direct mail were used to invite participation in a series of six public meetings which were held throughout the basin. People attending these meetings received an introduction to the draft Program, then had the opportunity to ask questions and provided comments. During the public meetings many people requested a continuation of the consensus building workshops sponsored by the Klamath Compact Commission. In response, Reclamation financially supported an additional 5 workshops on communications and consensus building during which further input on a basin-wide program was received.

Based on the public input the CIP has been re-designed as an ecosystem restoration program, addressing all species, including the Chinook salmon, green sturgeon, and lamprey. The CIP will aid existing ecosystem restoration and water management efforts developed at the local level, to advance more rapidly by providing resources, coordination, and communications. The CIP will also fund research to increase understanding of the Klamath River system and monitoring to evaluate progress toward the Program goals. The CIP will conduct an annual science conference to share research results and monitoring information. Results of monitoring will be incorporated into the

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program through an adaptive management process of continual learning and incorporation of emerging science.

The purposes of the CIP are:

1) To restore the Klamath River ecosystem.

2) To further the fulfillment of the Federal Government's tribal trust responsibilities as they relate to natural resources from the Klamath River ecosystem.

3) To sustain agricultural, municipal and industrial water use while reducing demand throughout the Klamath River Basin.

4) Foster a lasting partnership between Governments (Tribal, Federal, State, County and local) and private interests of the Klamath Basin to advance the goals of the CIP.

This significant undertaking will require the joint efforts of numerous parties. The CIP is intended to serve as a mechanism by which the participants can work together to achieve the program goals. It will strive to coordinate the many existing conservation and restoration efforts on-going in the basin. The CIP will provide technical and funding resources.

The CIP will also provide essential services for communication and coordination such as a web-based clearing house for posting data, reports, notices and other information. The CIP will work to fill gaps in data and answer research questions where they exist.

CIP meetings and activities will invite participation by all interested stakeholders.

Although the CIP is being initiated by the Bureau of Reclamation, it will be carried out jointly by the Program participants. The CIP creates no new authorities and is subject to state and local laws and ordinances.

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1. Background

In 1988, the US Fish & Wildlife Service (FWS) listed the shortnose sucker (*Chasmistes brevirostris*) and the Lost River sucker (*Deltistes luxatus)* as "endangered" under the Endangered Species Act (ESA.) In 1997, the Southern Oregon/Northern California Coasts coho salmon (*Oncorhynchus kisutch*) was listed under ESA as a "threatened" species.

On February 25, 2002, Reclamation transmitted its Biological Assessment (BA) on the effects of proposed operation of the Klamath Project for a ten-year period of April 1, 2002 to March 31, 2012, to the FWS and the National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries). Appendix A of the BA contains a list of potential actions to assist with protection, conservation and/or recovery of listed species. Specifically, in item 2.B Reclamation proposed to take the responsibility to develop a comprehensive plan to provide direction for research efforts, implementation of restoration projects, and monitoring of results. The plan would be developed with the Tribal and state governments and a network of stakeholder groups and would provide a mechanism for implementation of activities to be undertaken by tribes, federal, state, and local agencies and interest groups to improve habitat conditions for the listed species.

On May 31, 2002, the FWS and NOAA Fisheries each issued jeopardy Biological Opinions (BO) with a reasonable and prudent alternative (RPA) on Reclamation's proposed operation of the Klamath Project. An element of the NOAA Fisheries RPA recognized that achieving target flows would likely require more contributions to flow than could be provided by Reclamation's Klamath Project alone, and that the larger context of actions affecting threatened salmon would be best addressed through a comprehensive plan. FWS's BO also recognized the need for a basin-wide approach to resolving natural resource issues. Reclamation accepted the RPA, including the responsibility to develop a comprehensive plan, which has been titled the Klamath River Basin Conservation Implementation Program (CIP).

Reclamation produced an initial draft Program Document describing one possible approach to a basin-wide process which was made available to the public. Reclamation staff also introduced the concept by attending numerous meetings of existing restoration efforts (Klamath Basin Taskforce, Trinity River Restoration Council, Upper Basin Working Group and others), visiting with the county supervisors of the six basin counties, meeting on a government to government basis with the Hoopa, Yurok, Karuk, and Klamath Tribes, and compiling an e-mail list to distribute the document. Comments were requested and a large amount of constructive input was received. A second draft, incorporating the feed back, was prepared and distributed for further comment. Newspapers, e-mail, and direct mail were used to invite participation in a series of six public meetings which were held throughout the basin. People attending these meetings received an introduction to the draft Program, then had the opportunity to ask questions and provided comments. During the public meetings many people requested a continuation of the consensus building workshops sponsored by the Klamath Compact Commission. In response, Reclamation financially supported an additional 5 work shops

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on communications and consensus building during which further input on a basin-wide program was received. This document is the third draft Program Document.

The shut down of deliveries of water to Klamath Project contractors in 2001 in order to address sustained drought and fish needs, and the fish die-off of 2002, juvenile disease problems, and the depressed status of the Basin's fisheries resources illustrate the urgency with which a basin-wide approach to resolving natural resource issues in the Klamath Basin must be undertaken.

Similar programs are being successfully employed elsewhere (Upper Colorado River, Platte River, San Juan River, and Provo River Recovery Implementation Programs; Grand Canyon Adaptive Management Program; Multi-species Conservation Program in the lower Colorado River, etc.). These programs were designed to address similar issues of conflict between water use/development and ecosystem protection and restoration. Although the CIP draws on these programs conceptually, it incorporates the input garnered from public meetings, consensus building workshops, direct feedback, written comments, and government to government meetings. This input has shaped the document so that it is specific to the Klamath River Basin and its unique set of circumstances.

Not all parties and governments consulted have endorsed the CIP and some are in direct opposition. Participation in the CIP is fully voluntary. New participants will be welcomed to the process at any time they elect to join. In an effort to produce a Program which is acceptable to as many people as possible, a public meeting will be held in early 2006 to further refine this document with the help of a professional organizational development consultant. The CIP Program Document will remain a living document which will be modified to address issues and concerns as they arise.

2. Progress to date

Although the CIP is not fully formed, funding has been made available by Reclamation and certain activities have taken place. This includes the following:

- Funding of 50% of the cost of the Shasta/Scott water master expenses in 2004 and 2005.
- Purchase and installation of a weir used to monitor sucker movements
- Funding support of a ground water study in Siskiyou county
- Funding support of the 5 year status review of the listed suckers
- Partial funding for a genetic study on spring run Chinook
- Partial funding of a juvenile Coho telemetry study
- A thermal refugia study
- Partial funding of a data portal being developed by the Trinity Restoration Office with potential to be expanded for the entire Klamath River
- Funding of a training course on data collection for the 2-D modeling for Trinity
- Funding of The Natural Flow Study above Keno Dam

- Collection of electronic and/or existing restoration plans throughout the basin to aid in avoiding duplication and to insure coordination with existing groups
- Contract with the National Academy of Sciences to review two important studies
- Partnering on 5 three day consensus building workshops at various locations in the basin
- Conducting 6 public meetings to receive public input on the draft CIP document
- Funding Oregon State Extension office to conduct public out reach meetings
- Funding for a science team for upper basin restoration

In addition, many hours of staff time have been dedicated to laying the ground work for a long term plan for fish and water quality monitoring in the Upper Klamath Basin and in working with others to gain an understanding of how the CIP should be formulated.

2.a Recovery Plans

Section 4(f) of the ESA requires the Secretary to develop and implement recovery plans for the conservation and survival of each listed species, unless the Secretary finds that a recovery plan will not promote the conservation of the species. The FWS is responsible for the preparation of recovery plans for the shortnose and Lost River suckers, and NOAA Fisheries is responsible for the recovery plan for the Southern Oregon and Northern California Coastal (SONCC) Coho salmon.

The recovery plans for the shortnose and Lost River suckers were completed by the FWS in 1994, based on the best available information at the time. Significant new information has been developed since 1994, and the FWS is near completion of the 5-year review and is preparing to update the recovery plans. Two separate but related processes, one by the State of California, and another by the 13 member Shasta Scott Recovery Team (SSRT) have developed recovery plans for the Coho. These plans describe the actions needed to recovery the coho. The broader California Department of Fish & Game document titled *Recovery Strategy for California Coho Salmon,* extending beyond the Klamath River Basin and the scope of the CIP, overlays the entire region, while the SSRT strategy provides a customized recovery plan for the Scott and Shasta rivers.

These two state-of-the-art recovery plans represent an extensive and comprehensive effort. In addition, NOAA Fisheries is in the process of developing a coho recovery plan. The CIP will rely on these efforts, working to aid the State and SSRT as they implement their plans.

The content of recovery plans is discretionary; however, to the extent possible, recovery plans should contain criteria for when down listing can occur and for what constitutes recovery. Ideally, the FWS and NOAA Fisheries recovery plans will identify the specific, measurable criteria (recovery goals) needed to remove the threats to the species which resulted in their listing as threatened or endangered. The CIP will coordinate and participate in their implementation. Progress toward meeting the recovery goals will constitute one of the Program bench marks.

3. Relationship of the CIP to Existing Klamath Basin Conservation Efforts

The CIP is not intended to supplant, duplicate or compete with any of the existing efforts. Instead, the CIP is intended to respond to the many requests for basin-wide coordination and information sharing.

Numerous efforts to manage natural resources are on-going in the Klamath River Basin. Several were created by state or federal legislation, including:

- The Upper Klamath Basin Working Group, established by Public Law 104-333
- The Trinity River Restoration Task Force created by Public Law 98-541, as amended by Public Law 104-143
- The Klamath River Basin Fisheries Restoration Program established by the Klamath River Basin Fishery Resource Restoration Act (Public Law 99-552, 16 U.S.C. 460ss-3 et seq.)
- The Klamath River Basin Compact Commission created pursuant to the Klamath River Compact Act of 1954
- The Oregon Watershed Enhancement Board, originally established by the Oregon State legislature as the Governor's Watershed Enhancement Board in 1987
- The Trinity River Restoration Program per the Department of Interior 2000 Record of Decision regarding the Trinity River Mainstem Restoration Final Environmental Impact Statement/Environmental Impact Report.

Other efforts include the Salmon River Restoration Council, the Klamath Basin Ecosystem Foundation, Shasta River Coordinated Resources Management and Planning Committee, and the Scott River Watershed Council. The Karuk, Hoopa and Yurok Tribes are actively involved in restoration of aquatic resources in their ancestral territories.

A coordinated approach to resolving the natural resource problems of the Klamath Basin has a greater chance of success, and of attracting funding and other resources from state and federal funding sources.

In addition, CIP participants recognize that Oregon and California water law governs the management of water resources in the Basin, the Klamath Project Operations Plan (Reclamation) serves as a planning guide for Klamath Project water users, and that Reclamation has entered into contracts to provide agricultural deliveries of Project water. CIP participants also recognize that the Federal Government has a Tribal trust responsibility to protect the Tribes' natural resources. CIP participants need to remain mindful of these obligations, as well as other state, federal, and local laws when planning CIP activities. PacifiCorp's application to the Federal Energy Regulatory Commission for a renewal of their license to operate hydropower facilities on the Klamath River will

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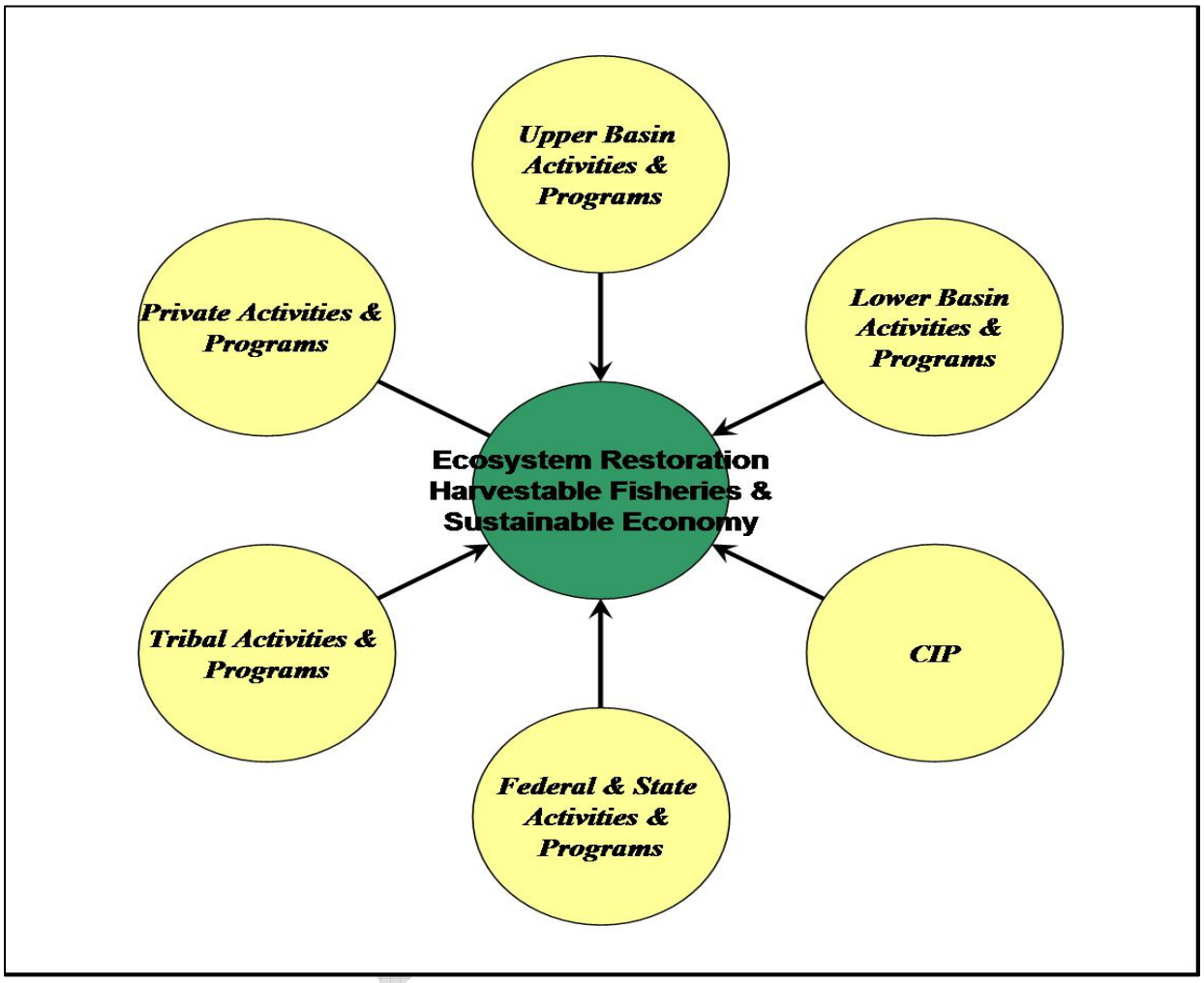
also affect the CIP's ability to achieve its goals. That process is outside of the scope of the CIP and proceeding on its own time line.

Collaboration between the various interest groups is critical to the success of the CIP. Despite the seemingly conflicting views on natural resource management in the Klamath River Basin, the common need is for the ecosystem to be restored so that a sustainable, harvestable fishery can co-exist with agriculture, recreation, and other uses.



4. Purposes of the Klamath River Basin CIP

The Purposes of the CIP are:

1) To restore the Klamath River ecosystem.

2) To further the fulfillment of the Federal Government's tribal trust responsibilities as they relate to natural resources from the Klamath River ecosystem.

3) To sustain agricultural, municipal and industrial water use while reducing demand throughout the Klamath River Basin.

4) Foster a lasting partnership between Governments (Tribal, Federal, State, County and local) and private interests of the Klamath Basin to advance the goals of the Program.

4.a Goal 1

In the context of this document, **ecosystem restoration** is defined as management of a human altered and degraded ecosystem so that is more closely emulates conditions prior to disruption of the functions, processes, and physical structure of the system. An adaptive management approach will be used. **Adaptive management,** for the purposes of this document, is defined as a process of continually incorporating new information and knowledge of the results of a scientific assessment and research program in conjunction with past management action in to the planning and management process.

To apply the concept of adaptive management, the historical conditions first need to be described and quantified to the degree possible, and then compared to the current conditions, to develop an understanding of what changes have resulted in the current conditions of lowered productivity. Adaptive Management requires a robust research and monitoring program so that the effects of management actions can be evaluated and new information can be obtained and applied to management decisions for restoration activities. Management actions will be designed to favor native species and naturally produced fish populations and to control non-natives. This approach will necessarily recognize that humans are a part of the ecosystem, and human use of resources will continue at a sustainable level, be they harvest of fish or diversion of water. CIP activities should be designed to support vibrant economies in harmony with natural resource protection.

4.b Goal 2

The availability of an abundance of natural resources – plants, wildlife, fish, water – are a trust responsibility of the Federal government to the tribes. The CIP will foster coordinated effort among federal agencies to further the fulfillment of trust responsibilities. The CIP's tribal trust committee will provide a forum for tribal leaders

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to describe or define tribal trust needs and monitor CIP activities to insure the management actions undertaken by the CIP are advancing the fulfillment of that responsibility.

4.c Goal 3

Many of the people and economies of the Klamath Basin are dependent on water use, whether they are agricultural, municipal, commercial or industrial. Sustaining these uses while reducing demand can be accomplished through techniques such as development of alternative water sources, increasing storage, improving water quality, proper management of ground water, dry land farming, irrigation efficiency by home owners, farmers and ranchers, and recycling to name a few. The CIP can conduct groundwater studies to increase the States understanding and ability to manage groundwater, aid farmers in efficiency through existing government programs such as those offered by the Natural Resources Conservation Service, and advising on water conservation practices. Reduction in demand throughout the basin in conjunction with continued production of crops and livestock can make additional water available for ecosystem restoration.

4.d Goal 4

Developing and maintaining a partnership between the many governments and private interests in the Klamath River Basin will require strong leadership, a secure funding source, and dedicated staff. Communication and coordination will likely prove to be a full time effort for a number of individuals. Local residents will need to dedicate time and effort and the CIP administrative staff will implement actions to make it easier and more convenient for people not associated with a government or established organization to keep abreast of CIP activities and provide their input. Obtaining, distributing, tracking, and being accountable for funds provided by state and federal governments will require the involvement of state and federal agencies. Salaries, travel costs and preparation for meetings should be calculated and reported as in-kind contributions by other governments and organizations which are participating and will represent a cost-share to state and federal funds. The methods, individuals involved, organization and even location of the CIP may change over time, but the processes, benchmarks, and goals, in their original or modified form, will be contained in the Program Document. The program document describes the process, or standard operating procedures, and will giving stability and continuity to this long-term effort. The first three goals set out what needs to be accomplished, and the fourth goal ensures the program will remain an open and inclusive process.

4.e Goals – general

The goals of the CIP are interdependent and no one goal is more important or of higher priority than another. Support of all of the goals, while ensuring the program proceeds in a fair and equitable manner, is necessary for success. Although there seems to be contradiction between the goals in the eyes of some of the stakeholders, it is this tension between the future vision of differing individuals and broad expectation for multiple use

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of Klamath River Basin natural resources that will serve to bring the numerous interests together.

Goals are desired end results. Strategies are the methods or steps toward achieving those goals. A restored, functioning ecosystem is a goal which can be achieve by employing a large number of strategies, i.e. wetland restoration, water quality improvement, flow management, disease control. Many interim goals have been proposed by stakeholders, Tribes, and agencies. Some of these are described in the following section.

4.f Other Goals

Other goals which are inherent in the CIP are to:

- Reduce conflict among stakeholders and support collaboration;
- Improve communications and data sharing;
- Support a viable economy throughout the Klamath River Basin;
- Provide a mechanism to streamline the ESA consultation process;
- Avoid litigation;
- Provide an increased level of certainty that sustainable, harvestable levels of fish populations will be restored and maintained;
- Provide an increased level of certainty of water supply to irrigated agriculture;
- To insure ecosystem restoration actions and water use and management do not negatively impact other native species;
- To measure success and progress of the CIP through established benchmarks.

4.g CIP Underpinnings/Principles

Critical underpinnings of the CIP include:

- Long range CIP Activities will be based on FWS/NOAA Recovery Plans and other existing restoration plans
- Commitment to the use of sound science
- Rigorous scientific peer review
- Transparency
- Collaboration
- Adaptive management
- Adaptive management principles
- Benchmarking of progress and regular evaluations with adjustments where needed
- Coordination with other restoration efforts
- Compliance with Federal and state law, including state water laws
- Public education and information including opportunities for non-program participates to contribute and be involved in the process

Protocols and operating procedures need to be developed to ensure these additional principles are met.

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5. Program Actions and Achievements

The complexity of the issues challenges faced by Klamath Basin residents, combined with a large and diverse geographic area and the multiple government jurisdictions of local and county governments, two states, a dozen federal agencies, and four Indian Tribes both aids and hinders the CIP's ability to make progress. While coordination, communication, and equitable distribution of resources will be a huge challenge, a large number of entities working toward common goals will facilitate meeting this challenge.

5.a Short and Long Range Plans

Many strategies for accomplishing the CIP goals have been identified and implementation can begin. The CIP will simultaneously empower existing restoration groups to execute actions to restore habitat and improve water use practices (short range plan) while a long range plan (including research needs) is being developed, thereby adding to the list of CIP accomplishments. Other government programs being conducted through other agencies such as the Forest Service, NRCS, FWS, NOAA Fisheries, and Bureau of Land Management will continue. The long range plan will serve as a guide for implementing future recovery actions, research, and monitoring efforts, including development of annual work plans and budget decisions. It will be an adaptive plan, modified annually as needed to incorporate new information and emerging science. As the recovery plans and recovery goals are completed, the actions they identify as needed for fish protection and recovery will be incorporated into the long range plan.

As stated earlier, many actions, either physical restoration efforts or data needs have previously been identified. They are listed in existing plans or were identified during the Science Workshops and public meetings. These will be compiled, expanded if needed, and prioritized by the technical groups and will constitute the short rang action plan. It is unlikely there will be sufficient resources available to implement all of the priority actions in this time frame. Those not selected for immediate implementation will be incorporated into the long range plan.

The long range plan will be a more comprehensive list of needs to be completed in the out years. The long range plan will also serve as the basis for budget requests, an estimate of total program cost, and a time frame for the CIP.

5.b Measure of Progress and Achievements

All needs listed in the short or long range plans will include an explanation of how the accomplishment of the need support achievement of one or more of the program goals, a cost estimate, a recommendation for how/who will implement it, interim and final products and their due dates. Plans should also include the benchmarks by which progress toward CIP goals will be measured.

Actual progress of the CIP will be measured in a variety of ways, as agreed to by the participants in the final Program Document. Examples of ways in which progress will be measured could include resource improvements such as increases in population size and demographics; improvements in water quality and quantity; physical habitat

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improvements such as wetland restoration and development, channel improvements, dam removal, or protective measures such as fish passage and screening of diversions. Administrative progress could be measured in terms of agreements between the parties, establishment of a data clearing-house, a list-serve or web page, contribution to electronic libraries, development of standardized data format to enhance technology transfer, meetings and conferences to share information, or public education and outreach, to list a few. Scientific progress will be measured in terms of research results, research facilities, publications in peer review journals, and ultimately by increased understanding of the Klamath River Basin ecosystem. Budget progress will be measured in terms of dollars, services in kind, and volunteer hours contributed to the program, and performance (expenditures). A report will be produced annually outlining the achievements or progress in each of these areas.

Process ≠ Progress

6. Benefits of the CIP

The immediate benefit of the CIP will be having a mechanism to meet the CIP goals. Establishing a basin-wide process endorsed by numerous participants is expected to increase funding for such activities.

6.a ESA Compliance

The CIP is intended to serve as the basis for compliance with sections 7 and 9 of the ESA. It will accomplish this through identifying and implementing actions to improve habitat and populations of threatened and endangered fish so that other activities in the basin do not jeopardize the fish and through protecting fish populations to reduce to the greatest extent possible take incidental to other natural resource uses. Measurable, tangible improvements in habitat and populations will be required before these benefits can be realized.

The FWS and NOAA Fisheries will be able to rely on the CIP to off set unavoidable impacts and to mitigate past actions. In this way, the CIP will, in time, be able to provide programmatic incidental take coverage. That is not to say the CIP will in any way effect the statutory mandate of the FWS and NOAA Fisheries it implement the ESA. For example, if it is identified that a particular activity, federal, state or private, is resulting in unmitigated incidental take, a remedy could be implemented through the CIP. Rather than the private land owner or agency having full responsibility to plan, fund, and carry out the remedy, a partnership with the CIP could be established to execute the remedy. This would both increase the certainty of on the ground implementation, and serve to streamline the consultation process.

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Specific agreements to describe how and under which conditions the CIP will be able to serve as the basis of compliance with the ESA will need to be developed by the participants. Knowledge of upcoming actions requiring consultation may influence the priority of work items or monitoring and research efforts. Continued participation in, cooperation with, or support of the CIP could also be a basis for a biological opinion or a no-jeopardy decision. By implementing (or enabling the implementation) of the actions identified by FWS and/or NOAA Fisheries as required to achieve compliance with section 7 and 9 of the ESA, the financial burden of that compliance will be born by the CIP, as opposed to a project proponent.

It is important to note that the legal mandate for enforcement and implementation of the ESA lies with the Secretary of the Interior and the Secretary of Commerce. This responsibility is carried out by the FWS and NOAA Fisheries, respectively. All decisions related to the ability of, or the degree to which the CIP can serve as the basis for compliance with the ESA must remain with those agencies.

7. Scope

The CIP is being formulated by the Bureau of Reclamation, but will not be solely a Reclamation program. It will be governed and implemented by the participants.

7.a Program Scope

The geographic scope of this Program is the Klamath River Basin.

The biological scope of the CIP will initially be focused on activities that benefit Lost River sucker, shortnose sucker, and Klamath River Coho and Chinook salmon. The Chinook salmon has been identified by the Tribes, commercial fishermen, and other stakeholders as a species which must receive full and equal consideration from the inception of the CIP if it is to achieve its goals. Although these species will be the initial focus, work on other species and issues will not be precluded.

Numerous other species of concern have also been identified by the tribes and other stakeholders. However, if the scope of the activities initially undertaken with the limited resources available to the CIP is overly broad, the effects of the program will be diluted and progress slowed. This would likely affect the ability of the program to demonstrate enough benefit and progress to the Congress of the United States and to the States of California and Oregon to justify continued funding. Activities undertaken to benefit the initial target species (listed species and Chinook salmon), and increased understanding of the system, will likely benefit other native species as well. For example, improved water quality and the restoration or creation of wetlands will have benefits for many species, both aquatic and terrestrial, and to the human communities within the ecosystem. This is not to say that no resources will be dedicated toward native species which are not listed under the ESA, only that emphasis needs to be placed on those habitat factors which

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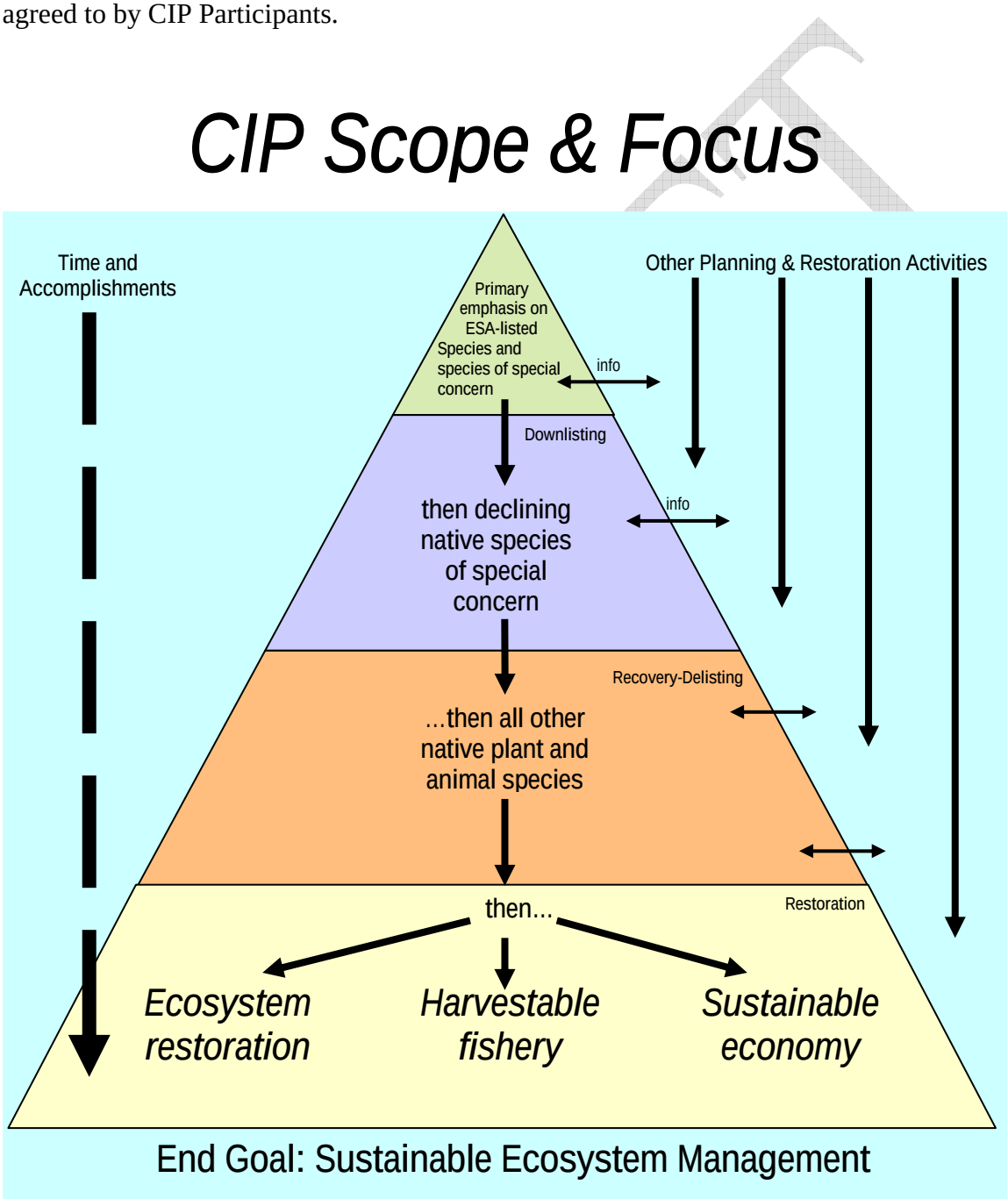
affect the most imperiled species. No action will be approved of, funded, or carried out by the CIP which would knowingly harm native species or degrade the habitat.

The CIP Participants will determine when there are sufficient resources to be applied toward additional efforts. Some level of funding will be immediately available, particularly for research and monitoring, to confirm that actions taken under the CIP are not negatively affecting them. The CIP could support other conservation or restoration activities which are being conducted in the basin. All activities would have to be within the authority of a participant providing the funding, consistent with goals of the CIP, and agreed to by CIP Participants.



8. CIP Participants

Reclamation originally envisioned the structure of the CIP as consisting of a relatively small working group directly participating in the process with input from existing groups and stakeholders. It was anticipated that both individuals and interest groups with similar philosophies, for example, environmental organizations, would elect to send a single participant to the CIP meetings. This member would be responsible for communicating with the individuals they were representing and developing positions on the issues facing the CIP, then representing that position during meetings. Based on the comments received from the stakeholders, it is clear that this model is not acceptable to many of the residents of the Klamath Basin, who prefer more direct representation. However, it is not practical to make committee membership unlimited. Certain restrictions will have to be placed on committee membership which will be determined by a group discussion of interested parties. Some criteria which may be considered is expertise or training, land ownership, land management responsibilities, regulatory authority, and others.

All meetings will be open to the public and there will be an opportunity for public comment at each. The greatest opportunity for general public input will be in project development and prioritization. Sub-basin groups will work at the local level to determine which actions are of the highest priority and acceptable to local residents and governments. This would be in contrast to, for example, the science committee which would be made up of individuals with science background.

9. Program Governance

Any activity of a group requires organization and leadership. Whether it is a scout troop, church group, irrigation district, club, or business, there is some form of governing structure. The CIP also requires a governance structure. The proposed structure was created based on the organizational charts and comments submitted. The specific comments have been available on the Reclamation web site since shortly after the public meetings of 2003, and the proposed organizational charts are included as an appendix to this document.

Although many potential CIP participants have expressed concerns over increasing levels of bureaucracy, they also expressed their desire for strong leadership. Many of those who commented on the first two drafts were concerned that an uninformed decision would be made before they had a chance to influence it. One of the purposes of bureaucracy is to slow the process down, to create a system of checks and balances to insure no interest group benefits at the expense of others, and to provide opportunity for public input through selecting representatives, through hearings or the like. The proposed CIP governance structure may appear cumbersome; however, it has been designed to address the concerns raised by potential participants and to increase the probability that good decisions will be made. It will likely be modified further as the process of drafting the program document and seeking public input continues.

Most of those who commented on the first two drafts of the CIP program document emphasized the need for the CIP to be from the ground up as opposed to the top down.

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However, no concrete recommendation on how to accomplish a ground up form of program governance which was inclusive of all participants was submitted. We have interpreted the call for a ground up program to be a call for no new restrictions, regulations or requirements; the need for local land owners and residents to approve/reject any activity which may effect them; the need to be informed of emerging science and for decisions to be based on sound science; and the need to have an opportunity provide their personal experience and knowledge to the restoration activity formulation process. We believe the draft governance structure will meet these needs. Reclamation is in the process of selecting an organizational development consultant to guide and direct the finalization of the CIP governance structure. A meeting will be held early in 2006 to guide the participants through finalization of CIP goals and a structure. The governance structure will be modified as needed once it is put into practice.

One major point of indecision is whether to organize committees by subject matter (suckers, salmon, water quality) or by geographic region (coastal, mid-basin). Neither approach is wholly satisfactory, therefore, a hybrid approach, utilizing sub-basin groups to propose and oversee projects, and broader committees to address basin-wide issues is recommended. A point of nearly unanimous agreement was that all interest groups should be represented. It was also recognized that the responsibilities of any appointed or elected official could not and should not be abrogated by the Program.

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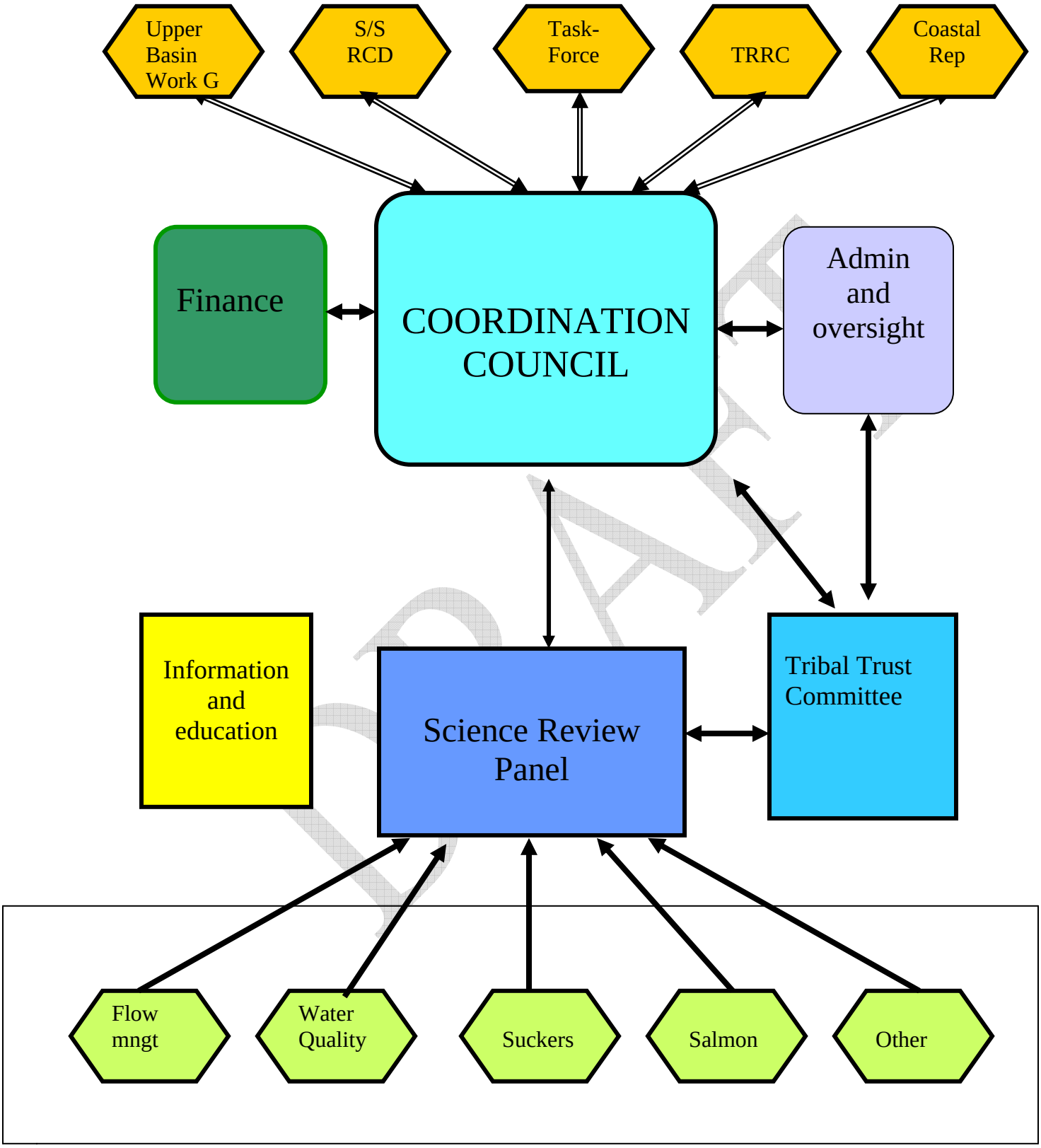
New Proposed Governance Flow chart



The Policy Administration Group will oversee the policy issues of CIP as they relate to government policy, funding, and authorization. A Coordination Council will conduct the CIP's regular business including planning, coordinating with other entities, and preparing an annual work plan/budget.

Support for these two Committees will be provided by four standing committees: Public Involvement, Science, Water Quality, and Tribal Trust Committees. The Science Committee will be supported by 5 subcommittees: An Independent Science Review Panel, and the Salmon, Sucker, Native Aquatic Species, and Other Resources subcommittees. Subcommittees can be created and dissolved as needed.

A Program Administrator and staff may also be created. The CIP Administrator will track and manage the budget, keep records, plan and manage meetings, and conduct other support services for the Policy Administration Group and Coordination Council.

Each CIP Participant will appoint one individual to represent them on each of the committees as appropriate. A backup should be designated to hold official proxy for the member when the member cannot be present for a meeting.

9.a Policy Administration Group

The Policy Administration Group will meet semi-annually to provide general oversight of the CIP. The committee has the following responsibilities:

- Provide general oversight of the CIP, ensuring courses of action being recommended by the Coordination Council are in keeping with the goals of the program and are being pursued proportionately;
- Ensure the direction of the program is consistent with the policy and legal mandates of the participant's organization;
- Approve prioritized work plans and associated budget documents;
- Ratify such committees and ad hoc groups as are necessary to ensure effective implementation of the CIP;
- Resolve issues elevated from the Coordination Council.

Membership on the Policy Administration Group will be the head of the CIP participant's organization, or their official designee. It is anticipated the Tribal Chair, Regional Director, Regional Administrator, Executive Director, Area Manager, State Supervisor, Governor's representative, etc. will be participating actively on the Policy Administration Group. This committee will meet semi-annually.

9.b Coordination Council

The Coordination Council is the planning and problem solving arm of the CIP. The primary responsibility of the Coordination Council is to ensure that the CIP is effectively managed and coordinated and addresses the highest priority ecosystem restoration issues.

The Coordination Council will develop new procedures to resolve problems or to help remove obstacles to recovery. Responsibilities include:

- Annually review and recommend for approval to the Policy Administration Group any updates to the CIP Activities;
- Develop a prioritized annual work plan and budget to achieve the CIP activities;
- Review and approve the annual report for the CIP, which includes status of activities, status of fish populations, and budget information and serves as the primary source of information on progress of the CIP to the Policy Administration Group, tribal councils, and Congress;
- Report and/or respond to the Policy Administration Group on special issues that arise during implementation of the CIP;
- Monitor, evaluate, coordinate and direct activities of Biology Committee, Coordination, Information and Education Committee, and any subcommittees.

The Coordination Council will consist of one representative of each of the CIP Participants or their representative.

The Coordination Council may invite input from other appropriate technical experts or working groups as deemed necessary. Reports from the subcommittees will be provided to the Coordination Council. The chair of the Coordination Council will initially be selected by the Policy Administration Group. The CIP participant serving as chair may be changed based on a consensus vote of the Coordination Council and approval of the Policy Administration Group.

9.c Public Information Committee

Communication and coordination with the many groups working to conserve and enhance the natural resources of the Klamath River basin will be an essential element of a successful CIP. Coordination is the responsibility of all committees and participants in the CIP, however the Public Involvement Committee (PIC) will actively coordinate with outside groups, and be responsible for the production of information and education materials about the CIP and its mission and accomplishments. This includes news releases, briefing materials, and educational materials.

Each CIP participant may appoint one member of their organization to the PIC. Major responsibilities of the PIC are to:

- Promote public and agency support for the recovery and restoration of the Klamath River Basin;
- Develop and distribute information on the CIP for educational purposes;
- Serve as a point of contact for information and education materials;
- Present the CIP and/or status reports to interested parties;
- Prepare news releases and briefing materials.

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9.d Science Committee/Peer Review

A Science Committee will be a multi-disciplinary group responsible for reviewing the monitoring and research activities, identifying and recommending needed studies, and advising the Coordination Council and/or Program Administrator's office in scientific matters. This committee will also be responsible for development of the details of an internal and external peer review process. Participation on the science committee will require an appropriate scientific background.

9.d.1 Science Committee

The Science Committee will consist of representatives of the CIP participants with a science specialty such as hydrology, biology, modeling, statistics, or ecology. The primary responsibility will be to provide scientific advice and input to the Management and Policy Administration Groups. Specifically, the Science Committee will:

- Review scopes of work, research proposals, draft and final reports which are submitted to the CIP;
- Identify data gaps and recommend needed research to Coordination Council;
- Aid the Coordination Council in prioritizing CIP activities;
- Answer technical and scientific questions;
- Monitor the outside peer review process.

Members of the Science Committee may also serve on one or more of the subcommittees. The subcommittees will consist of experts in a given topic, such as salmon/anadromous fishes, water quality, or suckers. The subcommittees will be encouraged to draw on and work with the broader Science Committee. In an effort to reduce any duplication of effort and to avoid increasing the work load of scientists currently working in the Klamath Basin, existing science committees, such as that of the Klamath River Fisheries Taskforce, may be asked to provide their expertise to the CIP instead of a new committee being formed.

9.d.2 Peer Review

Peer review can take many forms and be conducted at a variety of levels. Most often peer review is a process used to increase the technical quality and credibility of science. Typically, outside experts with similar areas of expertise are invited to review research proposals and products for accuracy and scientific merit. Scientific work of the CIP will likely require several degrees of peer review. The Science Committee will serve as a general peer review panel for the activities of the CIP, yet an independent level peer review should also be used. Final products such as research reports could be subject to both internal and external peer review. In addition, the CIP itself should be periodically reviewed by an independent external group.

Internal peer review will be conducted by members of the science committee themselves, and may include other specialists who have worked or are working in the Klamath Basin.

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External peer reviewers should be subject matter experts not currently working in the Klamath Basin. This independent, disinterested group would be less subject to bias, group think, or politics, and could provide a different perspective. At the same time, the recommendations from such a peer review group should also be evaluated by the internal peer review group with hands-on experience and a higher degree of familiarity with the resources in question to insure they are practical and useful.

The Science Committee will develop a plan for peer review, including what work will be subject to what level of peer review at differing points in its development.

9.e Tribal Trust Committee

The Tribal Trust Committee will be composed of CIP participants who are Tribal members, Tribal Representatives, and government agency personnel with a trust responsibility. Like all committee meetings, Tribal Trust Committee meetings will be open to the public unless proprietary information is being discussed. They will not take the place of government-to-government meetings between tribes and federal agencies. The roll of the committee will be:

- To provide oversight of the CIP as it concerns Tribal Trust and to make recommendations to the Coordination Council and Policy Administration Group to ensure equitable consideration of Tribal Trust issues;
- To inform and educate other participants and other committees on trust issues, laws, regulations and responsibilities and tribal culture.

Nothing in this Program will affect or impede the obligations of the Federal agencies to protect and/or mitigate effects on tribal trust resources. Nor will anything in this Program diminish or impair the Federal government's trust responsibilities or obligation to consult with tribes on a government to government basis pursuant to Presidential Executive Order 13175 or Department of the Interior Secretarial Order 3206. These documents are contained in Appendix 3 for reference.

10. CIP Administrator's Office

The Administrator and staff are a service group, and will not influence the direction or activities of the program. The primary mission of the CIP Administrator and staff is to manage the program. Initially, this role will be filled by Reclamation. The CIP Administrator will be employed by the U.S. Fish and Wildlife Service, NOAA Fisheries, or U.S. Bureau of Reclamation and will be responsible for carrying out the decisions of the Policy Administration Group and Coordination Council. The CIP Administrator and staff are dedicated to accomplishing all the goals of the CIP, and will not serve as their agency's representative on any of the CIP Committees. The members of the Administrator's office will not promote objectives or mission of the specific agency in which they are a part, but will promote actions consistent with the goals of the CIP. The CIP Administrator and staff are responsible for coordinating implementation contracts, planning and evaluating CIP progress, monitoring and tracking CIP budgets and

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accounts, providing assistance to CIP Committees, and coordinating technical review for the Program. Specific examples of the administrative responsibilities of the CIP Administrator and staff include:

- Drafting an Annual Work Plan for the Coordination Council, making changes as directed and preparing the final;
- Prepare and or update a bi-annual budget document in support of the Annual Work Plan, and track expenditures in conjunction with the funding agencies;
- Compile and maintain the CIP's administrative record including producing meeting agendas, meeting summaries, and a library of CIP reports and other documents;
- Develop the Request for Proposals, compile proposals for Management and Biology Committee Review;
- Aid the Science Committee in coordinating the technical review and peer review processes;
- Compile and distribute annual CIP accomplishments reports;
- Work with the FWS and NOAA Fisheries to develop an Annual Assessment of CIP progress. This document will be used by the service to gauge the progress toward recovery of listed species.

11. Finance Committee and Funding of the CIP

Initial funding is being provided by Reclamation. It is anticipated that the other federal agencies and the states of Oregon and California will contribute to funding the Program as well.

Contributions can be in the form of in-kind services, equipment, or staff time. Some participating agencies will implement actions under their respective mandates which will be considered a contribution to the CIP as determined by the Policy Administration Group.

A separate Finance Committee will be formed in the future to support the funding process in various government budgets. Members of this committee will not be federal employees.

The short and long range plans will have budget estimates associated with them. An equitable distribution of costs will be developed by the Coordination Council and forwarded to the Policy Administration Group for a final decision. A cost-sharing agreement among the parties may be required to ensure a disproportionate burden is not born by any one participant.

12. Decision Making Process

Upon formulation, the members of the various committees will determine the best method of decision making for that committee. It is anticipated that the Policy Administration Group will operate by consensus. Consensus means that all members can

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support a proposed action, even though some members may prefer an alternative approach or action. Any participant choosing to abstain from any vote or decision will be allowed to do so. However, because of the depth and breath of issues facing the other committees and subcommittees, and their large number of participants, these committees may chose to use a majority or supermajority form of decision making. Unresolved issues can be reported to the next higher level of committee for resolution along with majority and minority reports detailing the areas of disagreements.

A quorum of the participants, as defined by each committee, must be present before an issue can be put to a vote. Members who are not able to be present can have a representative appear in their stead, or present their position in writing. A member who is not able to attend may request a topic be tabled for one meeting only. Non-attendance and no written objection will constitute a no-dissent vote.

All CIP Participants will agree to operate in good faith to advance the goals of the CIP as a whole, and not block actions or the ability of the other participants to reach consensus unless they have serious reservations about the appropriateness or out come of an action. CIP participants will engage in active discussion of any concern raised by any member and attempt to develop a means to accommodate the member's concerns. Each member will express in clear and concise terms what their concerns are, and why they believe an action would be detrimental to the CIP's goals.

When decisions cannot be reached at the Coordination Council the issue will be elevated to the Policy Administration Group for resolution. In the rare circumstance that the Policy Administration Group cannot resolve the issue to the satisfaction of all parties, a participant may be required to make an independent decision if the issue involves their obligations under applicable federal, state or tribal law, or expenditure of appropriated funds.

CIP participants are expected to attend meetings and be prepared to discuss the topics on the agenda. Significant time may be required to read materials and become fully prepared for the meetings. Agendas will identify topics as work in progress, for discussion, or for decision. Lack of familiarity with an issue should not be used as a reason to prevent discussion or decision.

13. Miscellaneous Provisions

All CIP Participants recognize that each Participant has statutory and/or corporate responsibilities that must be respected and cannot be delegated. This CIP does not and is not intended to abrogate any of the CIP Participants statutory or corporate responsibilities.

This program is a partnership effort, in which the representative of each participant will provide input and recommendations on program activities on an individual basis, and has not been established or utilized to advise the executive branch through its agencies. The Committees of the Program shall meet to explore potential means of accomplishing

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program objectives through informal consultations, not to form a recommendation to any one participant or group of participants on behalf of the Program. All activities and decisions will be in compliance with existing state and federal laws and executable under existing agency authorities, and do not constitute policymaking. Furthermore, all meetings shall be open to the public and include an opportunity for broad public input beyond that represented by the program participant's representatives.

The term of this CIP shall be 15 years. It shall be automatically renewed on consecutive 15 year intervals unless the CIP Participants agree otherwise.

Any Participant may withdraw from the CIP on sixty (60) days written notice to the other CIP Participants.

This CIP is subject to, and is intended to be, consistent with all applicable federal and state laws. The requirements of the National Environmental Policy Act will be met before the implementation of this CIP and prior to implementation of significant actions under the CIP.

Any funding commitments made under this CIP are subject to approval and appropriations by appropriate private, state, local, and federal legislative bodies.

No member of, or delegate to Congress, or resident Commissioner, shall receive any direct or immediate benefit that may arise from this CIP.

Appendices

Appendix 1: List of Acronyms

List of Acronyms

BOR – U.S. Bureau of Reclamation
CIP – Conservation Implementation Program
ESA – Endangered Species Act
FWS – U.S. Fish and Wildlife Service
KIFWC – Klamath Intertribal Fish and Water Commission
NOAA Fisheries – National Oceanographic and Atmospheric Association, National Marine Fisheries
PIC – Public Involvement Committee
RPA – Reasonable and Prudent Alternative
SONCC – Southern Oregon and Northern California Coastal Coho salmon

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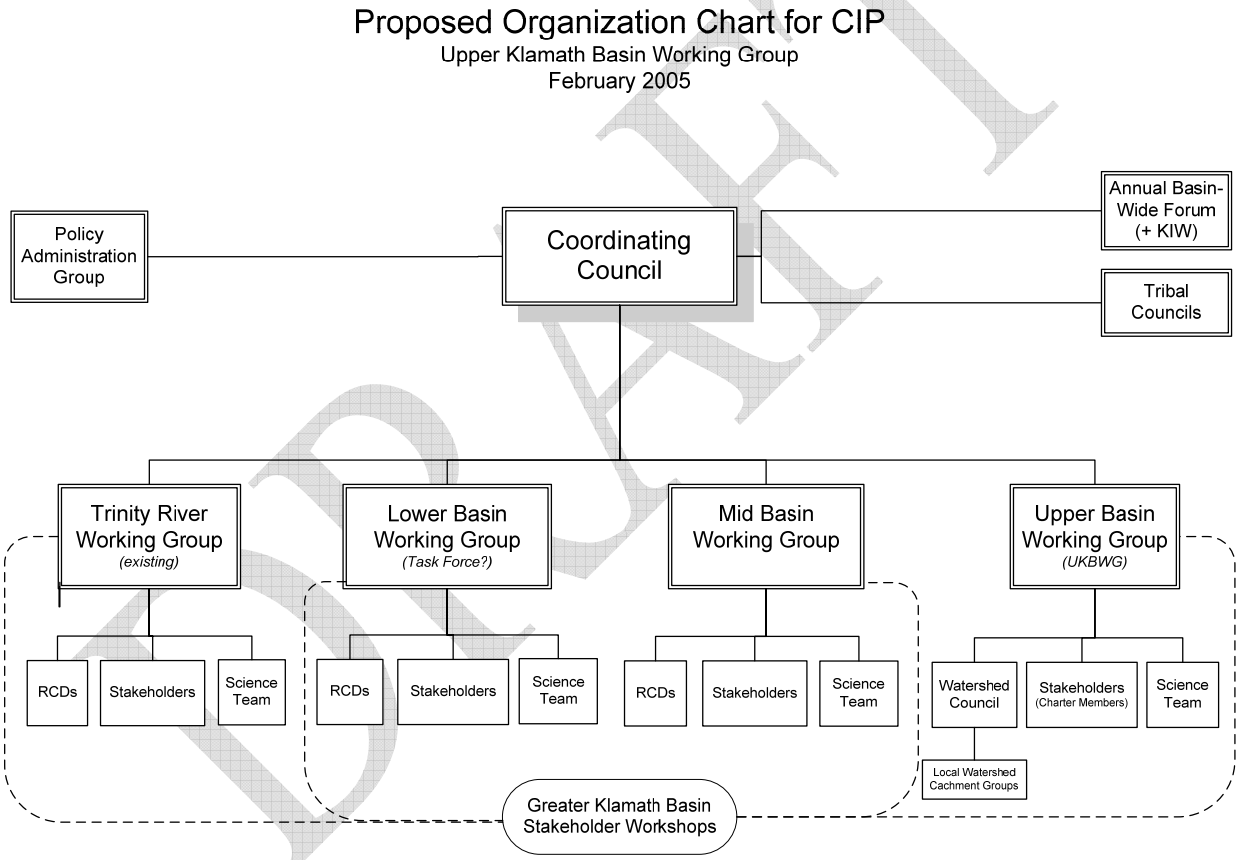
Appendix 2: Proposed Organizational Charts

A number of proposed organizational Charts, in various stages of development, were submitted during the comment period or were developed conceptually during the public meetings. Reclamation's original intent was to provide all of these to interested parties and hold a meeting during which they would be discussed and melded together to develop one chart with which most people could agree. It was later determined that this would be a time consuming and difficult task. The organization chart contained in the text is a compilation of those submitted and from earlier drafts of the Program Document. The drafts are provided here so that the reader can see the various proposals. Reclamation appreciates the time, effort and thought of the commenters.



Note: Coordinating Council consists of 4 members of each Working Group: Tribal, Agricultural, Environmental and Business representatives

Note: Policy Administration Group would include US Fish & Wildlife Service and NOAA Fisheries, as well as the Bureau of Reclamation

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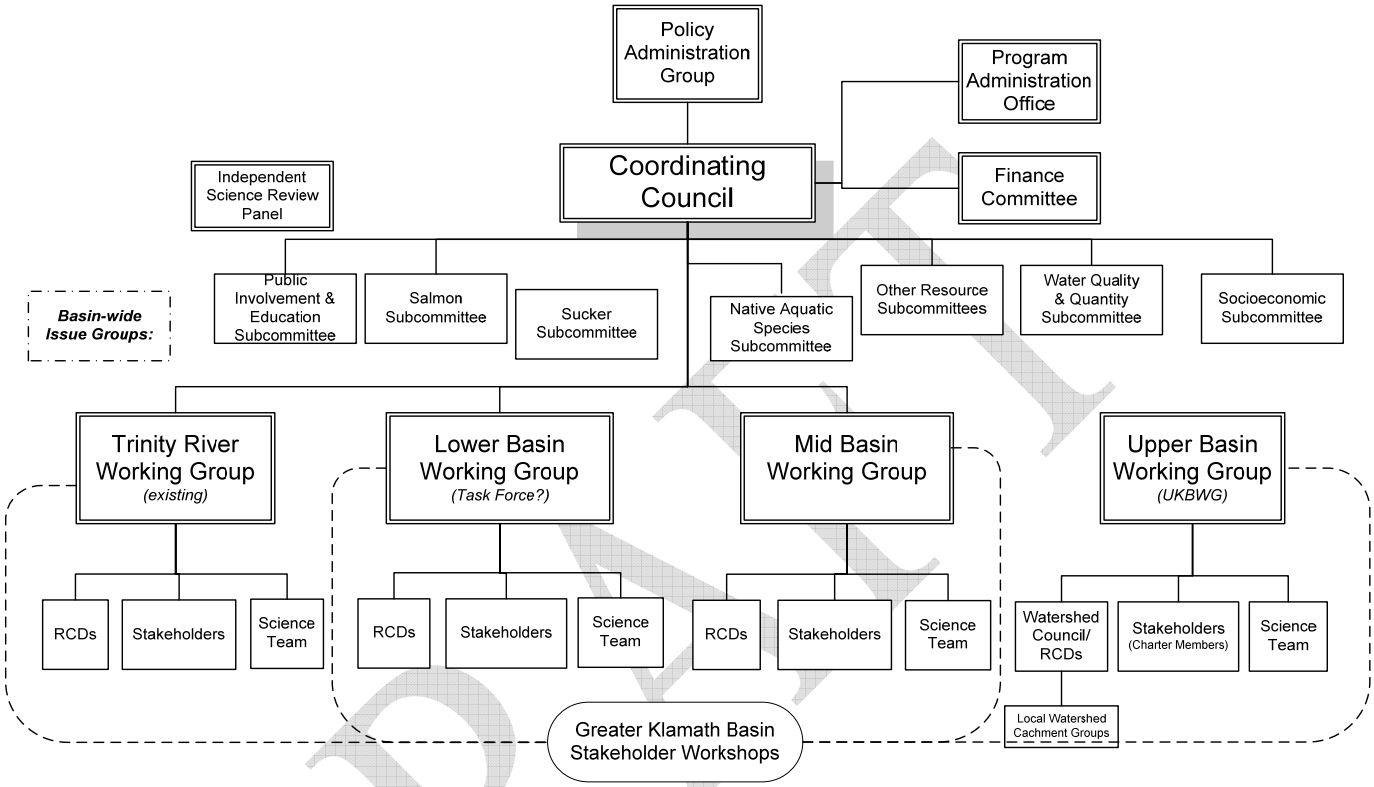
UKBWG CIP BRAINSTORMING

4/14/2005

GROUP A

MISSION
Sustainable/Healthy Communities
Healthy Ecosystems & Resource Use
Tribal representation throughout to respect Tribal Trust



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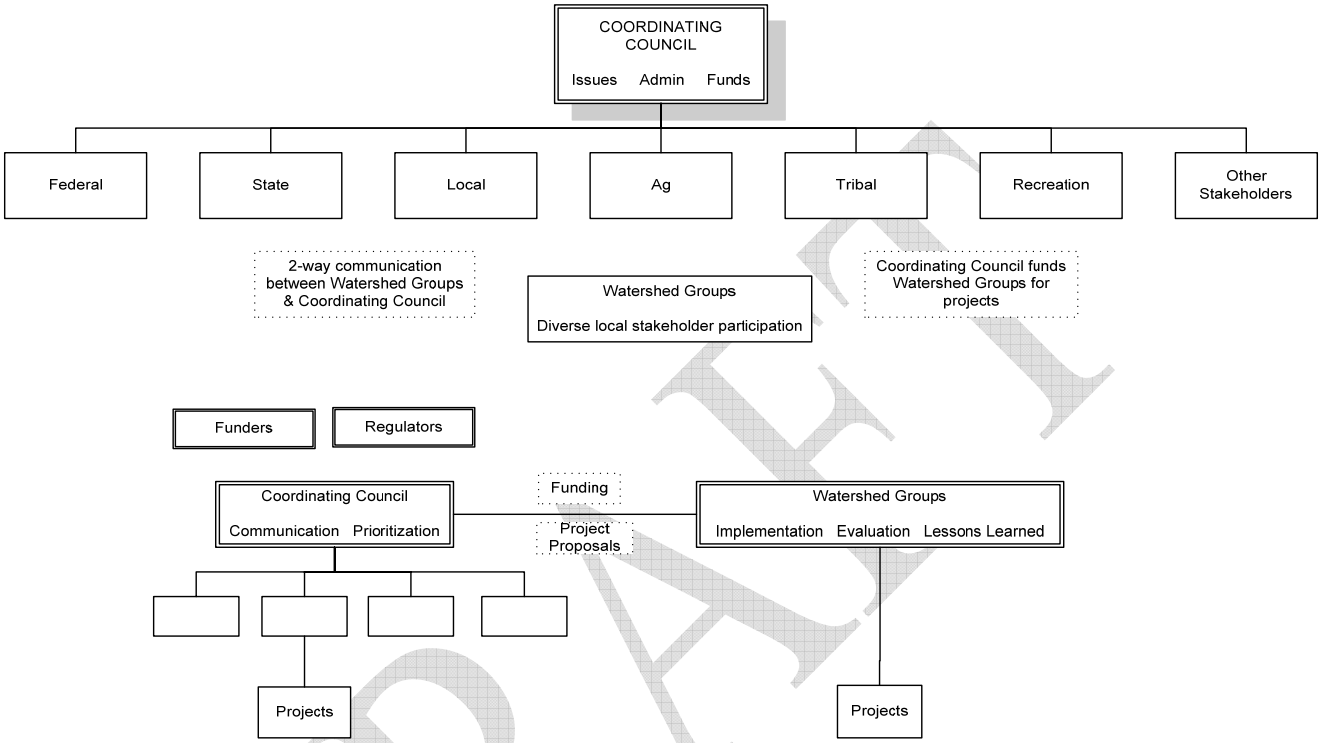
UKBWG CIP BRAINSTORMING

4/14/2005

GROUP B



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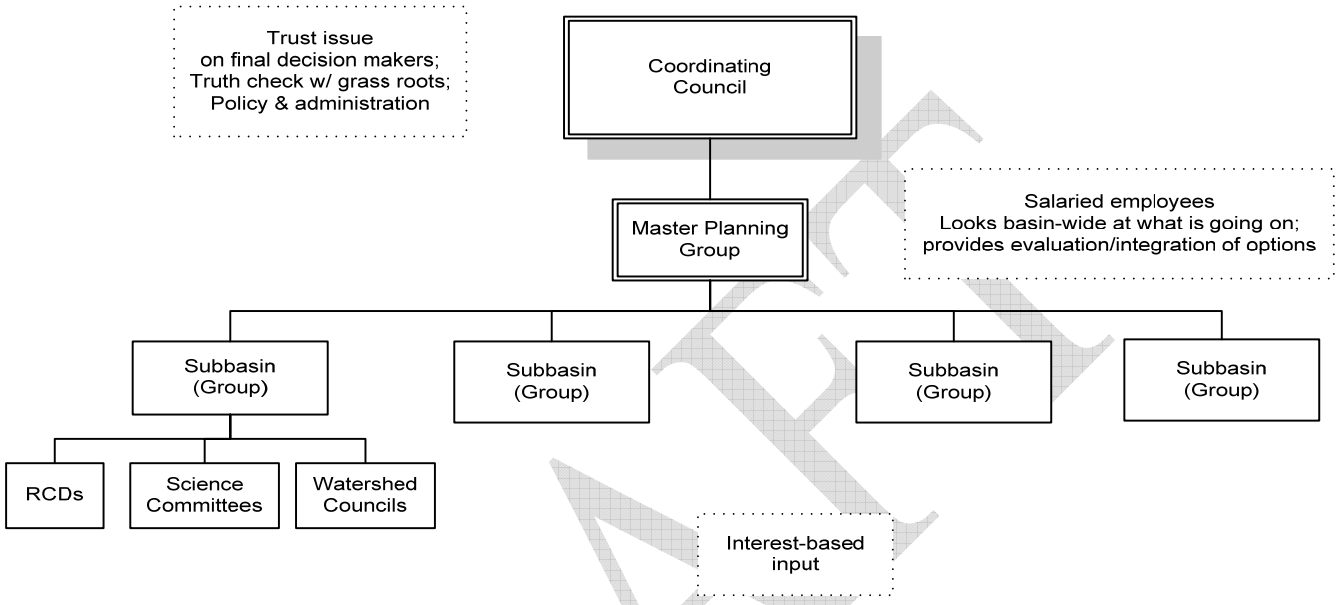
UKBWG BRAINSTORMING FOR CIP

3/14/2005
GROUP C



- There will be a Coordinating Council that sets priorities, reaches agreement on what the problem is, and through outreach what solutions are, then develops a capital improvement program and goes out and gets money.
  - Collaborative decisions
  - United front
  - Supported by broad base.
-
- Coordinating Council: Functions: policy & planning
- Decides how money gets allocated to policy decisions
- Prioritize & allocate among competing proposals
- Seek funding
- Truth-checking, trouble-shooting, compile & evaluate public opinion

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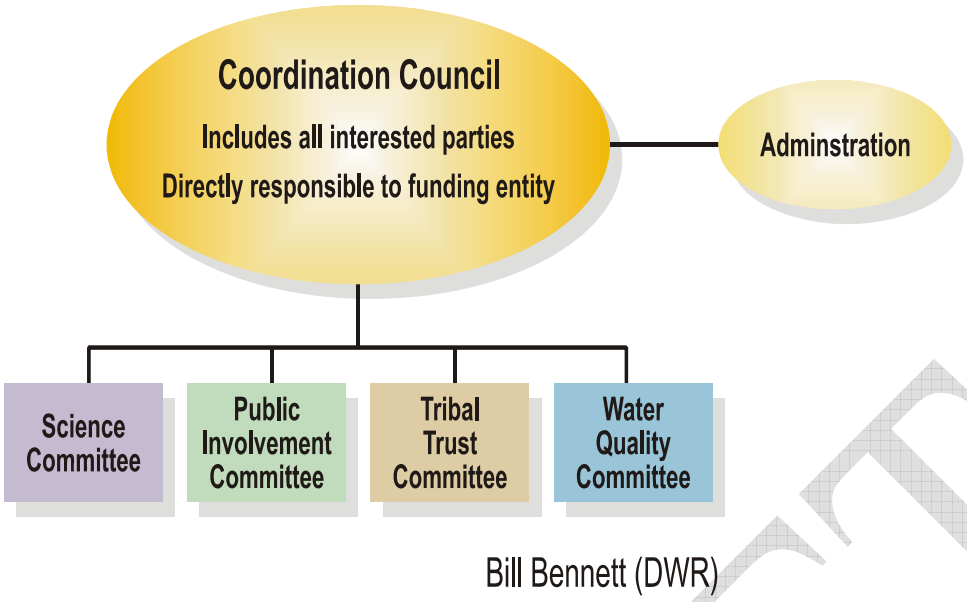
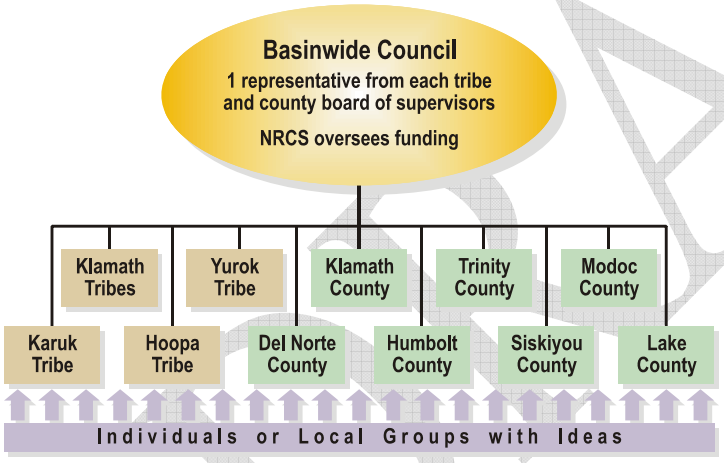


Bill Bennett (DWR)



Marcia Armstrong (Siskiyou County Board of Supervisors)

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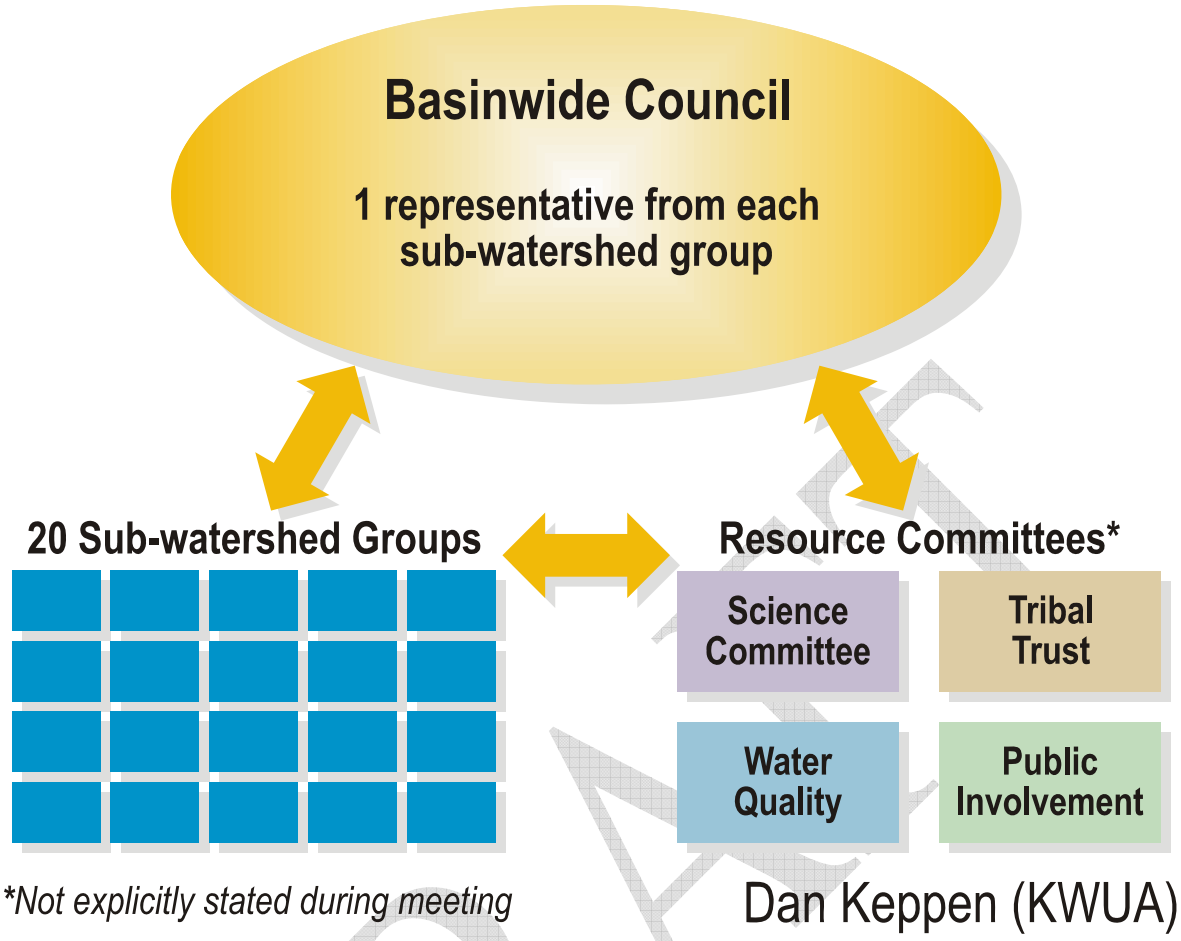
Basinwide Council
1 representative from each sub-watershed group
20 Sub-watershed Groups
Resource Committees*
Science Committee
Tribal Trust
Water Quality
Public Involvement
*Not explicitly stated during meeting
Dan Keppen (KWUA)

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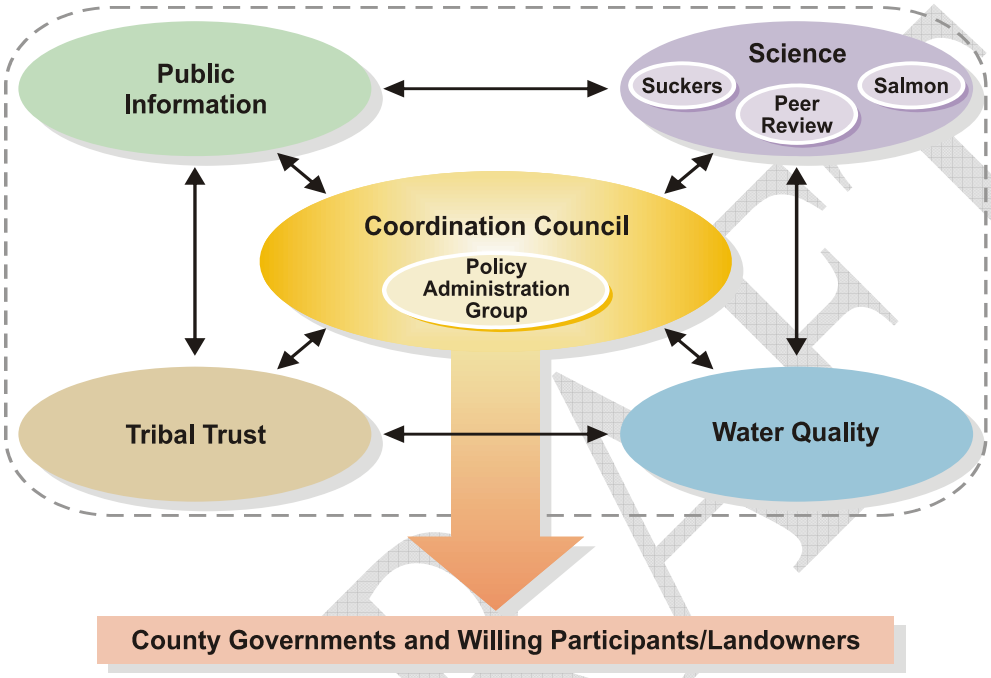
Facilitator
Issue # 1
Communcation
Issue # 2
Funding
Issue # 3
Research
Issue # 4
Instream Flows


Public
Information
Science
Suckers
Salmon
Peer
Review
Coordination Council
Policy
Administration
Group
Tribal Trust
Water Quality
County Governments and Willing Participants/Landowners

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Appendix 3: Secretarial Order # 3206

Subject: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act

Sec. 1. Purpose and Authority. This Order is issued by the Secretary of the Interior and the Secretary of Commerce (Secretaries) pursuant to the Endangered Species Act of 1973, 16 U.S.C. 1531, as amended (the Act), the federal-tribal trust relationship, and other federal law. Specifically, this Order clarifies the responsibilities of the component agencies, bureaus and offices of the Department of the Interior and the Department of Commerce (Departments), when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights, as defined in this Order. This Order further acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship in dealing with tribes. Accordingly, the Departments will carry out their responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.

Sec. 2. Scope and Limitations. (A) This Order is for guidance within the Departments only and is adopted pursuant to, and is consistent with, existing law.

(B) This Order shall not be construed to grant, expand, create, or diminish any legally enforceable rights, benefits or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Order be construed to alter, amend, repeal, interpret or modify tribal sovereignty, any treaty rights, or other rights of any Indian tribe, or to preempt, modify or limit the exercise of any such rights.

(C) This Order does not preempt or modify the Departments' statutory authorities or the authorities of Indian tribes or the states.

(D) Nothing in this Order shall be applied to authorize direct (directed) take of listed species, or any activity that would jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. Incidental take issues under this Order are addressed in Principle 3(C) of Section 5.

(E) Nothing in this Order shall require additional procedural requirements for substantially completed Departmental actions, activities, or policy initiatives.

(F) Implementation of this Order shall be subject to the availability of resources and the requirements of the Anti-Deficiency Act.

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(G) Should any tribe(s) and the Department(s) agree that greater efficiency in the implementation of this Order can be achieved, nothing in this Order shall prevent them from implementing strategies to do so.

(H) This Order shall not be construed to supersede, amend, or otherwise modify or affect the implementation of, existing agreements or understandings with the Departments or their agencies, bureaus, or offices including, but not limited to, memoranda of understanding, memoranda of agreement, or statements of relationship, unless mutually agreed by the signatory parties.

Sec. 3. Definitions. For the purposes of this Order, except as otherwise expressly provided, the following terms shall apply:

(A) The term "Indian tribe" shall mean any Indian tribe, band, nation, pueblo, community or other organized group within the United States which the Secretary of the Interior has identified on the most current list of tribes maintained by the Bureau of Indian Affairs.

(B) The term "tribal trust resources" means those natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.

(C) The term "tribal rights" means those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and which give rise to legally enforceable remedies.

(D) The term "Indian lands" means any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Sec. 4. Background. The unique and distinctive political relationship between the United States and Indian tribes is defined by treaties, statutes, executive orders, judicial decisions, and agreements, and differentiates tribes from other entities that deal with, or are affected by, the federal government. This relationship has given rise to a special federal trust responsibility, involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights.

The Departments recognize the importance of tribal self-governance and the protocols of a government-to-government relationship with Indian tribes. Long-standing Congressional and Administrative policies promote tribal self-government, self-sufficiency, and self-determination, recognizing and endorsing the fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life. The Departments recognize and respect, and shall consider, the value that tribal traditional knowledge provides to tribal and federal land management

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decision-making and tribal resource management activities. The Departments recognize that Indian tribes are governmental sovereigns; inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights and protect tribal trust resources. The Departments shall be sensitive to the fact that Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places.

Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.

Because of the unique government-to-government relationship between Indian tribes and the United States, the Departments and affected Indian tribes need to establish and maintain effective working relationships and mutual partnerships to promote the conservation of sensitive species (including candidate, proposed and listed species) and the health of ecosystems upon which they depend. Such relationships should focus on cooperative assistance, consultation, the sharing of information, and the creation of government-to-government partnerships to promote healthy ecosystems.

In facilitating a government-to-government relationship, the Departments may work with intertribal organizations, to the extent such organizations are authorized by their member tribes to carry out resource management responsibilities.

Sec. 5. Responsibilities. To achieve the objectives of this Order, the heads of all agencies, bureaus and offices within the Department of the Interior, and the Administrator of the National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce, shall be responsible for ensuring that the following directives are followed:

Principle 1. THE DEPARTMENTS SHALL WORK DIRECTLY WITH INDIAN TRIBES ON A GOVERNMENT-TO-GOVERNMENT BASIS TO PROMOTE HEALTHY ECOSYSTEMS.

The Departments shall recognize the unique and distinctive political and constitutionally based relationship that exists between the United States and each Indian tribe, and shall view tribal governments as sovereign entities with authority and responsibility for the health and welfare of ecosystems on Indian lands. The Departments recognize that Indian tribes are governmental sovereigns with inherent powers to make and enforce laws, administer justice, and manage and control their natural resources. Accordingly, the Departments shall seek to establish effective government-to-government working relationships with tribes to achieve the common goal of promoting and protecting the health of these ecosystems. Whenever the agencies, bureaus, and offices of the Departments are aware that their actions planned under the Act may impact tribal trust resources, the exercise of tribal rights, or Indian lands, they shall consult with, and seek

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the participation of, the affected Indian tribes to the maximum extent practicable. This shall include providing affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes. To facilitate the government-to-government relationship, the Departments may coordinate their discussions with a representative from an intertribal organization, if so designated by the affected tribe(s).

Except when determined necessary for investigative or prosecutorial law enforcement activities, or when otherwise provided in a federal-tribal agreement, the Departments, to the maximum extent practicable, shall obtain permission from tribes before knowingly entering Indian reservations and tribally-owned fee lands for purposes of ESA-related activities, and shall communicate as necessary with the appropriate tribal officials. If a tribe believes this section has been violated, such tribe may file a complaint with the appropriate Secretary, who shall promptly investigate and respond to the tribe.

Principle 2. THE DEPARTMENTS SHALL RECOGNIZE THAT INDIAN LANDS ARE NOT SUBJECT TO THE SAME CONTROLS AS FEDERAL PUBLIC LANDS.

The Departments recognize that Indian lands, whether held in trust by the United States for the use and benefit of Indians or owned exclusively by an Indian tribe, are not subject to the controls or restrictions set forth in federal public land laws. Indian lands are not federal public lands or part of the public domain, but are rather retained by tribes or set aside for tribal use pursuant to treaties, statutes, court orders, executive orders, judicial decisions, or agreements. Accordingly, Indian tribes manage Indian lands in accordance with tribal goals and objectives, within the framework of applicable laws.

Principle 3. THE DEPARTMENTS SHALL ASSIST INDIAN TRIBES IN DEVELOPING AND EXPANDING TRIBAL PROGRAMS SO THAT HEALTHY ECOSYSTEMS ARE PROMOTED AND CONSERVATION RESTRICTIONS ARE UNNECESSARY.

(A) The Departments shall take affirmative steps to assist Indian tribes in developing and expanding tribal programs that promote healthy ecosystems. The Departments shall take affirmative steps to achieve the common goals of promoting healthy ecosystems, Indian self-government, and productive government-to-government relationships under this Order, by assisting Indian tribes in developing and expanding tribal programs that promote the health of ecosystems upon which sensitive species (including candidate, proposed and listed species) depend.

The Departments shall offer and provide such scientific and technical assistance and information as may be available for the development of tribal conservation and management plans to promote the maintenance, restoration, enhancement and health of the ecosystems upon which sensitive species (including candidate, proposed, and listed species) depend, including the cooperative identification of appropriate management measures to address concerns for such species and their habitats.

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(B) The Departments shall recognize that Indian tribes are appropriate governmental entities to manage their lands and tribal trust resources. The Departments acknowledge that Indian tribes value, and exercise responsibilities for, management of Indian lands and tribal trust resources. In keeping with the federal policy of promoting tribal self-government, the Departments shall respect the exercise of tribal sovereignty over the management of Indian lands, and tribal trust resources. Accordingly, the Departments shall give deference to tribal conservation and management plans for tribal trust resources that: (a) govern activities on Indian lands, including, for the purposes of this section, tribally-owned fee lands, and (b) address the conservation needs of listed species. The Departments shall conduct government-to-government consultations to discuss the extent to which tribal resource management plans for tribal trust resources outside Indian lands can be incorporated into actions to address the conservation needs of listed species.

(C) The Departments, as trustees, shall support tribal measures that preclude the need for conservation restrictions.

At the earliest indication that the need for federal conservation restrictions is being considered for any species, the Departments, acting in their trustee capacities, shall promptly notify all potentially affected tribes, and provide such technical, financial, or other assistance as may be appropriate, thereby assisting Indian tribes in identifying and implementing tribal conservation and other measures necessary to protect such species.

In the event that the Departments determine that conservation restrictions are necessary in order to protect listed species, the Departments, in keeping with the trust responsibility and government-to-government relationships, shall consult with affected tribes and provide written notice to them of the intended restriction as far in advance as practicable. If the proposed conservation restriction is directed at a tribal activity that could raise the potential issue of direct (directed) take under the Act, then meaningful government-to-government consultation shall occur, in order to strive to harmonize the federal trust responsibility to tribes, tribal sovereignty and the statutory missions of the Departments. In cases involving an activity that could raise the potential issue of an incidental take under the Act, such notice shall include an analysis and determination that all of the following conservation standards have been met: (i) the restriction is reasonable and necessary for conservation of the species at issue; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose; (iv) the restriction does not discriminate against Indian activities, either as stated or applied; and, (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose.

Principle 4. THE DEPARTMENTS SHALL BE SENSITIVE TO INDIAN CULTURE, RELIGION AND SPIRITUALITY.

The Departments shall take into consideration the impacts of their actions and policies under the Act on Indian use of listed species for cultural and religious purposes. The

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Departments shall avoid or minimize, to the extent practicable, adverse effects upon the noncommercial use of listed sacred plants and animals in medicinal treatments and in the expression of cultural and religious beliefs by Indian tribes. When appropriate, the Departments may issue guidelines to accommodate Indian access to, and traditional uses of, listed species, and to address unique circumstances that may exist when administering the Act.

Principle 5. THE DEPARTMENTS SHALL MAKE AVAILABLE TO INDIAN TRIBES INFORMATION RELATED TO TRIBAL TRUST RESOURCES AND INDIAN LANDS, AND, TO FACILITATE THE MUTUAL EXCHANGE OF INFORMATION, SHALL STRIVE TO PROTECT SENSITIVE TRIBAL INFORMATION FROM DISCLOSURE.

To further tribal self-government and the promotion of healthy ecosystems, the Departments recognize the critical need for Indian tribes to possess complete and accurate information related to Indian lands and tribal trust resources. To the extent consistent with the provisions of the Privacy Act, the Freedom of Information Act (FOIA) and the Departments' abilities to continue to assert FOIA exemptions with regard to FOIA requests, the Departments shall make available to an Indian tribe all information held by the Departments which is related to its Indian lands and tribal trust resources. In the course of the mutual exchange of information, the Departments shall protect, to the maximum extent practicable, tribal information which has been disclosed to or collected by the Departments. The Departments shall promptly notify and, when appropriate, consult with affected tribes regarding all requests for tribal information relating to the administration of the Act.

Sec. 6. Federal-Tribal Intergovernmental Agreements. The Departments shall, when appropriate and at the request of an Indian tribe, pursue intergovernmental agreements to formalize arrangements involving sensitive species (including candidate, proposed, and listed species) such as, but not limited to, land and resource management, multi-jurisdictional partnerships, cooperative law enforcement, and guidelines to accommodate Indian access to, and traditional uses of, natural products. Such agreements shall strive to establish partnerships that harmonize the Departments' missions under the Act with the Indian tribe's own ecosystem management objectives.

Sec. 7. Alaska. The Departments recognize that section 10(e) of the Act governs the taking of listed species by Alaska Natives for subsistence purposes and that there is a need to study the implementation of the Act as applied to Alaska tribes and natives. Accordingly, this Order shall not apply to Alaska and the Departments shall, within one year of the date of this Order, develop recommendations to the Secretaries to supplement or modify this Order and its Appendix, so as to guide the administration of the Act in Alaska. These recommendations shall be developed with the full cooperation and participation of Alaska tribes and natives. The purpose of these recommendations shall be to harmonize the government-to-government relationship with Alaska tribes, the federal trust responsibility to Alaska tribes and Alaska Natives, the rights of Alaska Natives, and the statutory missions of the Departments.

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Sec. 8. Special Study on Cultural and Religious Use of Natural Products. The Departments recognize that there remain tribal concerns regarding the access to, and uses of, eagle feathers, animal parts, and other natural products for Indian cultural and religious purposes. Therefore, the Departments shall work together with Indian tribes to develop recommendations to the Secretaries within one year to revise or establish uniform administrative procedures to govern the possession, distribution, and transportation of such natural products that are under federal jurisdiction or control.

Sec. 9. Dispute Resolution. (A) Federal-tribal disputes regarding implementation of this Order shall be addressed through government-to-government discourse. Such discourse is to be respectful of government-to-government relationships and relevant federal-tribal agreements, treaties, judicial decisions, and policies pertaining to Indian tribes. Alternative dispute resolution processes may be employed as necessary to resolve disputes on technical or policy issues within statutory time frames; provided that such alternative dispute resolution processes are not intended to apply in the context of investigative or prosecutorial law enforcement activities.

(B) Questions and concerns on matters relating to the use or possession of listed plants or listed animal parts used for religious or cultural purposes shall be referred to the appropriate Departmental officials and the appropriate tribal contacts for religious and cultural affairs.

Sec. 10. Implementation. This Order shall be implemented by all agencies, bureaus, and offices of the Departments, as applicable. In addition, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service shall implement their specific responsibilities under the Act in accordance with the guidance contained in the attached Appendix.

Sec. 11. Effective Date. This Order, issued within the Department of the Interior as Order No. 3206, is effective immediately and will remain in effect until amended, superseded, or revoked.

This Secretarial Order, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," and its accompanying Appendix were issued this 5th day of June, 1997, in Washington, D.C., by the Secretary of the Interior and the Secretary of Commerce.

Secretary of the Interior Secretary of Commerce

Date: June 5, 1997

APPENDIX

Appendix to Secretarial Order issued within the Department of the Interior as Order No. 3206

Sec. 1. Purpose. The purpose of this Appendix is to provide policy to the National, regional and field offices of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), (hereinafter "Services"), concerning the implementation of the Secretarial Order issued by the Department of the Interior and the Department of Commerce, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act." This policy furthers the objectives of the FWS Native American Policy (June 28, 1994), and the American Indian and Alaska Native Policy of the Department of Commerce (March 30, 1995). This Appendix shall be considered an integral part of the above Secretarial Order, and all sections of the Order shall apply in their entirety to this Appendix.

Sec. 2. General Policy. (A) Goals. The goals of this Appendix are to provide a basis for administration of the Act in a manner that (1) recognizes common federal-tribal goals of conserving sensitive species (including candidate, proposed, and listed species) and the ecosystems upon which they depend, Indian self-government, and productive government-to-government relationships; and (2) harmonizes the federal trust responsibility to tribes, tribal sovereignty, and the statutory missions of the Departments, so as to avoid or minimize the potential for conflict and confrontation.

(B) Government-to-Government Communication. It shall be the responsibility of each Service's regional and field offices to maintain a current list of tribal contact persons within each Region, and to ensure that meaningful government-to-government communication occurs regarding actions to be taken under the Act.

(C) Agency Coordination. The Services have the lead roles and responsibilities in administering the Act, while the Services and other federal agencies share responsibilities for honoring Indian treaties and other sources of tribal rights. The Bureau of Indian Affairs (BIA) has the primary responsibility for carrying out the federal responsibility to administer tribal trust property and represent tribal interests during formal Section 7 consultations under the Act. Accordingly, the Services shall consult, as appropriate, with each other, affected Indian tribes, the BIA, the Office of the Solicitor (Interior), the Office of American Indian Trust (Interior), and the NOAA Office of General Counsel in determining how the fiduciary responsibility of the federal government to Indian tribes may best be realized.

(D) Technical Assistance. In their roles as trustees, the Services shall offer and provide technical assistance and information for the development of tribal conservation and management plans to promote the maintenance, restoration, and enhancement of the ecosystems on which sensitive species (including candidate, proposed, and listed species) depend. The Services should be creative in working with the tribes to accomplish these objectives. Such technical assistance may include the cooperative identification of appropriate management measures to address concerns for sensitive species (including candidate, proposed and listed species) and their habitats. Such cooperation may include intergovernmental agreements to enable Indian tribes to more fully participate in conservation programs under the Act. Moreover, the Services may enter into

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conservation easements with tribal governments and enlist tribal participation in incentive programs.

(E) Tribal Conservation Measures. The Services shall, upon the request of an Indian tribe or the BIA, cooperatively review and assess tribal conservation measures for sensitive species (including candidate, proposed and listed species) which may be included in tribal resource management plans. The Services will communicate to the tribal government their desired conservation goals and objectives, as well as any technical advice or suggestions for the modification of the plan to enhance its benefits for the conservation of sensitive species (including candidate, proposed and listed species). In keeping with the Services' initiatives to promote voluntary conservation partnerships for listed species and the ecosystems upon which they depend, the Services shall consult on a government-to-government basis with the affected tribe to determine and provide appropriate assurances that would otherwise be provided to a non-Indian.

Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

The Services shall coordinate with affected Indian tribes in order to fulfill the Services' trust responsibilities and encourage meaningful tribal participation in the following programs under the Act, and shall:

(A) Candidate Conservation.

(1) Solicit and utilize the expertise of affected Indian tribes in evaluating which animal and plant species should be included on the list of candidate species, including conducting population status inventories and geographical distribution surveys;

(2) Solicit and utilize the expertise of affected Indian tribes when designing and implementing candidate conservation actions to remove or alleviate threats so that the species' listing priority is reduced or listing as endangered or threatened is rendered unnecessary; and

(3) Provide technical advice and information to support tribal efforts and facilitate voluntary tribal participation in implementation measures to conserve candidate species on Indian lands.

(B) The Listing Process.

(1) Provide affected Indian tribes with timely notification of the receipt of petitions to list species, the listing of which could affect the exercise of tribal rights or the use of tribal trust resources. In addition, the Services shall solicit and utilize the expertise of affected Indian tribes in responding to listing petitions that may affect tribal trust resources or the exercise of tribal rights.

(2) Recognize the right of Indian tribes to participate fully in the listing process by providing timely notification to, soliciting information and comments from, and utilizing

the expertise of, Indian tribes whose exercise of tribal rights or tribal trust resources could be affected by a particular listing. This process shall apply to proposed and final rules to: (i) list species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to threatened (or vice versa); (iv) remove a species from the list; and (v) designate experimental populations.

(3) Recognize the contribution to be made by affected Indian tribes, throughout the process and prior to finalization and close of the public comment period, in the review of proposals to designate critical habitat and evaluate economic impacts of such proposals with implications for tribal trust resources or the exercise of tribal rights. The Services shall notify affected Indian tribes and the BIA, and solicit information on, but not limited to, tribal cultural values, reserved hunting, fishing, gathering, and other Indian rights or tribal economic development, for use in: (i) the preparation of economic analyses involving impacts on tribal communities; and (ii) the preparation of "balancing tests" to determine appropriate exclusions from critical habitat and in the review of comments or petitions concerning critical habitat that may adversely affect the rights or resources of Indian tribes.

(4) In keeping with the trust responsibility, shall consult with the affected Indian tribe(s) when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally-owned fee lands, or the exercise of tribal rights. Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

(5) When exercising regulatory authority for threatened species under section 4(d) of the Act, avoid or minimize effects on tribal management or economic development, or the exercise of reserved Indian fishing, hunting, gathering, or other rights, to the maximum extent allowed by law.

(6) Having first provided the affected Indian tribe(s) the opportunity to actively review and comment on proposed listing actions, provide affected Indian tribe(s) with a written explanation whenever a final decision on any of the following activities conflicts with comments provided by an affected Indian tribe: (i) list a species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to threatened (or vice versa); (iv) remove a species from the list; or (v) designate experimental populations. If an affected Indian tribe petitions for rulemaking under Section 4(b)(3), the Services will consult with and provide a written explanation to the affected tribe if they fail to adopt the requested regulation.

(C) ESA Section 7 Consultation.

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected Indian tribes in addition to data provided by the action agency

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during the consultation process. The Services shall provide timely notification to affected tribes as soon as the Services are aware that a proposed federal agency action subject to formal consultation may affect tribal rights or tribal trust resources.

(2) Provide copies of applicable final biological opinions to affected tribes to the maximum extent permissible by law.

(3)(a) When the Services enter formal consultation on an action proposed by the BIA, the Services shall consider and treat affected tribes as license or permit applicants entitled to full participation in the consultation process. This shall include, but is not limited to, invitations to meetings between the Services and the BIA, opportunities to provide pertinent scientific data and to review data in the administrative record, and to review biological assessments and draft biological opinions. In keeping with the trust responsibility, tribal conservation and management plans for tribal trust resources that govern activities on Indian lands, including for purposes of this paragraph, tribally-owned fee lands, shall serve as the basis for developing any reasonable and prudent alternatives, to the extent practicable.

(b) When the Services enter into formal consultations with an Interior Department agency other than the BIA, or an agency of the Department of Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and provide for the participation of the BIA in the consultation process.

(c) When the Services enter into formal consultations with agencies not in the Departments of the Interior or Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and encourage the action agency to invite the affected tribe(s) and the BIA to participate in the consultation process.

(d) In developing reasonable and prudent alternatives, the Services shall give full consideration to all comments and information received from any affected tribe, and shall strive to ensure that any alternative selected does not discriminate against such tribe(s). The Services shall make a written determination describing (i) how the selected alternative is consistent with their trust responsibilities, and (ii) the extent to which tribal conservation and management plans for affected tribal trust resources can be incorporated into any such alternative.

(D) Habitat Conservation Planning.

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected tribal governments in habitat conservation planning that may affect tribal trust resources or the exercise of tribal rights. The Services shall facilitate tribal participation by providing timely notification as soon as the Services are aware that a

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draft Habitat Conservation Plan (HCP) may affect such resources or the exercise of such rights.

(2) Encourage HCP applicants to recognize the benefits of working cooperatively with affected Indian tribes and advocate for tribal participation in the development of HCPs. In those instances where permit applicants choose not to invite affected tribes to participate in those negotiations, the Services shall consult with the affected tribes to evaluate the effects of the proposed HCP on tribal trust resources and will provide the information resulting from such consultation to the HCP applicant prior to the submission of the draft HCP for public comment. After consultation with the tribes and the non-federal landowner and after careful consideration of the tribe's concerns, the Services must clearly state the rationale for the recommended final decision and explain how the decision relates to the Services' trust responsibility.

(3) Advocate the incorporation of measures into HCPs that will restore or enhance tribal trust resources. The Services shall advocate for HCP provisions that eliminate or minimize the diminishment of tribal trust resources. The Services shall be cognizant of the impacts of measures incorporated into HCPs on tribal trust resources and the tribal ability to utilize such resources.

(4) Advocate and encourage early participation by affected tribal governments in the development of region-wide or state-wide habitat conservation planning efforts and in the development of any related implementation documents.

(E) Recovery.

(1) Solicit and utilize the expertise of affected Indian tribes by having tribal representation, as appropriate, on Recovery Teams when the species occurs on Indian lands (including tribally-owned fee lands), affects tribal trust resources, or affects the exercise of tribal rights.

(2) In recognition of tribal rights, cooperate with affected tribes to develop and implement Recovery Plans in a manner that minimizes the social, cultural and economic impacts on tribal communities, consistent with the timely recovery of listed species. The Services shall be cognizant of tribal desires to attain population levels and conditions that are sufficient to support the meaningful exercise of reserved rights and the protection of tribal management or development prerogatives for Indian resources.

(3) Invite affected Indian tribes, or their designated representatives, to participate in the Recovery Plan implementation process through the development of a participation plan and through tribally-designated membership on recovery teams. The Services shall work cooperatively with affected Indian tribes to identify and implement the most effective measures to speed the recovery process.

(4) Solicit and utilize the expertise of affected Indian tribes in the design of monitoring programs for listed species and for species which have been removed from the list of

Endangered and Threatened Wildlife and Plants occurring on Indian lands or affecting the exercise of tribal rights or tribal trust resources.

(F) Law Enforcement.

(1) At the request of an Indian tribe, enter into cooperative law enforcement agreements as integral components of tribal, federal, and state efforts to conserve species and the ecosystems upon which they depend. Such agreements may include the delegation of enforcement authority under the Act, within limitations, to full-time tribal conservation law enforcement officers.

(2) Cooperate with Indian tribes in enforcement of the Act by identifying opportunities for joint enforcement operations or investigations. Discuss new techniques and methods for the detection and apprehension of violators of the Act or tribal conservation laws, and exchange law enforcement information in general.

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Executive Order 13175--Consultation and Coordination With Indian Tribal Governments

November 6, 2000

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions.

For purposes of this order:

a. "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.
b. "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.
c. "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).
d. "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles.

In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

a. The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.
b. Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.
c. The United States recognizes the right of Indian tribes to self- government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria.

In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

a. Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.
b. With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.
c. When undertaking to formulate and implement policies that have tribal implications, agencies shall:
    1. encourage Indian tribes to develop their own policies to achieve program objectives;
    2. where possible, defer to Indian tribes to establish standards; and
    3. in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

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Sec. 4. Special Requirements for Legislative Proposals.

Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation.

a. Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.
b. To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:
    1. funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or
    2. the agency, prior to the formal promulgation of the regulation,
c. consulted with tribal officials early in the process of developing the proposed regulation;
d. in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
e. makes available to the Director of OMB any written communications submitted to the agency by tribal officials.
f. To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,
    1. consulted with tribal officials early in the process of developing the proposed regulation;
    2. in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
    3. makes available to the Director of OMB any written communications submitted to the agency by tribal officials.
g. On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

a. Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.
b. Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in

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connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

c. Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.
d. This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

a. In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.
b. In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.
c. Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies.

Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions.

a. This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.
b. This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).
c. Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.
d. This order shall be effective 60 days after the date of this order.

Sec. 10. Judicial Review.

This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

William J. Clinton

The White House,
November 6, 2000.

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