

ESTABLISHING A FRASER WATERSHED PROCESS

by Brenda Gaertner*

*Be realistic and do the impossible, because if we don't do the impossible
we face the unthinkable. (Murray Bookchin)*

Executive Summary:

As part of the Review Recommendations resulting from Dr. Brown's Report on the Fraser River Aboriginal Fisheries Secretariat,¹ it was recommended that a process be established as soon as possible to negotiate a new Fraser Watershed Agreement. The Interim Executive Committee has requested my comments and recommendations regarding the scope, timing and potential next steps towards implementing that recommendation.²

In the report, I also explore some of the historical, structural and legal roots of the present impasse, in order to identify what types of changes might be necessary to effect cooperation.

Attached as Appendix E is a list of the 13 specific recommendations which are discussed in detail within this report.

To move towards a consensual process, a common vision together with short and long term goals, must be developed. Given the complexities of peoples, issues and biology, the parties must commit the human and financial resources required for a facilitated process. Sufficient incentives will be required for the parties to do the required work. The required resources must be identified by DFO to initiate these discussions in good faith and provide the necessary support to the resulting watershed process. In the report, I review some of the specific FN and DFO issues and provide suggestions for the types of incentives, visions and goals which the parties could consider.

The negotiation of a watershed agreement will benefit from a clearly defined pre-negotiation, negotiation and finally, implementation phase. Because fisheries issues are evolving and interactive, how this process affects other processes (e.g., bilateral negotiations and consultation with DFO, BCA's Framework Process, Interim and Treaty measures, Fraser Basin Sustainability Initiative) will require clarification.

¹ March 2002

² When completing this report I have relied upon my professional experience, and in particular the education received from elders, political leaders and fisheries representatives of Fraser First Nations over the last 17 years.

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During the pre-negotiation phase, the following pre-requisites need to be put into place: a clearly mandated First Nation structure, a better understanding between the parties regarding their respective goals and aspirations, and if possible the introduction of new initiatives, including exploring immediate steps towards new types of decision making and management arrangements.

The complexities of creating a First Nations table with sufficient mandate and responsibility to address issues of common concern should not be understated. Given the other demands being placed on aboriginal leadership at this time and more recent history, a funded facilitated process is a necessary pre-requisite for the completion of this inter-tribal work. With an operative number of First Nations willing to explore the use of a broader table, a working group could be established to consider and make recommendations regarding such things as: the processes required for authority and accountability, and the development of mandates and decision-making power. (See Recommendation 3.)

During the pre-negotiation stage, DFO must take the steps necessary to confirm their commitment to developing and resourcing a FWP. Without such commitment, the parties will need to determine what other mutual goals and incentives could support the development of a functional WSP. (see Recommendation 4)

Once the preliminary steps are in place, most importantly establishing an inter-tribal process with operative representation from the different regions of the River, DFO and those First Nations can proceed to develop the framework for and negotiate either a new Watershed Agreement, or distinct components that could eventually evolve into a comprehensive agreement (e.g., test and other selective fisheries, technical processes, sales arrangements).

In the meantime, the process would benefit from a First Nation/DFO working group that gathers information, does preliminary work and makes recommendations regarding such things as: common visions and goals, the efficiencies and mutual benefits arising in modern management decisions being considered for the Fishery, and the obtaining of flexible mandates and the establishment of consensus building decision making processes. (see Recommendation 5)

There are many challenging tasks facing leadership these days. All of the parties will be required to prioritize this work. Because a process on the Fraser must be uniquely designed to meet the common goals and aspirations of the parties, a facilitator(s) will also be required to keep DFO and First Nation moving towards consensus. The focussed intensive negotiations between the parties should be timed outside of the May-October in-season management period. Although optimistic, it is possible to see a funded facilitated pre-negotiation phase completing its work in time to use the next two winters for focussed negotiations.

In addition I have recently had the opportunity to listen to members of the Interim Executive Committee and others working within the challenging task of First Nation fisheries in the Fraser Watershed.

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To be useful any watershed agreement must effect change and confirm the commitment required for a new co-operation. The parties must obtain the mandates to begin the process, and then develop and institute a negotiating process that is accountable to its principles, has the support of senior levels of governments, and actually moves the issues along. There will always be barriers to change, political, technical, legal or otherwise. Committed individuals with the required community and political support, and sufficient time and resources to see this through to a successful end, will help create the legacy on which future generations can rely. (see Recommendations 7 to 13)

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One Way of Telling the Story

The Fraser River is one of the world's largest salmon producing rivers. Since time immemorial (or time out of mind) the coast and interior aboriginal peoples whose territories include the Fraser River (or the "River")³, have had access to and relied upon, managed and conserved the Fraser River fishery (or the "Fishery")⁴. The abundance of the Fraser River Fishery had sustained aboriginal families and their communities into their future. Fish, and in particular salmon, provided food, wealth and a way of life. The Fishery is part of the First Nations communities' spiritual, cultural, dietary and economic wellbeing.

Diverse fishing methods were developed: dip nets, trawl nets, harpoons, fish traps, and weirs are just some of the methods used to access the fishing resources at varying times and places. The harvesting relationship to the Fishery carried with it stewardship responsibilities, no matter what the purpose of the fishing. Inherent in aboriginal fishing methods and practices was a respectful, integrated (spiritual, cultural, economic) relationship to the Fishery, which included managing the use of the Fishery in a manner which ensured the sustainability of their communities now and for future generations.

When non-aboriginal people arrived, aboriginal people provided fish to those arriving to their lands, and began to access expanded economies through expanded trade relations. However, without treaties in place, and with no regard for the traditional relationship and ecological knowledge of the aboriginal people, in or about 1878 Canada began regulating fishing

³ In this paper and in order to create some territorial boundaries within which these discussions will take place, the Fraser River is comprised of the Fraser River, including all tributaries, from the mouth to the headwaters. In time, the relationship with the aboriginal nations of Vancouver Island who access Fraser bound stocks must also be considered.

practices. Non-aboriginal laws and practices, written or otherwise, increasingly imposed regulatory control and other methods of marginalizing the aboriginal fishery. For example, in 1888 Canada passed legislation which stated that the aboriginal fishery was for food only – thus instituting a separation of fishing for food from fishing for any other purpose. Governmental policies and regulations working hand in hand with the economic interests of the commercial fishery, have often pitted the aboriginal fisheries against the non-aboriginal fisheries, and has resulted in division, conflict and competition amongst the Aboriginal Nations along the River.

Since 1888, regulations restricting when and how aboriginal people fish have been enforced by officers of the Department of Fisheries and Oceans (“DFO”). Oftentimes this led to DFO using domineering measures such as tearing down weirs, seizing nets, and arresting aboriginal people fishing on the River. Enforcement difficulties, physical confrontations and court challenges are a significant part of the history.

First Nations along the River have continued to defend themselves against unjust fisheries regulations. First Nations have taken challenges to the courts, in hope of obtaining the necessary clarification regarding the aboriginal right to the Fishery.

The constitutional priority to the Fishery for food, social and ceremonial purposes, the requirement to provide for the priority of aboriginal terminal fisheries, and the obligation to consult in order to justify infringements are all now confirmed as part of the aboriginal fishing right constitutionally protected under s.35⁵. In addition, the Supreme Court of Canada’s decision in *Delgamuukw* confirmed that unextinguished aboriginal title includes making decisions as to

⁴ The word “Fishery” includes the fish, fishing and fish habitat within the Fraser River, and broadly includes all components of the ecosystem.

the use of lands and resources, as well an inescapable economic component. The Crown must now accommodate the aboriginal interests in the resource in order to justify potential infringements resulting from activities or regulations authorized by the Crown.⁶

For a number of reasons, the most obvious being the political and historical allegiances amongst DFO and the commercial fishery and the marginalization of the aboriginal fishery, these legal principles which have evolved over the last decade have not been fully recognized on the ground. It is difficult for some First Nation leaders to understand the significant gap between the legal principles and their implementation.⁷ The pace of change has been frustrating to those First Nations who are readying themselves for increased recognition and responsibilities in a modern context.

In just over one century, the introduction of international markets and demand system economies into the West Coast Fishery, the industrialization of the Fishery (in particular the mixed stock ocean salmon fishery), the creation of wealth at an unprecedented rate, and now, increasing scarcity of fish, has all occurred. The decline in many salmon stocks returning to the River is, for many people, raising alarms. There is significant destruction of habitat, resulting

⁵ s.35 of the *Constitution Act, 1982*.

⁶ for eg.: SCC in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 and *R. v. Gladstone*, [1996] 2 S.C.R. 723; BCCA in *R. v. Jack, John and John*, [1995] BCJ No. 2632; SCC in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; BCCA in *Haida Nation v. B.C. and Weyerhaeuser*, 2002 BCCA 147 and *Taku River Tlingit First Nation v. Ringstad et al.* 2002 BCCA 59 and others.

⁷ One Chief noted the frustration resulting from knowing what the courts say about the nature of the aboriginal fishing right, including the Crown's lawful obligations regarding consultation and what is actually occurring on the ground. Consultation in the context of an unacknowledged aboriginal right is confusing; rarely is there an opportunity to consider issues in an informed timely manner in the pre-season chaos of multiple agendas; and often there is simply not the human capacity with First Nations to attend all the required meetings.

from such things as competing development, forestry practices and enforcement difficulties. Many Fraser River salmon stocks are approaching extinction; some are already extinct.⁸

Over the last few decades, various government-funded studies and commissions have reviewed the Fishery and the industry, and provided recommendations; the crisis in the management of the West Coast fishery, including the Fraser River Fishery, has been consistently identified. The current non-aboriginal fishery is not sustainable in either ecological or economic terms.

Significant steps will be necessary to restructure, protect and conserve the Fraser River Fishery. Some of those steps will include, for both legal and environmental reasons, the need to rely more on terminal fisheries for both management and harvesting.

Apparently in response to the Supreme Court of Canada decision in *Sparrow*, DFO introduced its Aboriginal Fisheries Strategy ("AFS"). The implementation of the AFS within the Fraser River Watershed has been controversial, and it has encouraged distrust, criticism, and division among some of the nations along the River, and between DFO and First Nations.

In 1993 DFO introduced a Fraser Watershed Agreement ("WA") which became a pre-requisite for any bilateral funding or AFS Agreements with Fraser First Nations⁹. DFO representatives came from Ottawa, ostensibly to negotiate the WA. Early in those discussions it became clear to the First Nation leaders that DFO's negotiators' mandate was limited to the draft agreement that was tabled by DFO.

⁸ such as the Thompson Coho and the Cultus Lake Sockeye

⁹ DFO Minister Crosbie announced that it was mandatory for any Fraser First Nation wanting funding for fisheries related matters to sign an AFS Agreement and the Watershed Agreement.

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Pursuant to the AFS policy, within the Fraser Watershed only the people in the Lower Fraser (from the Canyon to the mouth of the River) were able to negotiate a pilot sales arrangement. At that time, there appeared to be no DFO interest in finding solutions to the substantive issues raised by the First Nations about the content of the AFS and Watershed Agreements, and about the selective use of pilot sales agreements.

The implementation of the 1993 WA led to some capacity building for those First Nation participants who signed on to the WA (and none for the non-signors) and established committees (technical and working) at which DFO/First Nations could discuss some of the Fraser Watershed issues.

A Fraser River Aboriginal Fisheries Secretariat was formed, which facilitated the creation of a central office. In addition, some funding to hire biologists as consultants on watershed matters was provided.¹⁰ Attached as Appendix A is a report completed by Dr. Bob Brown regarding the Secretariat, and in Appendix B is a copy of a presentation completed for the Fraser River Aboriginal Fisheries Forum Meeting in November, 2002.

The First Nations having AFS bilateral agreements with DFO created a "Tier One" process which is a collective of only First Nation representatives. The purpose of this process is to discuss and try to reach agreements on matters requiring cooperation amongst the First Nations. Participation at the Tier One level fluctuates, although recently the trend shows a general decline in participation. This dwindling First Nation participation suggests that the

¹⁰ Mike Staley, Ken Wilson and more recently Jason Yarmish have been hired to provide technical assistance to the First Nations in the ever increasing demands for scientific understanding in the complex management decisions which plague fisheries management. Generally speaking, this technical biological capacity has not

interests of many First Nations are not being met in the present process; or that their interests are better served by not attending the watershed meetings; or that the perceived ineffectiveness of the process puts other matters in higher priority for First Nations' limited human and financial resources.

The 1993 WA expired in 1999. There has not been any further extension or replacement of that Agreement. Attached as Appendix C, is a copy of a briefing paper which was completed by the Fraser River Aboriginal Fisheries Secretariat regarding some of the challenges facing the creation of a new watershed agreement. Those include: a) historical differences in the approach used by DFO and by First Nations in the management of the Fisheries; and b) lack of First Nations' participation.

In this paper I begin by exploring some of the factors which have contributed to the present situation. For readability, I have categorized these into structural, management and legal issues. There is, of course, significant interplay amongst these issues. I then turn to a discussion of some possible next steps and specific recommendations.

The Challenges of the Present: Reasons for Change

It is important to consider and understand the significant factors contributing to the modern challenges in order to identify what might be necessary in order to effect the change required for a functional watershed process.

been supported by a compilation of the traditional ecological knowledge which will be a necessary part of future management decisions.
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There is what some call a structural or institutional impasse¹¹ between First Nations and DFO regarding the nature and content of aboriginal fishing rights and how those must be considered and involved in the management and allocation of the resources, in a modern day context. This impasse has multiple roots which manifests in various different forms:

1. Structural Issues

- a) There is a significant lack of clarity at both First Nation meetings and DFO/First Nation meetings regarding such principal matters as: intentions, goals, agendas, mandates, representation, and function. It is not clear whether a particular meeting is serving an information gathering, advisory or decision making purpose. This lack of clarity breeds distrust, unspoken and conflicting agendas, increased unwillingness to participate in fear of what it will be used for, and irritants such as too many meetings to attend which do not have meaningful or concrete results.
- b) There are no functional agreements in place amongst First Nations to guide how they will meet and make decisions on matters of mutual concern and interest at the watershed level.¹² There are no functional agreements in place between DFO and a representative, or at least an operative First Nation group which are providing on the ground examples of an effective movement forward towards an co-management or co-operative processes.

¹¹ Susskind & Cruikshank "Breaking the Impasse, Consensual Approaches to Resolving Public Dispute", Harvard Public Dispute Program, 1987 Basic Books, Inc.

¹² This statement is made with knowledge of the work done through the IIFC, and in particular the 1989 Intertribal Fishing Treaty between Indian Nations: A treaty of mutual purpose and support.
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- c) While DFO would significantly benefit if watershed discussions could provide the basis upon which it could meet part of its lawful obligations to consult, at present there is not consistent capacity, nor the necessary structural foundation at the community, regional and watershed levels to provide the expertise and informed representation of First Nations that is required for that to be possible. In addition there are no clear agreements on what topics and/or what consultation efforts are appropriate at the watershed level.
- d) The scientific component of fisheries management requires significant capacity within First Nations, and at the regional and watershed level; all of which needs to be supplemented with traditional ecological knowledge in order to explore and implement a more sustainable co-management structure. There is an increasing gap between those First Nations who have been able to access federal funding for fisheries programs providing technical capacity, and those who have not.
- e) The lack of clarity regarding the role of technical capacity provided at the Watershed level, in the Crown consultation process with First Nations, and the inability of present resources to service the varying levels of expertise required, has caused increasing concern. The technical capacity provided at the Watershed Level is presumably intended to help First Nations understand modern fisheries management and help assist the leadership of participating First Nations in Crown consultation. However recently DFO has argued (against a first nation who is not participating at the watershed level) that watershed technical capacity is part of the way DFO is engaging in good faith consultation.

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- f) The particular type of watershed process introduced in the mandatory 1993 AFS Watershed Agreement came with no prior consultation or real buy-in by the First Nations. The structure provided for one technical and one political committee, which, at best has played only an advisory role to DFO. The differences in interest amongst the regions of the River, as well as differences arising from stock distinctions needs to be considered when structuring a watershed organization.
- g) There has been little First Nations political leadership consistently involved in , or accountable to a watershed process. Fishing meetings amongst the leaders have been few and far between, or only in response to immediate and serious in-season issues. It is difficult, and in some cases impossible, to get people to attend meetings to truly address outstanding issues and move forward. In some cases, it appears that positions have solidified into bitter disputes. Distrust has been engendered at a personal, regional and nation level which has lead to significant and continued dysfunction. Some geographic regions and Nations do not attend Watershed meetings at all. For at least some First Nations this has resulted in serious questions as to the utility of pursuing a watershed process. Others suggest that the inability to speak with a unified voice, at least on key issues of mutual concern, has resulted in it being difficult to effect real change.
- h) A lack of DFO commitment to securing any long term budgets has resulted in the loss and/or inability to attract committed staff, requiring the use of short term training contracts to provide services, and the use of ad hoc committees with little or no mandates to pursue important issues.

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- i) Pilot sales agreements have not expanded to other parts of the Watershed (and have recently been seriously challenged in the courts by the Survival Coalition. This has resulted in an inequality amongst the First Nations in their ability to explore modern forms of economy within the Fishery, which in turn serves to create further divisions and competition amongst the First Nations. Arbitrary distinctions between those First Nations on the Fraser who can legally derive an economy from the fishery and those who cannot is not productive. Changing this alone, might have interesting effects on First Nations' willingness to work together at a Watershed level, and in order to create a mutually beneficial, thriving fishery into the future.

- j) Because functional mechanisms for resolving disputes amongst First Nations do not presently exist, DFO has assumed, either by design or by default, the role of arbitrator of competing First Nation interests. There is nothing in DFO's history which suggests it is particularly well suited for this job (in that there is not a broad base of individuals within DFO who have familiarity with the complexities of aboriginal history, politics or interests; nor does DFO have a history of political independence and trustworthiness on First Nation fishery issues). It is also possible to argue that DFO's own agendas have, at least on occasion, been served by continued divisiveness amongst First Nations.

- k) while some First Nations are presently engaged in the B.C. Treaty Process, others are not. For those First Nations within the process, it is challenging to conclude

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Interim Measures Agreements and AIPs on the Fisheries without clearer direction on the role/function of the watershed process.

2. Management Issues

- a) DFO and many Fraser First Nations have different needs/ways of approaching the management and harvesting of the Fishery. This is seen in the increasing conflicts between strong stock management of mixed stock fisheries, and weak stock management through in-river and terminal fisheries. The continued decline in the salmon returns, in conjunction with the some of the anticipated effects of the *Species at Risk Act*, will refocus the management of the Fishery into the terminal fisheries. Because this is also consistent with in-river aboriginal rights/needs, there is a pressing need to use this convergence to effect change.
- b) The Fraser River watershed is a vast geographic area¹³, from the head waters in the northern interior plateau to the mouth of the River where it meets the west coast. The complexity of the management and allocation issues which result from various geographic and historical influences cannot be overstated. Any umbrella organization which is intended to facilitate or represent First Nations of the Watershed, and negotiate and consult (perhaps accommodate) First Nations fisheries issues with DFO regulations, must include regional sub-groups and approaches. These sub-groups would build the necessary expertise and

¹³ The Fraser River is the largest river in B.C., with the watershed drainage basin being 234,000 s. kilometres, with approximately 59 fish species. (roughly ¼ the area of B.C.) The river is 1,375 Kilometres in length. There are eight linguistic groups and 96 first nation communities along the River. (Fraser Basin Management Plan 1995)

information base upon which regional and stock based interests can be properly represented and mandated to address complex fisheries issues.

- c) There is a growing (apparent) disparity of interest between the resource management capacities being developed by the middle and upper river people operating terminal fisheries on or near to spawning grounds and what is viewed by some as the predominately mixed stock harvesters of the lower Fraser. The differences in form and content of those distinct components of the watershed is fostering distrust rather than mutual respect and co-operation. These distinctions are short sighted as all harvesters rely upon thriving spawning grounds. Mutually beneficial relationships, perhaps in the form of protocols, between all those with aboriginal rights to access specific stocks will be necessary.
- d) Even for the basic task of developing an integrated fishing management plan, (eg. conservation/escapement goals, re-building policies and fishing plans) the process of how information is provided and when, and how discussions will be held and when, is not explicit.
- e) The present process is at best focused on the funder's needs – i.e. a highly technical process of reviewing and commenting on DFO's plans, policies and decisions, without sharing substantive management or decision-making

responsibilities.¹⁴ If this does not change then how/why would First Nations stay involved?

3. Legal Issues

- a) While DFO needs to improve its ability to meet its lawful obligations arising from aboriginal rights and titles, often their mandate does not include considering aboriginal rights or title matters. This inherent contradiction breeds frustration and confusion.¹⁵ Many are calling for the recognition that appears obvious, and the ability to move to implement the real tasks of reconciliation and accommodation, including restoration of the Fishery.
- b) When discussions turn to the scoping of a new relationship between aboriginal people and DFO regarding the fishery, disagreements or the lack of clarity, on the principles/indices/scope of aboriginal fishing rights, especially related to allocations and management responsibilities, serve as barriers against change.
- c) As set out in detail in Appendix C, not all First Nations are participating in a Watershed Process for a variety of reasons including specific clauses in the AFS/

¹⁴ The long term sockeye escapement goal process (now underway) is a case in point. A blue ribbon multi-sector technical working group is developing complex computer models to consider how best to set exploitation rates for large stock aggregates. First Nations, whose interests are tabled through technical experts, continue to argue that DFO has to manage Fraser sockeye in a larger number of smaller groups in order to explicitly protect weak stocks and the priority for First Nation fisheries which depend upon these weak stocks. The technical working group just carries on using the same four stock aggregates designed to support a large mixed stock ocean fisheries at the expense of weak stocks.

¹⁵ An example is DFO's use of such things as Watershed Talk and Tier 1 and Forum meetings as steps towards meeting their consultation obligations. Although these activities, taken individually would not be consultation, DFO's use of them to defend court challenges or otherwise is confusing to many First Nations and results in increased fear in participating in any process. Another example is the many attempts to negotiate changes to the AFS Agreements. DFO negotiators often rely upon a lack of mandate to deal with aboriginal rights as reasons for not changing terms which have been unacceptable to First Nations.

WA that have been offensive and unacceptable from the outset. Previously an AFS agreement was a prerequisite to participating in the WA.

- d) Many First Nation leaders question the utility of meeting with DFO to work out the hard issues, if DFO continues to rest on their statutory authority to decide unilaterally how they will proceed. No dispute mechanisms (mediation or arbitration) have been successfully introduced amongst the First Nations or between First Nations and Canada regarding contentious fisheries management issues. In addition, DFO not only insists on the hammer of being the final/ statutory decision maker, but also uses it¹⁶.
- e) The lack of clarity regarding how participation at a watershed level could be viewed as assisting the Crown in meeting its consultation obligations, and the lack of any real change in the status quo of fisheries management gives First Nation leadership reasons not to participate.
- f) Experiences where pre and in-season work could have been used to build functional watershed relationships have, even recently, continued to breed considerable lack of confidence in the possibility of change through negotiations and agreement. Many believe that litigation is really the only way to make DFO change; yet others question the value or utility of court decisions which are not implemented on the ground.

¹⁶ For example DFO's decision made August 27, 2002 which opened the commercial fishery on Late Fraser Sockeye, in contrast to the fishery plan arrived at after protracted discussions with First Nations (see Watershed Talk Vol. V111, Issue 34).

Meaningful results, are one of the best ways of building trust and encouraging change. If these are not being achieved, then it is necessary to seek out new ways of promoting positive changes. Perhaps one benefit of the status quo is that there has not been large expenditures of money spent to develop complex structures that would be difficult to walk away from. It appears that right now there is only an ad hoc Tier One and Interim Executive Committee in place both of whom are calling for direction, guidance and assistance in moving forward.

First Nation Considerations

As already noted, one effect of the 1993 schism between the signors and the non-signors of the AFS and the WA, has been that a significant part of the middle of the River has not been represented. To my knowledge, the Nlaka'pamux Nation Tribal Council and the St'at'imc and Southern Carrier have not been participating in any processes related to fishery issues at a watershed level.

The negotiations and implementation of a watershed process that substantively moves the issues forward, including creating an implementation structure that has any real chance of success, requires the participation of all regions of the River. If the re-structuring and the negotiations of a new agreement occur without such participation, there will remain the risk that some will have less (no) commitment to the process, and could view the process as exclusionary. In addition, First Nations need to speak with one voice on a number of specific issues in order for them to effect the change they require.

First Nations must develop their own agreement regarding representation, mandates and accountability for their participants. Because many First Nation communities are participating

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through tribal organizations, and others are not (and likely will not), who and how representation, participation and voting will occur must be discussed and agreed upon. It may be that relying upon the geographically different regions along the River (lower, middle and upper) and/or different stock distinctions may also be helpful to framing the structure.

If a watershed process is intended to do anything more than provide a convenient place to provide and exchange DFO's information, (which does not require a watershed process) and move into a meaningful process, then the First Nation representatives will need to be mandated on specific issues, i.e. have the authority to reach agreements. The First Nation process will need to be transparent, informed and include a dispute resolution process.

It is my understanding that DFO has bilateral discussions underway with the NNTC, and is commencing discussions with the St'at'imc and the Southern Carrier. These discussions must be given a high priority within DFO, so that agreements can be reached to provide necessary funding for capacity building and participation in the management of the resource.

At the same time, the other First Nations could continue to develop recommendations for structuring the First Nations watershed organization. Internal disputes which are getting in the way of participation must be considered, with creative and direct problem solving brought to the table. Facilitators should be used to keep the issues moving. Unless an inter-tribal process, independent of the DFO table, is in place and functioning, the negotiation and implementation of a Watershed Agreement/Process is unlikely to yield productive results.

Clearer understandings on what issues the Nations are prepared to put to the watershed level, and what must remain at the nation and/or community level must be explored in the

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context of the increasing complexity of fisheries management. At one point BCAFC did some substantive work towards identifying issues, interests, rights and possible approaches to assist this work.¹⁷ These resources should be carefully reviewed, and built upon.

While there are some who argue that it does not make sense to take any further steps until the middle River is more fully represented at the Watershed level, doing so would bring all initiatives to a halt, thereby making it more difficult at some future time to re-gather focus or initiative. There are enough things that need improvement; focussing on the lack of representation as the sole or primary fault is mis-leading. Undoubtedly, the process will be stronger when all the River is represented within its structures, but there are ways of proceeding in the interim if that is necessary.

DFO Considerations

DFO needs to be forthcoming about both their present mandates and their willingness (or not) to seek expanded mandates. This is particularly relevant to rights based discussions where both the relationship needs to be improved, and a new/joint vision needs to be created. There are various interests which DFO will need to have considered as they proceed. In addition DFO has budgetary and timing constraints that must be considered in order for the process to work for them. The parties need opportunities to build the trust that DFO is willing to change in a way that does not effectively result in First Nations issues being undermined by other DFO interests.

Obtaining useful and flexible mandates, that include substantive issues regarding aboriginal fishing rights and modern management, will involve senior levels of government. The

¹⁷ BCAFC has done considerable work recommending what issues in fisheries management could be discussed at what level (i.e. community, nation, and watershed). Attached as Appendix D is a copy of those

groundwork for effecting change must be completed, and there needs to be a clear process for obtaining mandates and approvals for new arrangements. The groundwork must be done at both the Regional and National level, and it will be important to First Nations that they know that where required Headquarters is kept informed and remains committed to both the steps along the way, and the longer term vision.

While it would be preferred by many that this be a Regionally driven initiative, past experience has many First Nations doubting whether DFO Region has the decision making power to truly effect the necessary changes. If Ministerial or Deputy Minister approval for any new arrangements is required, it will be important to either have a headquarter representative participate directly in the negotiation phase or be available to the negotiating table. As a minimum, ADM of Fisheries Management, the Regional Director of Treaty and Aboriginal Policy, Aboriginal Affairs in Ottawa, and the requisite Department of Justice (regional and national) representatives need to be meaningfully engaged in the process.

One of the recurring challenges to fisheries negotiations on the Fraser, has been that DFO has difficulty committing individuals to particular projects that require multi-year attention. The constant change in personnel is damaging to relationship building. Representatives need to be committed to trying to effect real change within how DFO thinks and acts, and not simply trying to get through another year with as minimal conflict as possible, (sometimes expresses as getting away with what they can within the present structures and policies). This will require both vision and organizing against the inertia that sets into government when people feel their hands are tied. Having committed people who can get the necessary support from those in senior

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government, and who are prepared to stick it out until the goals have been achieved, are significant components for success.

DFO needs to get out of the role of arbitrator amongst First Nations, including between different regions of the River. This will require that they resist making decisions when there is conflicting positions, and assist in putting into place the consensus building approach that is required. Alternate ways of resolving disputes must be considered, and, as recommended below, tried in good faith. The sooner this is begun, as it will require baby steps leading to fuller processes, the better.

Finally, the process required to move forward will require appropriate funding and human resources. This will require that DFO prioritize this issue in such a manner that the resources are in place.

Incentives For a Watershed Process

What might inspire people to commit to a Fraser River watershed process? How do you get people talking and discussing and moving things forward?

From the First Nations the types of incentives to work collectively will include: more real influence and direct involvement in the management of the Fishery, and the improved ability to rely upon the management, harvest and processing of fish (by themselves and others) as the foundation for thriving communities. This will necessarily include proceeding in a manner which informs and respects their aboriginal rights and interests in the Fishery. Incentives for change, to be effective, will need to be seen and felt on the ground in the day to day management, harvest and use of the fisheries, and in the Crown consultation process.

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From DFO's perspective incentives for a watershed process will include: reliable mechanisms for developing acceptable integrative management plans; and meeting (some of) their lawful obligations to consult and accommodate. The management issues, including minimizing the risks of extinction and maximizing sustainability, can not be accomplished without consultation and regional/watershed decision making processes.

For both parties, minimizing conflict on the River and in the courts, maximizing the efficiencies in utilizing dwindling funding dollars and building working relationships could be important incentives.

Developing Common Visions and Goals

Very early in the discussions it will be necessary for the parties to reflect upon, discuss and find common ground around the short, medium and long term purposes of a First Nations/Canada process at the watershed level. Ultimately it will be far less frustrating if there is a meeting of minds, and the necessary political will and mandates on behalf of all parties, regarding the short and long term goals.

An over-arching vision of a Fraser Watershed process could include a comprehensive reshaping of the Fraser River Fishery, and a sharing of the benefits and responsibilities involved in its management. Such a vision could include:

- re-organization of the harvesting, conservation, stock rebuilding and economics of the Fishery for constitutional and ecological purposes;
- reconciliation of the aboriginal and non-aboriginal management of the Fishery;
- re-allocation of harvest to meet aboriginal, constitutional and other entitlements;

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- meeting DFO's lawful obligations to manage, conserve and promote the Fishery; and
- consultation with First Nations, including an accommodation of their interests.

Whatever the common vision the parties agree upon, they will then need to find common ground in the form of short and long term goals and mechanisms on which they can work together.

A Fraser River Watershed Process could assist in the following structural and management goals:

1. Structure

- a) Create a forum for decision making regarding conservation, escapement and other fisheries management matters which directly affect the Fishery, and therefore the aboriginal access to the Fishery.
- b) Provide meaningful First Nations' participation in the other management structures already existing in relation to the Fraser River fisheries – including the Fraser River Panel and other Pacific Salmon Treaty processes (eg. test fisheries).
- c) Provide the process required for Canada/DFO to meet their legal obligations to consult with and accommodate the aboriginal concerns and interests in the Fraser River Fishery on certain watershed issues (as distinct from individual nation based issues).

- d) Provide the organizational structure from which First Nations and DFO can work with non-governmental organizations and interest groups.
- e) Create a forum for the development (review, approval) and implementation of broad management policies (eg. Wild Salmon Policy).
- f) Provide a mechanism for compiling and integrating aboriginal traditional knowledge with the scientific/technical information which would be collectively used to make sound fisheries management decisions.
- g) Provide the structure for First Nations and DFO to continue to resolve their differences and build upon the common vision of having a healthy river based fishery which supports both thriving First Nations cultures and societies, including food and economic requirements, and thriving non-native communities.

2. Management

- a) Assist in making decisions which directly result in the increased conservation and rebuilding of the stocks, thereby leaving the legacy of an improved Fraser River system that has recovered from the effects of the last 200 years of colonization. This will include developing a broad understanding regarding the management of risks (long and short term), agreements regarding rebuilding efforts and benefits and developing agreements the result in economics efficiencies and benefits around management.

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- b) Develop an annual fisheries management plan for those stocks and on those aspects which involve, and/or impact all or many of the regions within the River – i.e. conservation objectives, production goals, allocation principles, in-season implementation, in-season stock assessment and integrative management of openings.
- c) Provide an incremental approach to co-management and resource sharing amongst the Fraser First Nations and DFO regarding the Fraser River fisheries – assisting reconciliation between aboriginal people and Canada through negotiations rather than litigation or confrontation. When litigation becomes absolutely necessary in order to proceed, the parties could provide for efficient ways of getting the assistance they need from the courts.
- d) Develop and implement an eco-system based co-management of Fraser River fisheries within modern fisheries management processes and knowledge.
- e) Provide the necessary complementary capacity building at the Watershed level which is required to meet these goals.

It will also be important to identify what the watershed process would not be intended to do, including:

- not replace the responsibilities that DFO holds to each Fraser First Nation or replace the bilateral agreements/relationships between DFO and individual Fraser First Nations;

- not to replace the nation to nation relationships (and agreements) amongst the aboriginal peoples of the Fraser River;
- and not to be a technically driven process that serves only to share information regarding DFO's plans and receive First Nations' responses or feedback.

What Might it Look Like? Using the NWIFC as a Case Example.

Presented below is a summary of preliminary research into the basic structures used in Washington State to implement the changes that resulted from the 1979 *Boldt* decision. It was that decision which confirmed the Washington Tribe's treaty right to 50% of the fishery. This example, given the similarities in geography, people and resources, is useful for showing that while agreement on all the complex matters has not yet been reached, there are many common issues which have been worked through by the parties and are proceeding with consensus. For that and a number of subsequent court decisions, the judge stayed engaged with how the parties were implementing the agreement on the ground. The *Boldt* decision itself precipitated significant conflict throughout the region and further legal actions were pursued through to the U.S. Supreme Court.

Eventually, state and tribal leaders were able to look beyond their tumultuous, conflict-ridden history and create a set of functional institutions that attempt to balance conservation requirements with the social, economical and recreational needs of a large number of widely separated and heterogeneous groups of fishermen.¹⁸

Following the *Boldt* decision the Washington Tribes created the Northwest Indian Fisheries Commission (NWIFC), to assist them in conducting orderly and biologically sound fisheries.¹⁹ Over the years, the collective action of the Tribes, subsequent Court rulings and the interconnectedness of all natural resources has resulted in tribal participation being necessary and encouraged in nearly all aspects of natural resource management in the region.²⁰

¹⁸ Sara Singleton

¹⁹ Further court rulings were pursued to expand their roles and responsibilities to include shellfish

²⁰ For at least the last decade the tribes and tribal organizations have participated in the Timber/Fish/Wildlife (TFW) Agreement, along with the timber industry, state and local governments, recreational, and environmental groups.

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In the preamble of the NWIFC Constitution the commitment to wise natural resource management is evident as a first principle:

“... We, the Indians of the Pacific Northwest recognize that our fisheries are a basic and important natural resource and of vital concern to the Indians for this state, and that the conservation for this natural resources is dependent upon effective and progressive management. *We further believe that by unity of action, we can best accomplish these things, not only for the benefit of our own people but for all of the people of the Pacific Northwest.*” (added emphasis)

The common goals that have been recognized amongst the Tribes, and have thereby contributed to them achieving cooperative management are:

- integrating natural resource management and initiating institutional change to overcome barriers;
- protecting and restoring habitat;
- sustaining hatchery production to provide meaningful levels of harvest and aid wild stock rebuilding efforts; and
- promoting and maintaining healthy stable fisheries.

The present membership includes between 17-20 member tribes, including the mixed stock fishers near the mouth and the up-river terminal fishers. The NWIFC is governed by its member tribes, which appoint commissioners to develop policy and to guide the organization. Commissioners elect a chair, vice-chair and treasurer. The Commission's executive director supervises NWIFC staff in the implementation of the policies and natural resource management activities approved by the Commissioners. Acting as a central coordinating body, the Commission also provides a forum for member tribes to jointly address natural resource management issues and for the Tribes to speak with a unified voice on issues of mutual concern.

The NWIFC sees itself as a support service organization that provides direct services to its member tribes to assist their natural resource management efforts. According to their web site, they have approximately 70 full time employees providing services to member tribes through an economy of scale that enables the tribes to more efficiently use the limited funding provided (federally).

The NWIFC is organized into divisions:

- Administration (exec director, legislative, fishery and habitat policy, wildlife management, human resources etc.);
- Fishery Services Division providing fish and shellfish management programs for member tribes, including technical assistance, coordinating management programs and representing tribal management policies;
- Fishery Management and Planning Division providing technical assistance and coordination to the tribes in the development and implementation of annual and long-range fishing plans (including U.S./Canada Pacific Salmon Treaty and Endangered Species Act issues);
- Quantitative Services Division providing data, quantitative analysis tools and technical consulting to aid tribes in their natural resource management activities, including catch monitoring plans for the tribes, database for harvest statistics critical for fishery management planning and allocations;

- Enhancement Services Division providing coordination for tribal hatchery program activities, including wire tagging, fish health programs, fish pathology etc;
- Habitat Services Division providing technical coordination and policy development assistance to member tribes on fish habitat issues and related environment issues, including forest processes and tribal water quality programs, and joint salmon habitat inventory and assessment project; and the
- Information and Education Services Division which conducts public relations.

Each tribe regulates and coordinates its own fishery management program within its specific adjudicated "Usual and Accustomed" fishing grounds.²¹ Typically each tribe maintains their own fishery management staff including a manager who oversees staff working in the areas of harvest management, enhancement, habitat protection and enforcement. In some cases, several tribes have joined together to form collective organizations. In addition there are tribal fish committees which balance tribal harvest needs with resource needs. Tribal harvest management staff develop fishery plans and run size forecasts, assess spawning escapement needs and monitor stock status. The tribes also have hatchery and/or enhancement programs, maintain habitat staff, and also maintain enforcement programs.

Tribal representatives participate in a state wide process with state representatives. The Pacific Fishery Management Council develops and monitors fishery management plans for waters from three to 200 miles off the Washington coast. Tribal and state representatives hold seats on this council and participate on technical committees.

²¹ This follows from the rights as described in the treaty and interpreted in the court decisions.
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In addition tribal representatives sit at the policy and decision making level on the bilateral Pacific Salmon Commission, and its panels and the many committees and work groups which provide technical support to implement the treaty.

The NWIFC acts as a central clearinghouse and facilitator for the decisions which the tribes must make to participate effectively in these various, highly complex and often politically charged, processes:

“The advantage of this process and structure are threefold. First, it provides a broad base of local participation for all parties, including each tribal government involved in the process. Second, it provides tribal and other governments with flexibility to address regional and political differences. Third, this process and structure is designed without a top-heavy bureaucratic response that is costly and slow to react to problems.”²²

There remain contentious issues about which the tribes do not always agree. In the 1980s the tribal commercial fishery expanded and competition among tribes increased, a set of potentially devastating intertribal conflicts arose over how tribes were to solve a variety of problems accompanying their reinstated property rights and management responsibilities.

While the courts have ruled where different tribes could fish, it has not determined how much of the 50% each tribe could. This has resulted in sufficient guidance for determining that the tribal/nontribal shares be calculated on a species by species, region by region basis. There are no such rulings with respect to sharing between tribes. So, while tribal/state conflicts dominated the discussion in the past, the intertribal disputes are now becoming the focus. Flurries of last minute crisis negotiation, litigation between tribes and emergency court orders have been a regular part of each season’s management of the fisheries.²³

²² Singleton, Sara. “Managing Pacific Salmon: The Role of Distributional Conflicts in Coastal Salish Fisheries” Western Washington University.

²³ Singleton at pages 9-10
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Because tribes are competing amongst themselves for portions of increasingly scarce resources, intertribal conflicts over allocation shares has become time-consuming, inefficient and destructive to both resource stocks and intertribal relationships. Where different tribal groups harvest fish in succession, if no agreements are reached then fishers are encouraged to fish as hard as they can before the fish pass, frustrating management goals. There is a recognition that there is a need for an orderly, predictable and jointly coordinated fishing season, without being disrupted by last minute court challenges and crisis negotiation. The Tribes, fully aware of the desirability of agreeing on a set of institutions or intertribal allocation principles, have made attempts to have discussions to solve this highly charged contentious issue. This has included two tracks: one involving attempts to develop overarching principles to be used to solve particular conflicts, and the other involving the “far more mundane, incremental process through which tribes have found partial solutions to day to day problems..... [by developing] a messy patchwork of formal and informal, written and unwritten understandings that eventually became the allocational framework that structures the tribes’ annual fishing agreements”.²⁴

Despite their inability to resolve allocational issues at the level of overarching principles²⁵ the tribes have been able to move some distance to solving intertribal conflicts. They continue to support and work together on shared interests, such as “creating and maintaining a highly effective intertribal fisheries organization and in orchestrating their

²⁴ Singleton at pages 14-15, et. seg. where she reviews the meta-principles being discussed for intertribal allocations. It appears that all of the tribes express support for the idea that no tribe could be entirely denied a fishery, and nearly all tribes agree on the desirability of having home waters where their own members fish exclusively.

²⁵ A framework agreement emerged from an 18 month mediation process that occurred in 1987-89 which extended and codified some of the formal and informal, written and unwritten agreements. The tribes considered a number of different principles to be used, and ultimately settled upon one which primarily reflected historical catch and dependency, with some modifications to create fairness. (p. 24) The agreement

participation in annual negotiations with state and international regulatory agencies so as to achieve common objectives. In fact one of the most striking aspects of the intertribal allocational conflicts of the 1980s is the degree to which tribes were able to divorce themselves from these conflicts when faced with an external threat.”²⁶

has not been formally accepted, with 80 % of its recommendations being used to develop annual fishing plans, and the rest negotiated annually. Singleton p. 25-26

²⁶ Singleton at pages 23-24
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Recommended Next Steps

1. Determine whether there are mutual goals and sufficient incentives to justify the work necessary for the development of a functional Fraser Watershed process. In particular, DFO needs to confirm with First Nations whether there is a commitment to create and resource a consensus building process for addressing fisheries matters common to the Fraser Watershed. While steps have to be modest and built on trust, they will need to include the identification of common incentives within the Fishery that make it worth the effort to keep moving forward.

Because the issues that characterize the Fraser River Fishery are not only concerned with the definition of the constitutionally protected aboriginal fishing rights, but more importantly on how those rights are usefully integrated into complex modern fisheries management and resource allocation decision-making processes, there is a definite need for a consensus-building approach. Change will not some day just happen. Rather concerted effort by dedicated individuals who are committed to change and have the required mandates to create that change is necessary. Whether the parties are willing to set this common goal needs confirmation.

For public disputes which have long standing (institutionalized) impasses, it is not possible to expect change that results in either party compromising legal rights which they hold or believe they hold²⁷. Consensus building requires committed face to face work aimed at “all-gain” (rather than win-lose) solutions:

²⁷ The approach will need to allow for the parties to go to court should that become necessary to move forward.
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“We believe that the only way to avoid stalemate, reduce the need for litigation, and restore the credibility of government is to generate agreement on how to handle the problems that confront us. We argue not for political compromise, but for voluntary agreements that offer the wisest, fairest, most efficient, and most stable outcomes possible. This requires that all stakeholders have a chance to participate directly in any dispute resolution effort. It certainly requires substantial time and the investment of public funds. We are convinced, though, that in most cases the savings will far outweigh the additional costs.”²⁸

To be *bona fide*, a consensus building process for resolving or addressing issues of common concern. must be a common goal of the parties.

2. Given the present circumstances and challenges, achieving a watershed agreement will benefit from a clearly defined pre-negotiation, negotiation and implementation phase. Because this is not a “once and for all” negotiation where the issues stand still until the negotiations have concluded, how this process does and does not supplement other processes requires clarification. For example how will the negotiations regarding the development of a watershed process complement existing bilateral discussions and consultation between First Nations and DFO? How does it complement interim and treaty measures? This will include addressing such matters as:
 - a) the present form of meetings/discussions etc. between the parties at a watershed level need immediate clarification. Without such, the distrust amongst the parties will undermine the actions taken to build a cooperative process. Being clear about the purposes for the discussions, understanding the intentions (goals and objectives) of the participants, and sharing common visions/goals will be extremely helpful in resolving mistrust;

²⁸ Breaking the Impasse “Consensual Approaches to Resolving Public Disputes” by Lawrence Susskind and Jeffrey Cruikshank. (1987) Harvard Public Disputes Program , p. 13,
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- b) the distinction between meetings (or parts of meetings) intended to receive, disseminate and discuss in-season management issues (and therefore part of Crown consultation efforts), and meetings to develop recommendations for the longer term process must be clearly understood;
 - c) because the subject matter of the negotiations ultimately includes a forward looking understanding of fishery resource rights in a modern context²⁹ every step of the process should be as transparent as possible.³⁰ For example, using the distinctions between the components of consultation (information sharing, understanding the interests and concerns, and seeking the necessary accommodation) will be helpful when clarifying the purposes of certain meetings or actions (eg. Watershed Talk).
3. The next step is not simply to proceed into the negotiation of a new agreement. During the pre-negotiation phase certain useful pre-requisites need to be put into place, including building a clearly mandated First Nation table. This will include, securing the commitment by an operative³¹ number of First Nations to use an inter-tribal table that:
- a) develops the mandate and authority to represent collectively those First Nations of the River (until the entire watershed participates) on matters of collective interest

²⁹ Including legally and factually complex issues such as the co-existence of crown and aboriginal title, accommodation, and the establishment of reliable mechanisms for discussions and decision making.

³⁰ Both parties will need to be clear on how, or for what issues, the process, discussions and outcomes may be relied upon in court proceedings, including whether the process is relevant to the question as to whether or how the Crown has met its lawful obligations to the First Nations participating (and not participating) in the processes.

³¹ I am using the word "operative" to include both functional and political effectiveness, i.e. having both the authority and ability to act at the watershed level. First Nations from all regions need to be participating and need to be committed in the short and long term to finding solutions, including resolving long-standing disputes.

and concern. This will require the development of and commitment to a process which is politically accountable (informed representation with mandates and reporting responsibilities), and has a clear/reliable decision making process. While not everyone needs to meet on all issues, and not everyone needs to know all components of fisheries issues, the structures put into place need to support mandated informed political representatives, with the necessary technical expertise available, using transparent systems of decision making;

- b) considers and makes recommendations on a regional and/or stock-based sub-committee approach, that both supports the specialization that modern management requires and minimizes the number of meetings for representatives to attend;
- c) initiates immediate and longer term projects that rebuild inter-tribal trust. (eg. test fisheries, technical processes and sale agreements may be sub-components that people use to rebuild right relations prior to reaching comprehensive agreements on all matters.); and
- d) the inter-tribal process will also require maintaining some central office charged with such things as organizing meetings, drafting agendas, and calling on the expertise required to keep the process moving and achieve short and long term goals.

4. In the pre-negotiation phase, DFO will need to:

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- a) secure a commitment to resource a First Nations/DFO watershed process and begin the necessary long term budget planning for it;
 - b) obtain flexible mandates; and
 - c) develop a transparent and engaged chain of authority. For example, if Deputy Minister and Ministerial approval is required for any new agreement, it will be necessary to have a headquarter's representative committed to either participating in the negotiation phase or being available when required by the negotiating table. As a minimum ADM of Fisheries Management, the Regional Director of Treaty and Aboriginal Policy, Aboriginal Affairs in Ottawa, and the requisite Department of Justice (regional and national) representatives need to be meaningfully engaged in the process.
5. The parties need to develop compatible goals. There will need to be opportunities to canvass all or most of the issues which would be tabled during the negotiations, fill information gaps, identify possible solutions and seek necessary and flexible mandates. Therefore during the pre-negotiation phase, a joint working committee of DFO and participating First Nations must be resourced to discuss and develop recommendations, including:
- a) developing the incentives, a common vision, including the identification of the necessary mutually-compatible short and long term goals, a realistic game plan for achieving them, and opportunities for reviewing progress;

- b) exploring and providing recommendations on what management efficiencies and benefits could result for both DFO and First Nations from a watershed organization that oversees and develops watershed, regional and stock expertise;
- c) developing recommendations for both the timing (readiness) and formation of a representative group charged with the authority to negotiate a multi-year watershed agreement;
- d) what immediate steps can be taken to assist more positive relationship-building between DFO and First Nation representatives by engaging in meaningful dialogue;³²
- e) encouraging the parties to develop and obtain clear and evolving mandates, within the complexity inherent in Fraser River fisheries. This will require people being willing to bring the decision makers into the process;
- f) recommending the facilitator/mediator which the parties will use to move the process forward. How, (and if), that facilitation could serve as building blocks for some of the alternate dispute resolution processes that are needed could also be considered;³³

³² A number of people referred to a continued interest and potential benefit resulting from the “River Gatherings” – which I understand are facilitated focused discussions which allow people to both get to know each other, and discuss the issues in an open, meaningful manner. Once an operative group is formed and willing to engage in dialogue, and a facilitator has been chosen, such gatherings may be useful in opening up dialogue.

³³ For example, when writing this paper I considered the benefit of creating a two or three person facilitation team (one chosen by DFO, one by First Nations and one jointly) who would be used to facilitate the relationship building and the meetings which will be required to move this process along. For most meetings only one facilitator would be necessary – so for example the First Nations rep could be used to facilitate their internal

- g) identifying the areas which would benefit from some possible solutions being introduced on an immediate and trial basis; and
 - h) making recommendations on when is the appropriate term for the creation of a table that includes Vancouver Island First Nations who share responsibilities and rights with respect to some components of the Fisheries.
6. Given the long-standing nature of the disagreements, the complexities (human, environmental and financial), and the need for the process itself to have built-in flexibilities, both the inter-tribal process and the DFO/First Nations process must be facilitated. The person(s) hired needs to carry the respect from all parties, have sufficient knowledge of the fisheries issues and be committed to assist in shaping and implementing the pre-negotiation and negotiation phase. Because the Fraser Fishery³⁴ will continue to present new challenges, the parties are going to need to remain flexible, committed and willing to move towards a more functional relationship at a rate much faster than in the past. Having a facilitator(s) that keeps people answerable to the process will be invaluable. Whether this person(s) might also be helpful in the implementation phase could be explored.
7. A team of people who have the attention and support of senior levels of First Nation and Canadian governments, and access to the necessary technical expertise, who are committed to see the process through to completion is a significant pre-requisite to

meetings, and when appropriate help facilitate some of the inter-tribal disputes. It would be extremely useful if these people had knowledge of the subject matter, and were prepared to commit to working with the issues at the watershed level for at least 2-3 years.

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success. A minimum two year commitment to these negotiations is required. The roles of the negotiators and the principals will need to be clear. A willingness to work through the hard issues, while building respectful relationships amongst the individuals is also necessary and developing a better understanding between the parties as to their respective goals and aspirations, and the methods for reaching such.

8. The negotiating approach used to reach that goal would benefit from being:
 - a) clearly designed specifically for the issues and the parties;
 - b) include direct face to face meetings amongst those involved;
 - c) and consensual (parties agree to formulate the problems and the desired outcomes and agree to work through the difficult issues).

9. The parties will need to do the tough work of both interest and rights based negotiations. These discussions need to be guided by the responsibilities all parties carry with respect to the resource. Problem solving and the generation of workable options, will assist in keeping the negotiations moving forward. To reach negotiated resolution of these issues will require mandates that effect a change in the way governments are acting.

10. When and if barriers to change are caused by fundamental difference in view regarding the legal principles, the parties should look for how joint applications to the courts may be efficient and effective to moving certain issues forward without destroying good will.

³⁴ for eg., the biologically predictable requirement to rely more heavily on terminal fisheries for conservation purposes, and the SARA.
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11. Introduce as soon as possible a facilitated/mediated dispute resolution process for pre-season and in-season management decisions which both parties are willing to try.³⁵ This would provide a real signal that there is an interest in finding a better way of making the tough in-season decisions which are the foundation for much of the conflict. To date, DFO holds the final decision making seat, and too often exercises it in a way that builds continued distrust. A pilot project will provide valuable information on how to structure in-season and post-season decision making and dispute resolution processes to be included in any watershed agreement that will be negotiated. There are other topics which the parties may wish to identify and pursue on a similar basis.
12. Once the work in 3, 4 and 5 have been accomplished, confirm the negotiating teams and negotiate a framework for a new watershed agreement for review. Following upon the work already completed, it may be that the parties choose to negotiate and implement specific sub-components of a watershed agreement prior to reaching a comprehensive agreement.
13. These steps need to occur as soon as possible so that:
 - d) the process will help avoid the court actions which will inevitably result from the status-quo; and
 - e) it can actually promote a legacy of thriving wild salmon stocks for future generations.Intensive negotiations will need to occur outside the May-October in-season management period, and must be given priority of both human and financial resources from DFO and

³⁵ One possible structure is to choose a mediator pre-season who is required to participate as an observer during all in-season conversations, meetings etc. In this way as soon as the parties need the assistance of a facilitator/

First Nations leadership. It is possible, with sufficient resources and commitments from the parties to do this all before the 2004 season. Realistically it may take at least two more winters to complete. In any event it must be done, and there is no time like the present.

Given the status quo, the parties need to take immediate responsibilities for obtaining the funding required to support this process and making the decisions necessary to change how humans/fishing are presently managed. The basics, (a politically accountable decision making process and a genuine and mutual commitment to change) need to be given immediate priority. Once those are in place the myriad of demands that the management of fisheries requires will continue to challenge any new process, and alternative dispute resolution processes will be useful ways for avoiding conflicts on the River and in the Courts.

Being diligent in not repeating at least the obvious actions that have contributed to the dysfunctional relationship between Canada and First Nations, and amongst First Nations, should go without saying. Examples of obvious actions include not having one party develop unilaterally a certain form of agreement or certain form for the watershed process, not using the AFS as a pre-condition for either policy or funding issues, not relying upon the threat of loss of funding to demand participation, not using the economics of the Fishery in one part of the River against or in priority to others, and not simply walking away if things do not proceed precisely how either side wishes them to, or using other priorities as the justification for leaving. Often this tool, simply leaving the table with or without other pressing priorities, can be the most effective method in bringing discussions to an end.

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mediator for the person is engaged, fully informed and most importantly, able to assist the parties in a timely manner. **Draft #4 August 8, 2003**
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CONCLUSION

A reconciliation of the aboriginal and non-aboriginal management of the Fraser River Fishery is a necessary part of any sustainable relationship required to address the increasing demands of a vulnerable resource.

Cooperative arrangements amongst the First Nations will be necessary for long-term sustainable management of the Fishery. In pre-contact times the respectful, cooperative values and principles that governed aboriginal relations to each other and to the resource ensured that the Fishery sustained the people, and was in turn sustained. This has been dramatically disrupted to the detriment of the Fishery and the aboriginal and non-aboriginal people of British Columbia who rely upon the fishery.

Whether people are prepared to re-establish right relations is one of the key questions in determining whether a Fraser watershed process will be useful. A facilitated dialogue, aimed at exploring with the First Nations leadership and fisheries personnel what the issues, challenges, strategies and agreements are that could re-build the common ground amongst the Nations, is a necessary first step.

A First Nations and DFO working committee can explore how a watershed process would serve to implement the required changes in the status quo and assist the parties to meet their responsibilities to the fisheries and to each other, including reaching a sound fishing plan.

Addressing First Nations' rights, interests and perspectives in the Fraser River Fishery will continue to engage complex management issues, and raise competing interests for DFO. To deny the challenge, or to simply maintain the status quo, leaves a fight over an ever dwindling

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Fishery, involving expensive and often protracted conflict. The North West Indian Fisheries Commission provides a very useful example where similar complexities and interests have not prevented people from building on the areas of common ground, while still having unresolved issues.

Whether acknowledged or not, our actions effect at least the next seven generations. We have the option to change in such a way as to improve relations amongst ourselves, and with the Fishery. To do so, will improve the likelihood that we can pass on a healthier Fishery. To not do so invites the unthinkable.

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LIST OF APPENDIXES

DOCUMENT	APPENDIX
Report completed by Dr. Bob Brown regarding the Secretariat	A
Presentation completed for the Fraser River Aboriginal Fisheries Forum Meeting in November, 2002	B
Briefing paper which was completed by the Fraser River Aboriginal Fisheries Secretariat regarding some of the challenges facing the creation of a new Watershed Agreement	C
BCAFC recommendations regarding fisheries management issues within an inter-tribal process	D
13 Recommendations	E

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