GOVERNING PUGET SOUND

ROBERT L. BISH

feudalism/1066/common law/1215/Magna Carta/liberty/due process of law
freedom of speech/trial by jury/freedom of religion/appearance of fairness/colonies
Articles of Confederation/taxation without representation/American Revolution
U.S. Constitution/federal system/separation of powers/sovereignty/enumerated powers
property rights/taking/citizen rights/executive branch/legislative bodies/courts
treaties/interstate commerce/international trade/public lands/Bill of Rights
general welfare/power to spend/preemption/public trust/riparian rights
territorial sea/navigable waters/jurisdiction/submerged lands/executive branch
bureaus/agencies/departments/implementation/regulation/statutory law
legislative branch/authorization/appropriation/interest groups/equal footing
treaties/Washington State Constitution/popular sovereignty/Declaration of Rights
initiatives/referenda/recall/Washington Administrative Code/general elections
open primaries/nonpartisan elections/nominees/coalitions/majority/minority
party platform/constituencies/stalemate/mitigation/master permit/complex framework
coordinating processes/trade-offs/interdepartmental negotiation/pluralistic structure
popularism/open and flexible/responsive/Puget Sound/anadromous fish/water quality
navigable waters/military reservations/commercial fishing/recreational boating
dredging/diking/waste disposal/transportation/irrigation/highways/bridges
ferry system/shorelands/first class tidelands/submerged lands/second class tidelands
harbor lines/aquaculture/wildlife refuges/parks/ports/sewage/flood control
water supply/planning/zoning/municipal codes/property taxes/petitions
common problems/emergency services/citizen involvement/home rule/citizen access
appearance of fairness/jurisdictions/metropolitan municipal corporations
county government/city government/port districts/special districts/statewide associations
information exchange/lobbying/treaties/equal protection/reservations
civil and criminal jurisdictions/assimilation/allotment policy/fishing rights
tribal hatcheries/resource allocation/Point Elliott/Medicine Creek/Point No Point
court decisions/usual and accustomed/in common with/shoreline management
biological uses/human impacts/natural processes/economic development/public access
recreation/shoreline use/statewide significance/conservation/historical uses/guidelines
cultural aspects/master program/federal consistency/identification of boundaries
definition of uses/energy facility siting/full participation/national concerns
interdependency/consult/compromise/seek solutions/debate/legislate/adjudicate
adaptive capacity/coalitions/bias/veto/rigidity/accommodation/nullification/multiplicity
redundancy/multiple decision points/legal system/institutional arrangements
choice making/governance/knowledge/access/trade-offs/decision-making costs
adaptive capacity/certainty/innovation/fairness/maintenance of natural environment
effectiveness/efficiency/responsiveness

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ROBERT L. BISH

PUGET SOUND BOOKS

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to the memory of
E. L. 'Bud' and Mae Wright Bish

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About the Puget Sound Books

This book is one of a series of books that have been commissioned to provide readers with useful information about Puget Sound . . .

About its physical properties — the shape and form of the Sound, the physical and chemical nature of its waters, and the interaction of these waters with the surrounding shorelines.

About the biological aspects of the Sound — the plankton that form the basis of its food chains; the fishes that swim in this inland sea; the region's marine birds and mammals; and the habitats that nourish and protect its wildlife

About man's uses of the Sound—his harvests of finfish, shellfish, and even seaweed; the transport of people and goods on these crowded waters; and the pursuit of recreation and esthetic fulfillment in this marine setting

About man and his relationships to this region — the characteristics of the populations which surround Puget Sound; the governance of man's activities and the management of the region's natural resources; and finally, the historical uses of this magnificent resource — Puget Sound

To produce these books has required more than five years and the dedicated efforts of more than one hundred people. This series was initiated in 1977 through a survey of several hundred potential readers with diverse and wide-ranging interests.

The collective preferences of these individuals became the standards against which the project staff and the editorial board determined the scope of each volume and decided upon the style and kind of presentation appropriate for the series.

In the Spring of 1978, a prospectus outlining these criteria and inviting expressions of interest in writing any one of the volumes was distributed to individuals, institutions, and organizations throughout Western Washington. The responses were gratifying. For each volume no fewer than two and as many as eight outlines were submitted for consideration by the staff and the editorial board. The authors who were subsequently chosen were selected not only for their expertise in

a particular field but also for their ability to convey information in the manner requested.

Nevertheless, each book has a distinct flavor—the result of each author's style and demands of the subject being written about. Although each volume is part of a series, there has been little desire on the part of the staff to eliminate the individuality of each volume. Indeed, creative yet responsible expression has been encouraged.

This series would not have been undertaken without the substantial support of the Puget Sound Marine EcoSystems Analysis (MESA) Project within the Office of Marine Pollution Assessment of the National Oceanic and Atmospheric Administration. From the start, the representatives of this office have supported the conceptual design of this series, the writing, and the production. Financial support for the project was also received from the Environmental Protection Agency and from the Washington Sea Grant Program. All these agencies have supported the series as part of their continuing efforts to provide information that is useful in assessing existing and potential environmental problems, stresses, and uses of Puget Sound.

Any major undertaking such as this series requires the efforts of a great many people. Only the names of those most closely associated with the Puget Sound Books—the writers, the editors, the illustrators and cartographers, the editorial board, the project's administrators and its sponsors—have been listed here. All these people—and many more—have contributed to this series which is dedicated to the people who live, work, and play on and beside Puget Sound.

Alyn Duxbury and Patricia Peyton
January 1982

Preface

A snake, a tree, a blanket, a wall—thus was an elephant interpreted by the four blind men of an ancient Hindu tale. Similarly, the basic legal and institutional framework within which decisions on the uses of Puget Sound resources occur is subject to many interpretations. Because the system is sufficiently complex that no single individual can ever comprehend all of its nuances and intricacies, my approach has been to interpret the framework within the context of the tradition, philosophy, and theory of American federalism.

This book is not a study of *how* decisions are made (that was the focus of *Coastal Resource Use: Decisions on Puget Sound*); it is a description and analysis of the framework within which decision-making occurs. Where examples of conflicts or decisions are presented, they are illustrative of general principles only and are neither comprehensive nor exhaustively analyzed.

About some of the topics discussed in this book, especially some of the court decisions, there is disagreement among serious scholars. I have tried to examine differing perspectives and then present what I believe is the most appropriate conclusion based on the legal theory of federal systems and the implications of different laws. In some cases, I have included descriptions of laws or processes about which no systematic research or consensus exists. In such cases, my observations must be considered tentative. It should also be noted that today's apparently unimportant laws may become important in the future, so that existing but unmentioned laws remain a significant part of the legal and institutional system.

The basic research and writing for this volume were completed prior to development of Reagan Administration policies. Wherever possible, some insight into potential changes has been integrated into the text—with recognition that as this book goes to press, proposed changes are still just that—*proposed*. It is significant, however, that even highly visible changes such as the proposed phasing out of the federal Coastal Zone Management Program are all well within the legal and political framework that has evolved. Such changes are unlikely to make significant differences in the future of Puget Sound, not because some federally funded programs that may be cut back are not fulfilling

very useful functions, but because the overall system is sufficiently redundant for problems of major importance to be assumed by other organizations. That is the very nature of the American federal system—and also why there is so much variety and complexity within it.

Each reader will bring his or her own background to discussions of particular issues, and many readers will have more knowledge of some issues than I possess.

It is my objective to help place different issues into a broader perspective and to provide some insight into the development of legal and institutional arrangements in one of our most complex environments—the coast—with specific applications to Puget Sound.

Robert L. Bish
Whaletown, B.C.

August, 1981

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This project was undertaken with the support and assistance of many people. Instrumental in its conception and execution were Patricia Peyton, Alyn Duxbury, and the staff of the Washington Sea Grant Communications Program—Andrea Jarvela, Kirk Johnson, Carol Ovens, Alice Pitt, and Diana Jensen. Past Sea Grant-funded work on Puget Sound at the University of Washington with Robert Warren, James Crutchfield, Louis Weschler, and Peter Harrison has provided essential background, as has the opportunity to teach about and study Chesapeake Bay with Garrett Power and Patricia Florestano of the University of Maryland.

Research assistance for this study was provided by Christine Hageman, Janis Whitehead, and Lilly White; and reviews of earlier drafts by Robert Warren, Ralph Johnson, Robert Goodwin, Ruth Ittner, Robert Pealy, Garrett Power, Mark Sproule-Jones, Patricia Florestano, the Northwest Indian Fisheries Commission, and members of the Puget Sound book series editorial board have been important and helpful. Cam MacDonald of Island Wordworks Ltd. in Vancouver, B.C., processed the manuscript through all drafts.

Every effort has been made to avoid errors through extensive review processes. For the interpretations presented and any remaining errors, I assume full responsibility.

CHAPTER 1

Puget Sound: A Complex System

Puget Sound is an inland sea of great natural abundance. Its topography of waterways, harbors, islands, shorelands, and rivers lying between the Olympic and Cascade mountains contains many varied and rich biological communities. These physical and biological resources provide the base for human settlements—settlements that have always used and depended upon the region's resources for an economic base and for leisure-time activities. There are few other places in North America where the tie between people and their natural surroundings is or ever has been as close as on Puget Sound.

During the latter half of the twentieth century, it has become customary to examine the interdependencies among the physical environment, biological communities, and human uses of the environment. It has also become common to undertake such analyses as if the most complex interrelationships were those of the natural physical and biological environments. Actually, however, it is the interactions among human beings with one another and with the natural environment that are the most complex. Human beings possess greater intelligence, greater learning capacity, and a greater ability to modify the environment than any other species. And, most important, human beings themselves create the bounds on their behavior and interaction with one another through their own laws and institutions, whereas natural biological communities function within the narrower bounds of the laws of nature.

The future appeal and viability of Puget Sound depend on human beings functioning within an institutional and legal framework designed to guide the wise use of resources and avoid their destruction. Evolution of the laws and jurisdictions under which decisions on Puget Sound resources are made has occurred, and will continue to occur, within a legal and governmental system based on a combination of English common law, the principles of the U. S. Constitution, and the organization and operation of state and local governments within Washington.

The current legal and jurisdictional environment of Puget Sound is extremely complex, yet there are systematic patterns in relation to specific resource uses and constitutional principles. The essence of the

system, however, is the multiplicity of laws and agencies—and the interdependencies among them.

The greatest difficulty in examining any complex system is that descriptions—which must necessarily be abstractions—make the system appear simpler than it really is. The appearance of simplicity then leads to the belief that the system can be manipulated in a simple manner—and that belief nearly always turns out to be mistaken. Human beings involved in complex arrangements are extremely innovative, and thus even a well-planned conscious attempt at change may be thwarted by some new human strategy elsewhere in the system. This phenomenon is critical in designing rules for the human use of natural resources. It is hoped that this book will balance an appreciation for the difficulties of legal and jurisdictional design with an understanding of the current system on Puget Sound.

Readers are cautioned, however, that this attempt to convey an understanding of the current system will not cover every law, court decision, or jurisdiction that could influence the use of Puget Sound resources. Such a catalog would fill a book much larger than this, yet still not exhaust every aspect of how the system operates. However, many laws and court decisions and most jurisdictions are included in the context of the overall analysis, and general references are provided in the text itself and in notes following each chapter for those who wish to pursue a particular point further.

Chapter 2 provides a description of the Puget Sound region and outlines some basic problems in jurisdictional design for governing a complex resource. This discussion raises questions that will reappear throughout the analysis. The text next proceeds to an analysis of the constitutional laws of sovereignty, property, and citizen's rights as they apply to marine and coastal resource uses. Four chapters are then devoted to a description of the implementation of constitutional powers by the federal, state, local, and Indian tribal governments respectively. Chapters 8 and 9 focus on the interdependencies among agencies from different levels of government to provide an understanding of how the system operates, and the final chapter returns to basic questions as to how well the legal and jurisdictional framework created on Puget Sound is serving its human community.

CHAPTER 2

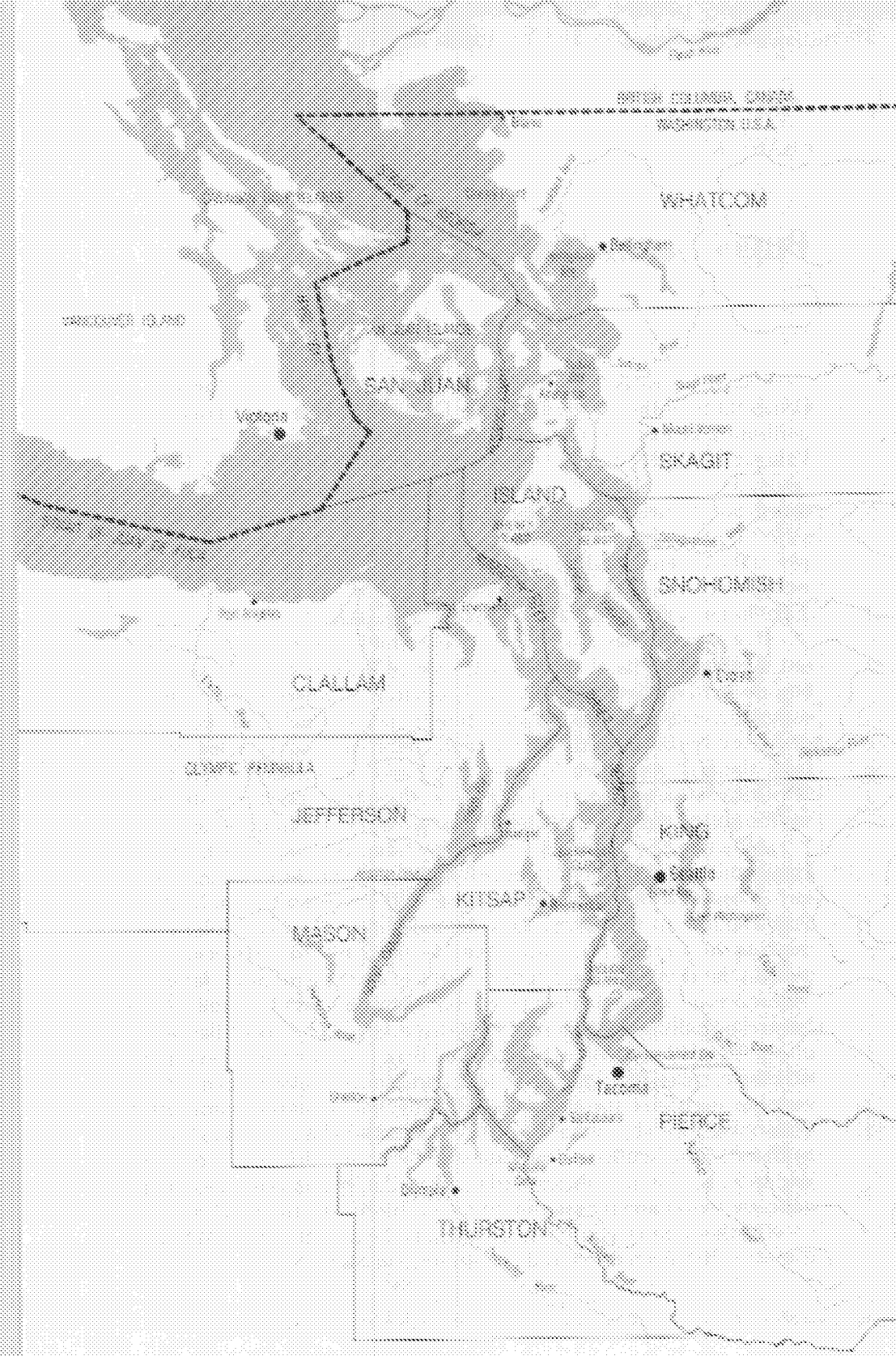
Puget Sound and Its Uses

Puget Sound is a fjordlike inland sea. It is linked to the Pacific Ocean through the Strait of Juan de Fuca, extending west between the northern coast of the Olympic Peninsula and the southern shore of Vancouver Island, and north through Rosario Strait, the San Juan Islands, and the Strait of Georgia between Vancouver Island and the mainland of British Columbia. From the Strait of Juan de Fuca and Rosario Strait, Puget Sound extends south for over a hundred miles between the Cascade and Olympic mountains. The Sound and the straits within the United States enclose 2,500 square miles of water, close to 2,350 miles of shoreline, and more than 200 islands.

Puget Sound has always been the center for development in Western Washington. Its abundant resources of finfish, shellfish, and timber, its mild climate, and the transportation afforded by its protected waterways made the Sound attractive to native Americans prior to its discovery by Europeans. These same characteristics attracted settlers from the East and from Europe, and today more than two-thirds of Washington State's population lives in the twelve counties surrounding the Sound and generally referred to as the Puget Sound region.

Although the region is well defined and is often thought of as a single unit, there is considerable diversity within it. Much of this diversity is related to the physical structure of Puget Sound itself. Northern Puget Sound, or the main basin, extends from Admiralty Inlet in the north to the Tacoma Narrows. Water depths of 600 to 800 feet are common in the basin, with a depth of 930 feet existing off Point Jefferson. The shoreline and estuaries along the east side provide excellent harbors, especially Elliott Bay in Seattle and Commencement Bay in Tacoma. The flatlands in the estuaries adjacent to these bays also provide extensive space for industrial and agricultural development. These eastside locations are also connected by transportation corridors to Vancouver, British Columbia, across the Cascade Mountains to the U.S. Midwest, and south to Portland and beyond. This area contained within King, northern Pierce and southern Snohomish counties has become the urban and population center of the Puget Sound region.

On the west side of the main basin is the Kitsap Peninsula (Kitsap County) with Bremerton and the Bremerton Naval Shipyard. The Kit-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CLALLAM
JEFFERSON
KITSAP
MASON
PIERCE
THURSTON

sap Peninsula has not experienced as much growth as King, Pierce, and Snohomish counties because of its relative isolation and its dependence primarily on the shipyard for its economic base. Thus, even though recent suburban development is occurring around the west end of the Tacoma Narrows Bridge and between Bremerton and the Naval Submarine Base at Bangor on Hood Canal, Bremerton remains the only sizeable city on the west side of Puget Sound.

Southern Puget Sound extends south from the Tacoma Narrows to the Nisqually Delta and west to several inlets between Olympia and Shelton. The area is characterized by large tidal fluctuations which, in combination with many small shallow inlets, results in vast tidelands and mudflats. These shorelands are not as suitable for industrial development as are the shorelands of northern Puget Sound, but they provide superior habitats for marine life—especially clams, oysters, and waterfowl. The only two cities of any size on South Sound are Olympia, in Thurston County, and Shelton, in Mason County, but neither has a natural harbor nor is either one surrounded by urbanization as is the main basin. The Nisqually Delta, one of the two largest less developed estuarine regions of the Sound, is also located on the east side of South Sound, between Pierce and Thurston counties. Western Pierce County, north of the Nisqually Delta, is part of the South Sound area.

Hood Canal is a relatively shallow arm of Puget Sound that lies between the Olympic Mountains to the west and the Kitsap Peninsula to the east. Hood Canal waters are warmer than those of the rest of the Sound, and there are fewer mudflats than on South Sound. It provides an excellent habitat for oysters and clams. Development on Hood Canal is primarily residential, and even that is concentrated on the southern toe portion and on the west side in Mason County. The only other significant use is the Naval Submarine Base at Bangor on the Kitsap County side of the Canal, and the Navy's torpedo-testing facilities on Dabob Bay, a bay that extends into Jefferson County.

The main channel of northern Puget Sound extends northwest between Whidbey Island (of Island County) on the east and the Kitsap Peninsula and Olympic Peninsula on the west to Admiralty Inlet, where it joins the Strait of Juan de Fuca. To the east of Whidbey Island lie Saratoga Passage and several large shallow bays in Snohomish and Skagit counties. With the exception of Everett, which has access to the main basin south of Whidbey Island, there are no major ports on these inner passages. The water is relatively shallow and the Stillaguamish and Skagit estuarine areas provide extensive natural habitat for marine life and waterfowl. Up these rivers from the Sound some diking and drainage have been undertaken to enhance agricultural use, but for the most part development within these waterways is occurring in summer home communities on Whidbey and Camano islands.

Outside of Puget Sound itself, but considered part of the Puget Sound region, are the San Juan Islands (San Juan County) where the Strait of Juan de Fuca connects to the Strait of Georgia via Haro and Rosario straits. The San Juan Islands themselves are surrounded by relatively deep water and possess many good natural harbors. They provide an extremely popular location for summer homes and recreational boating.

East of Rosario Strait lie several islands and several bays. Bellingham Bay in Whatcom County possesses excellent port facilities, and the Bellingham area is larger and more developed than any other area of the Sound except for Seattle, Tacoma, and Everett. Anacortes, the site of two oil refineries, is on Fidalgo Island south of Bellingham Bay in northern Skagit County. Cherry Point and Ferndale, also the location of oil refineries, are just north of Bellingham Bay.

North and west of the San Juans, across Haro Strait, lie Vancouver Island and the Canadian Gulf Islands. To the southwest the Strait of Juan de Fuca extends over 100 miles to the open Pacific. The Strait is open to Pacific storms, and the only major port on its American side is Port Angeles on the northern edge of the Olympic Peninsula in Clallam County.

Development on Puget Sound

Because the various parts of Puget Sound possess different characteristics, they have understandably developed differently. Urbanization and industrialization are concentrated around the port areas of Seattle on Elliott Bay and Tacoma on Commencement Bay, with lesser development at Everett, Bellingham, Bremerton, and Olympia. Most of the area, however, especially in southern Puget Sound, on Hood Canal, between Whidbey Island and the eastern shore, and in the San Juans either remains undeveloped or else development consists primarily of residences along the shoreline. Most of the western shoreline of the main basin remains only sparsely developed, again primarily with summer homes.

The differences in patterns of urbanization and development have led to different priorities for the use of Puget Sound and its resources. The ports of Seattle, Tacoma, Everett, Bremerton, and Bellingham, and to a lesser extent Port Angeles and Anacortes, play a major role in their local economies—and policies affecting dredging, shipping, international trade, and port development are very important to them. In contrast, most residents of South Sound, Hood Canal, and along the waters east of Whidbey Island see the Sound as a relatively natural body, useful for recreational boating, shellfish culture, fishing, and occasionally for shipping logs.

In the San Juans uses are almost exclusively recreational, with some commercial salmon fishing. Throughout the Sound, from the urban port of Seattle to small villages such as Gig Harbor or Friday Harbor, one finds clusters of commercial fishing boats—many of which fish primarily outside the Sound in the North Pacific or in Alaskan waters. Commercial fishermen, along with many recreational fishermen, possess a high level of concern over the fishery, especially because of activities that generate siltation of salmon spawning areas or that disrupt salmon migration. Also throughout Puget Sound there is concern about the disposal of wastes from both municipalities and from industry, although in contrast to the past, most of these wastes are now treated prior to their discharge into waters of the Sound.

Puget Sound's resources have been subject to many demands, and many of its uses are interdependent. As economic activity, population, and incomes have risen, even greater demands have been placed on its resources. Part of the increased income has come through industrialization and heavier use of port facilities. Higher incomes in turn have resulted in greater demand for pleasure boats, marinas, parks, summer homes, and other recreational uses of the Sound. These rising demands—and the conflicts they engender—place heavy burdens on processes through which the uses of Puget Sound are determined.

Resource Use Decision-Making

Virtually all of the uses of Puget Sound involve both private and government decisions. For example, the goods shipped through the Port of Seattle, a public enterprise, are shipped in response to market demand, and the ships are privately owned and operated. The goods are transferred within the port to private truck or rail. The entire port operation, however, is integrated with Corps of Engineers dredging programs, with the Coast Guard's maintenance of navigational aids, and with city, county, and state construction and maintenance of highways.

Recreation also involves a mixture of private and public decisions. Individuals purchase pleasure craft, but boating is made much more enjoyable by government-provided locks, launching ramps, marinas, and marine parks. Different uses may also come into conflict, as when building a marina would destroy shellfish on a beach, or when a larger allocation of salmon to Indian fishermen results in a smaller allocation to other fishermen.

The uses of Puget Sound are also interdependent with resource uses elsewhere in the state or in the rest of the country. For example, when the salmon sport fisheries opened at Westport and Neah Bay, sports salmon fishing effort on Puget Sound declined; and when Canada decided to curtail crude oil supplies to northern states, an oil port and pipeline terminus was proposed for Clallam County.

If all demands placed on the use of Puget Sound resources were fulfilled, important aspects of the resource would be destroyed and the potential for some uses eliminated. It is therefore obvious that some kind of allocation or rationing must take place among the many potential uses and users, and in many cases resource enhancement to increase the availability or usefulness of the Sound's resources will be a complementary strategy.

The most familiar form of rationing is through markets. Rationing takes place through the prices charged for products, with resources in turn rationed by owners who sell those resources to users who are willing to pay the most. The market system works reasonably well where resources are privately owned, and different activities do not affect one another except through market processes. The market system functions in a very decentralized manner while providing information upon which individual consumers and producers can base their decisions.

While market forces affect all of the uses of Puget Sound, rationing by markets alone will not work for common natural environments such as Puget Sound. Too many resource use interdependencies are simply not taken into account in market processes. Thus market forces must be supplemented by a great deal of non-market or governmental activity. Governments define and enforce property rights and contracts. Governments enhance resource uses with investments in ports, channels, marinas, parks, and fish hatcheries, and governments regulate private activity with rules and permit requirements. Thus one cannot understand the processes through which resource allocation decisions are made without understanding the public sector as well as market forces. When analyzing laws and jurisdictions of the public sector, however, one should not forget that market forces, which are in turn created by the purchases people choose to make, are not only always present, but they also exercise considerable influence on governmental decisions.

It is popular to discuss governmental influence over the uses of Puget Sound's resources in terms of coastal zone "management." Management, however, implies a relatively high level of agreement on the goals to be pursued, and some kind of hierarchical organization through which goal implementation is directly undertaken. Resource use decision-making on Puget Sound is much too complex to be called management. There are neither widely shared goals nor an organization capable of implementing such goals. Resource use decision-making on Puget Sound is much more accurately posed as a problem of "governance"—that is, a situation in which the conflicting and complementary goals of different people must be reconciled, traded-off, accommodated, or restricted. Not only is there no single organization to manage these processes on Puget Sound, but organizations designed to manage are seldom suitable for facilitating governance processes among diverse populations in a diverse environment.

Although this book focuses primarily on how existing institutions function, it will also introduce evaluations where appropriate. Several questions are relevant in this regard:

- Does the institutional structure provide relevant information for all concerned individuals and groups to make their preferences for the use of Puget Sound's resources known and considered?
- Does the institutional structure provide the means to take into account a wide range of alternative courses of action in response to these preferences and to compare and choose among trade-offs inherent in each?
- Are the time and costs of decision-making reasonable in relation to the magnitude of the issues?
- Do the decision processes produce an awareness of the consequences from a multiplicity of perspectives?
- Do individuals participating in the system develop compatible mutual expectations on which to base their decisions and thus reduce conflicts?
- Is the institutional structure flexible enough to compensate for failures and to avoid damaging irreversible actions? Can new knowledge be introduced and used and can new problems be resolved?
- Are the institutional structure, its processes and outcomes regarded as fair and ones that promote a high level of agreement on decisions that result?
- Does the institutional structure produce decisions that balance human uses of Puget Sound with the maintenance of essential characteristics of the natural environment?

The institutional structure and governance process on Puget Sound follow directly from English common law and the constitutions and laws of the United States and the state of Washington. This framework provides for a relatively clear delineation of property rights and governmental authority—which may be exercised in a variety of ways. The important question is, however, how well have the common law and constitutional framework been adapted to guide and constrain the uses of Puget Sound's resources?

Notes

A more extensive analysis of the characteristics of Puget Sound and its resources and resource uses is presented in Bish et al. (1975) and the other volumes of the Puget Sound Books of the Washington Sea Grant Program. A more detailed analysis of rationing alternatives and a preliminary approach to evaluative questions is contained in Warren et al. (1972).

CHAPTER 3

The Constitutional Framework

The constitutional framework within which decisions on the uses of Puget Sound's resources take place is complex and has a long history. The nature and operation of such a system can be understood only in relation to attempts to resolve important problems arising within earlier legal frameworks. In this chapter the history and evolution of the most important constitutional principles underlying the operation of governments on Puget Sound will be examined. Only after such an examination does it become possible to put specific laws and programs into a broader perspective so that the relationships among constitutional principles, the specific laws and programs, and the operation of governments and government agencies can be understood.

Historical Origins

The most important legal concepts and traditions that guide decisions on Puget Sound can be traced from continental feudalism brought to England in 1066, English common law, the Magna Carta of 1215, English law transferred to the colonies and ultimately to the U.S. Constitution, state constitutions, court decisions, and legislation in America. Under European feudalism, all land, including tidelands and submerged lands, not occupied under an agreement with the king were considered his property. Hence the king was both the sovereign or governor and the major proprietor or landlord of his realm.

Some of the earliest conflicts in this system were between fisheries and navigation. The king, as owner of submerged lands and hence of the fish in the waters above them, granted exclusive rights to fish and to construct fish weirs in inland waters and on navigable rivers such as the Thames. The grants of exclusive fisheries excluded common people from access, and the fish weirs obstructed navigation. The conflict over obstructing navigation up the Thames to London became sufficiently important that the City of London supported the barons against the king in 1214 in order to get specific provisions into the Magna Carta to eliminate fish weirs and obstructions to navigation on major rivers. By the time the American Colonies were established, the law had evolved so that even though submerged lands continued to be the property of the king, their use was conditional on not interfering with navigation, and

exclusive grants to fisheries were precluded. These precepts remain strongly entrenched in laws governing resource use today—and citations to Blackstone, Coke, other English jurists, and English court decisions are found in most 19th-century U.S. court decisions on disputes over these issues (Moore and Moore 1903).

Many of the disputes during the evolution of English government from 1066 through the American Revolution were disputes over rights of the king, or sovereign, *vis à vis* the rights of citizens. Limitations on the rights of the king to seize property "without due legal process" were imposed in the Magna Carta, and gradually, in England, the Parliament became supreme over the king in most matters of governance.

During the establishment of American colonies, the English kings and Parliament engaged in many disputes. As Parliament gained ascendancy, it began to pass laws for the colonies. However, the colonies had been created under grants by the king and the accepted legal evolution would have been the development of parliaments in the states, with the king still sovereign—not the imposition of legislation by the English Parliament, which had no right to extend its authority unilaterally to other domains (McIlwain 1923).

The failure of Americans and their parliamentary allies to curtail Parliament's attempt to control the colonies led to the American Revolution—whereby the states, by right of conquest, assumed all the common law rights formerly held by the British monarch, including ownership of tidal and submerged lands, subject to what had become common law rights to fish and navigate (*Martin v. Lessee of Waddell* 1842).

People occupying the colonies, especially those involved in problems of government, were acutely sensitive to historical attempts to assure citizens' rights in relation to government—and they recognized that neither a king nor an elected parliament could be trusted not to go beyond the "law." They also recognized, however, the need for a strong central government to deal with foreign powers and to prevent the individual states from warring among themselves like the states of Europe. After failure of the confederation, the constitutional structure of the United States as we know it today was created. This structure, with its attempt to achieve multiple objectives simultaneously, is extremely complex. Underlying this complexity, however, is explicit recognition of the single most important problem in political theory and constitutional design: how to prevent government officials from abusing their authority and using government power to further their own interests instead of those of their constituents, while at the same time having a government that can in fact govern.

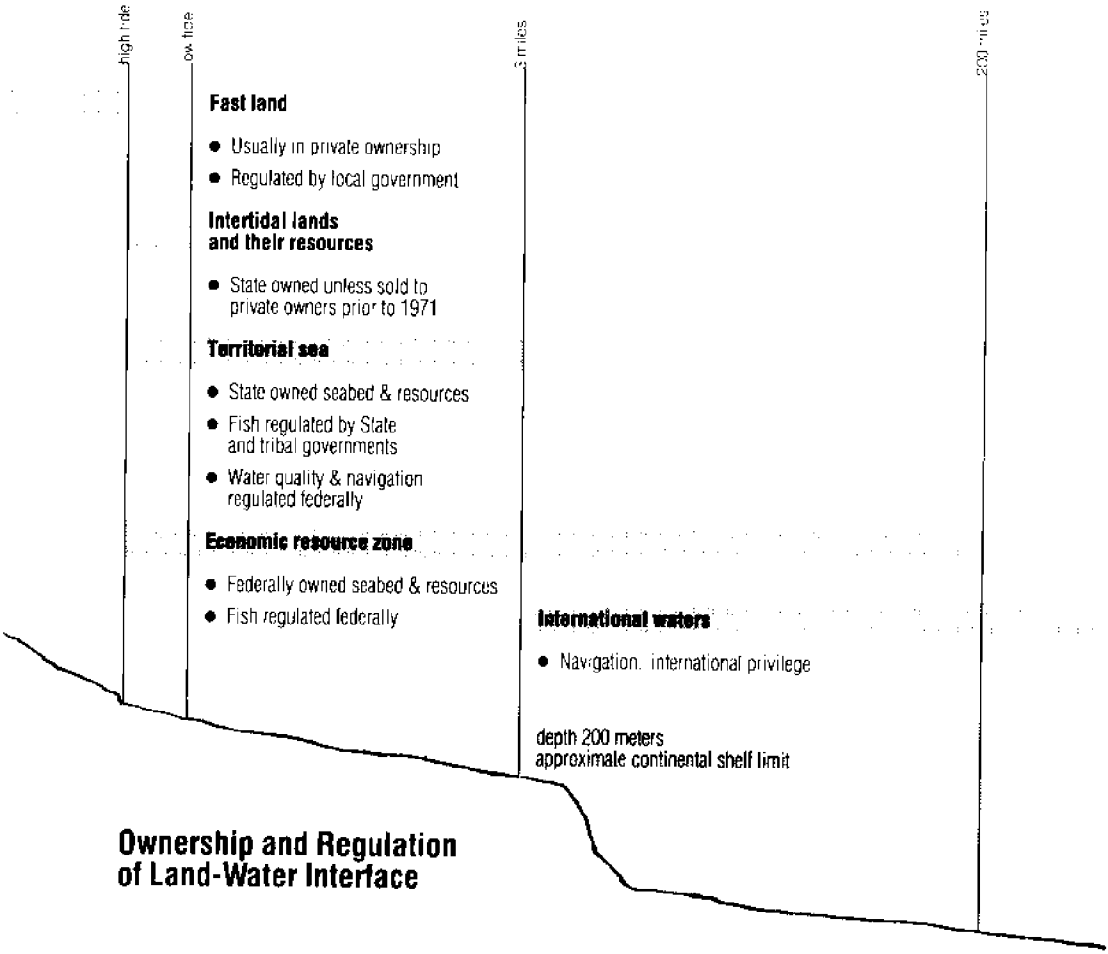
The American system is best characterized as "a system of separated institutions sharing power" (Pritchett 1978) whereby, through the

checks and balances inherent in sharing—along with the Bill of Rights—an attempt was made to guarantee preservation of citizens' rights while still maintaining a government structure to deal with a range of problems from foreign affairs through local improvements. It was recognized that, with the exception of foreign affairs where the president was given considerable discretion, the treatment of issues would involve extensive discussion and debate and concurrence in several forums before important decisions could be made. This time and effort devoted to decision-making in multiple forums was to assure that one group could not exploit others and to increase knowledge about proposed laws by examining them from many points of view (Hamilton et al. 1787). These principles led to the development of a complex governmental system that includes not only the President, Senate, and House of Representatives, but a federal court system, state governors, other elected state officials, state houses and senates, state courts and a multiplicity of cities, counties, and special districts—all of which are important in decisions over the use of Puget Sound resources.

While this multiplicity of governments often appears chaotic to those unfamiliar with its operation, the principles of law under which it operates have strong historical origins and are reasonably clear. The system has also demonstrated considerable adaptive capacity to deal with new problems over time. When the philosophy and the legal principles underlying this system are understood, the consequences of adjustments made to meet changing conditions can be better anticipated and further adaptions made as new problems are confronted. Toward this end, each of the major bodies of law critical to understanding the governance of Puget Sound resources will be examined more closely.

Sovereignty

The concept of sovereignty, or the authority to govern, is the most difficult feudal and common law concept to integrate into the American system. From one perspective it was the states that won independence from England and hence, to cite a major constitutional scholar, "enjoy all powers it is possible for any government to exercise in accordance with tradition in Anglo-American public law except as limited by provision in the United States Constitution or self-imposed by state constitutions" (Engdahl 1974, p. 3). From another perspective, however, it may be more appropriate to view the United States as a governmental system wherein sovereignty resides in the people—who through constitutional procedures may delegate or revoke authority to act in different areas to particular governments. If this view of popular sovereignty is held, there are areas of law where the transference of common law traditions of sovereignty—derived from conquest by a



Ownership and Regulation of Land-Water Interface

king and his armies— is not appropriate to the American system. One must be aware of this when precedents based on preconstitutional law are cited to justify expanded governmental authority.

While states possess general governmental powers, as stated in their constitutions, the federal government is one of the "enumerated powers"; that is, in the Constitution certain powers are delegated to the federal government and in those areas federal laws preempt state laws. All other powers are reserved to the states or to the people. The enumerated powers delegated to the federal government that are critical for Puget Sound resource use are those of national defense, treaties with foreign nations, and regulation of commerce among states and with foreign nations. In addition to these powers, the federal government also possesses power to spend—and spending is not limited to

spending to achieve enumerated concerns. Virtually all federal activities and regulations on Puget Sound are derived from these few constitutional enumerations. While the implications of maintaining national defense are relatively straightforward (see Chapter 4), the implications emerging from treaty and commerce concerns and the power to spend have been extensive—and far beyond what was envisaged in the Constitutional Convention.

Treaties

The federal government is the only government empowered to enter into treaties with foreign governments. Such treaties and the legislation necessary to implement them preempt state or local legislation that would be in conflict. An early example of federal use of treaty power to explicitly preempt a state concern occurred in the early 1900s. The federal government had passed a law to regulate migratory birds but, because this area was outside enumerated federal concerns, it was struck down as unconstitutional (*U.S. v. McCullagh* 1915; *U.S. v. Shauver* 1914). The government then negotiated a treaty on migratory birds with Great Britain (on behalf of Canada) and so was able to enact migratory bird legislation as necessary and proper to implement the treaty. This approach was held constitutional (*Missouri v. Holland* 1920). Such treaty power is important for Puget Sound. Treaties with Indian tribes have been the basis for federal preemptions of state regulation of the salmon fishery—a topic to be examined more closely in Chapter 7—and treaties could be used to obtain federal control over other Puget Sound resources. For example, treaties with Canada on oil transshipment could be used to preempt state regulations on oil movements. Treaty concerns are an important federal power in a world characterized by international interdependence in resource uses.

Commerce

The delegation of authority to regulate interstate commerce has become the major constitutional basis for the federal regulation of Puget Sound resource uses. The original purposes of delegating authority to regulate interstate commerce to the national government was quite clear. First, national regulation would prevent states from discriminating against one another as with tariffs (Virginia's tolls on goods shipped to Maryland via Chesapeake Bay, for example) and the resulting large free trade market would facilitate economic growth. Second, only by uniting could the states together engage in international trade on a par with the European countries; and third, a national tariff could serve as an important revenue source.

It was recognized very early (*Gibbons v. Ogden* 1824) that to carry out the regulation of commerce, it would be necessary to be able to pre-

vent obstructions in navigable waters. It is the relationship between navigable waters and commerce that provides the constitutional basis for the federal regulation of Puget Sound's waters.

In English common law, navigable waters were those affected by the ebb and flow of the tide. The United States, however, contains vast inland rivers suitable for commercial traffic, and in a relatively early court decision, navigable waters were defined as those to be "navigable in fact" and not limited to tidal waters (*The Daniel Ball* 1871). Further expansion of the concept of navigable waters, some with very tenuous connections to interstate commerce, has continued over time. Following "navigable in fact," came "formerly navigable," even if the waters were no longer suitable for navigation (*Arizona* v. *California* 1931); "available for navigation," even if such availability required extensive improvements (*United States* v. *Appalachian Electric Power Co.* 1940); and lakes within a single state (*Utah* v. *United States* 1971).

In addition to regulation of "navigation," federal water quality regulation has stemmed from commerce powers. The first federal water quality legislation was the Rivers and Harbors Act of 1899. This act prohibited the discharge of refuse matter of any kind, other than that flowing from streets and sewers in a liquid state, except with a Corps of Engineers permit. This part of the act, along with its other sections, was clearly navigation-oriented. It was not until 1966 that liquid pollution not related to navigation was interpreted to fall under the act (*United States* v. *Standard Oil Co.* 1966). In 1958 the Fish and Wildlife Coordination Act required that fish and wildlife values be taken into account along with navigation values in Corps of Engineers permit processes. In 1970, this extension to non-navigation interests in regulating navigable waters was upheld in *Zabel* v. *Tabb* (1971) and the Federal Water Pollution Control Act Amendments of 1972 indicate a desire for the broadest constitutional interpretation possible of navigable waters for federal regulatory purposes.

Broadening regulation to include wetlands above high tide (*United States* v. *Holland* 1974) has been upheld, and tests relating to navigability have been effectively defined away (*United States* v. *Ashland Oil Transportation Company* 1973). These court decisions go beyond the considerations of navigation as necessary and proper to regulating interstate commerce and instead focus directly on pollution per se as affecting interstate commerce. The result is that commerce powers can currently be used to justify any federal regulation of any activity that affects the waters of Puget Sound or its tributaries.

Power to Spend

The treaty and commerce powers provide the major constitutional bases for the federal regulation of Puget Sound resources. In addition to

specific enumerated powers to regulate, however, the federal government has the authority to spend. James Madison's interpretation of the spending power was that it was no more than an aspect of the necessary and proper clause, and available only as a means to promote objectives that were themselves enumerated federal concerns. In contrast to the Madisonian view was the argument that the power to spend was independent of other enumerated powers and hence Congress could appropriate and spend not just to achieve enumerated concerns but to promote whatever objectives it might choose that were consistent with the Bill of Rights and that provided for the general welfare.

While the Madisonian view of spending power is most consistent with the view of the federal government developed in the Convention and inherent in the Constitution, the courts have upheld the view that spending is not limited to the achievement of enumerated powers (*United States* v. *Butler* 1936; *United States* v. *Darby* 1941). The result is that the federal government may spend to achieve virtually any objective and it may regulate in virtually any area of interest by making compliance with those regulations a condition of state or local governments receiving federal funds. Furthermore, the regulations need not bear any relationship to the purpose for which funds are granted. Of course, if the state or local government should wish to refuse such federal regulations, the only sanction is withdrawal of federal funds. Because federal funds are a relatively large proportion (21 percent in Washington in 1977) of many state and local government budgets, this use of the spending power has resulted in the expansion of federal government regulation far beyond the concerns of treaties and commerce. This was the means taken to encourage development and implementation of coastal zone management programs in the states.

Preemption

Federal government laws necessary and proper to achieve enumerated federal concerns are the supreme law of the land and preempt conflicting state or local laws except in the unusual case in which those state or local government laws are necessary to the operation of the state or local government (*National League of Cities* v. *Usery* 1976; Buckley 1977). This is why the Supreme Court nullified those parts of Washington State's Tanker Safety Act to regulate oil transportation on Puget Sound. The federal Ports and Waterway Safety Act regulated ocean shipping (*Ray* v. *Atlantic Richfield* 1978). United States government treaties with Indian tribes also provided the legal basis for federal preemption of state fisheries regulations following the first Boldt decision in 1974 (*United States* v. *Washington* 1974). At the same time, however, the courts have been relatively careful to permit state regulation of the same activities regulated by the federal government

when there is no direct conflict between the regulations. Florida, for example, can impose strict liability for damages from oil spills (*Askew v. American Waterways Operators* 1973) in addition to the liability imposed by the federal government for the costs of clean-ups. Similarly, Washington State has imposed conditions to achieve higher levels of safety on oil tankers entering Puget Sound (*Ray v. Atlantic Richfield* 1978).

While the U. S. Constitution limits the federal government to the exercise of necessary and proper regulation to achieve a very small number of enumerated concerns—primarily in foreign affairs, in treaties, or in interstate commerce—the scope of federal regulation has continually expanded—as illustrated by the regulation of navigable waters. In addition, the broader interpretation of the power to spend and the importance of federal grants to state and local governments have resulted in further expansion of the role of the federal government. The specific regulation and programs utilizing this constitutional authority to influence the use of Puget Sound resources will be the subject of Chapter 4.

Property

When the states became independent of Britain, they assumed ownership of unoccupied lands, tidelands, and the submerged lands beneath navigable waters within their boundaries. While provision was made for federal government ownership of land for particular purposes and for lands westward of the Thirteen Colonies, it was the states that assumed the common law role as proprietor of public lands within their borders (*Martin v. Lessee of Waddell* 1842).

Under the common law, states may "own" land in two different capacities: as a proprietor or as a trustee. Lands held as a proprietor are held as by any other landowner—and the lands may be sold or "alienated" from state ownership. With lands held in public trust, however, the state holds land as a trustee for citizens' use—and the state cannot alienate the land to a particular individual except to further purposes for which the land is held in trust (Schoenbaum 1977).

In Washington, the state holds its forests and state parks as a proprietor (even though they are called "trust" lands), but tidelands (since 1971) and submerged lands are held as a public trust. Because in common law fish and shellfish have been treated as belonging to the owner of the submerged or tidal lands, fish and shellfish are also owned as a public trust by the state. While lands held in public trust generally cannot be sold for exclusive use, the state of Washington sold some tidal lands outside of harbor areas to adjacent upland owners prior to 1971. The state currently leases lands for uses such as oyster culture, other aquaculture, log storage, and the installation of mooring buoys and

docks. Under the common law, riparian rights (the right to install improvements such as docks, fills, or dredge channels to enhance access to water, or draw water for domestic, agricultural, or industrial purposes) are held by the owners of adjacent uplands (Johnson and Goldsmith 1977). In addition to the requirement of a lease for the use of state-owned tidal or submerged lands, all uses of tidal or submerged lands—even those undertaken by the state government itself—must receive permission from the federal government to be sure that there is no interference with navigation and to comply with other federal water quality regulations.

The continuity of state ownership of tidal and submerged lands underlying inland waters has never been seriously questioned in the United States. Until 1947, it was also assumed that state ownership of submerged lands extended into the ocean at least for the three miles that were generally recognized as controlled by an adjoining state at the time of the Revolution (the territorial sea). It was under such an assumption that states had been leasing submerged lands and collecting oil royalties from offshore oil drilling. In the 1940s, however, the U.S. government claimed ownership of all submerged lands and resources under territorial waters and hence the right to all lease fees and oil royalties. In an unexpected decision, a majority of the U.S. Supreme Court ruled that because the U.S. government maintained security against foreign nations over the three-mile zone, it also had "national dominion" (i.e. ownership) over the submerged lands.

In 1953, the U.S. Congress effectively reversed the 1947 court decision and returned all submerged lands and resources within three miles of shore to state ownership (Submerged Lands Act of 1953). Thus Washington State presently owns as a public trust the tidelands not formerly sold and submerged lands of all navigable waters except those sold in harbor areas to promote development in the state to three miles into the Pacific Ocean off the coast. Any submerged continental shelf lands beyond that limit are owned by the federal government.

The Constitution provides two capacities in which the federal government can own property. Congress possesses exclusive jurisdiction over places purchased with the consent of the legislature of the state in which the property is located for the erection of forts, magazines, arsenals, dockyards and other needful buildings (U.S. Constitution, Article I, Section VIII). These areas are essentially removed from state government jurisdiction in all respects—and are referred to as Title I properties. In addition, the federal government may own and administer other lands (Article IV, Section VIII) but in the capacity of a landowner subject to state laws. It would appear, however, that if these other lands, called Title IV properties, were used for an enumerated purpose (interstate commerce, fulfillment of treaties, military use) federal regulations

would preempt state law and the property would be legally similar to Title I property even without state legislative consent.

While the constitutional provisions for federal government land ownership clarified relationships in the thirteen original states, the federal government also obtained control over lands west of the thirteen states and has proceeded to develop a wide variety of ownership patterns, often based on disclaimers new states were required to include in their own constitutions as a condition of being granted statehood. In addition, state legislatures also surrendered jurisdiction over federal properties—such as Mt. Rainier National Park—in exchange for federal expenditures in their state. The result is that it is extremely difficult to identify the precise legal status of many federal properties. However, it would appear that unless federal property is either Title I property, used for an enumerated purpose, or subject to a specific agreement with a state, it is constitutionally subject to state law in spite of a yet unchallenged assertion by the Public Land Law Review Commission (1970, p. 278) that the Congress can pass laws to administer property of the United States and that no state may interfere with the exercise of that power (Engdahl 1974, p. 184). The precise limits a state may place on the federal government's administration of Title IV property, however, are unclear and have not been adjudicated in a definitive manner (Engdahl 1974, pp. 179–190).

Indian reservations constitute still another kind of property on Puget Sound. There are thirteen such reservations in the Puget Sound region, eleven of which are directly on the Sound or Strait of Juan de Fuca. The other two are close to the Sound on rivers flowing into it. Indian reservations are governed by the terms of the treaty between the tribe and the federal government and subsequent changes in federal law. Federal law does provide for states to assume some governing authority over Indian lands, but in Washington State, relationships regarding coastal resources have not all been clarified. Decisions by federal Judges Boldt and Orrick allocating the right to catch one-half of the salmon that migrate through all Indians' usual and accustomed fishing sites and grounds (not just reservations), and providing Indians with a major voice on any development that would affect salmon runs—including off-reservation developments—do, however, provide a major role for tribal governments in coastal resource use decisions on Puget Sound. Because the status of tribal governments is not widely understood and because of their new importance, Chapter 7 is devoted to these issues.

Puget Sound area land, including tidal and submerged land, may be owned in several capacities. In general, submerged lands are held in public trust by the state, and tidal lands are held in public trust by the state unless they were formerly sold to individuals (approximately 60

percent of Puget Sound's tidelands are in individual ownership) or are part of federal properties or Indian reservations. Fast (dry) land may be owned by individuals, by the state, by Indian tribes, or by the federal government as Title I or Title IV land, possibly subject to a specific state-federal agreement. Land proprietorship by government is not the same as sovereignty to regulate, however, and state-owned lands are subject to federal regulations concerning navigation or other enumerated federal concerns. Also federal Title IV lands not utilized for an enumerated concern or subject to a specific agreement are subject to general state law. A major result of the difference between sovereignty and proprietary rights makes the use of most Puget Sound resources subject to concurrent agreement between the state and federal government.

Citizen Rights

The rights of citizens dealing with a government or affected by a government's action are not unique to marine, coastal, or resource use questions. They extend across all areas of government activity. The focus here is on briefly describing those rights that have been or that still are potentially most important for influencing the use of Puget Sound's resources. As with the concepts of sovereignty and property, citizens' rights evolved in English common law and are specified in the United States Constitution (including the first ten amendments called the Bill of Rights), the Washington State Constitution, and court decisions. One way of looking at these rights is in terms of those protecting citizens from a government, those guaranteeing fair treatment, and those providing for participation in electing officials, formulating policy, and changing the constitutions themselves.

Protection from Government

Both the Bill of Rights of the U. S. Constitution and Article I—The Declaration of Rights—in the Washington State Constitution provide for rights such as freedom of speech, trial by jury, freedom of religion, and so on. Of major concern in coastal resources regulation is the U.S. Constitution's fifth amendment providing that no person shall "be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." Washington State's equivalent clause, Article I in Paragraph 16, states that "No private property shall be taken or damaged for public or private use without just compensation having first been made . . ." Furthermore, restrictions on the use of property may be construed as "taking" because taking need not be a physical taking. According to the U.S. Supreme Court "there can be no conception of property aside from its control and use, and upon its use depends its value" (*Cleveland*,

etc., Ry. Co. v. Backus 1894). On the other hand, the federal government clearly may regulate to accomplish its enumerated concerns, and state governments may regulate to enhance or protect the public welfare—and these activities may result in restrictions on uses of property and even the elimination of all uses that make the property valuable. For example, in California the state supreme court upheld the zoning of beachfront property for beach use only as not constituting a taking even though the zoning completely wiped out any value for property upon which $9000 in taxes were being paid annually (*McCarthy v. City of Manhattan Beach* 1953, discussed in Hagman 1971). The Wisconsin State Supreme Court upheld a county shoreland zoning ordinance that prevents development in marsh areas within 1,000 feet of a lakefront—even if it prevents all valuable use of the property (*Just v. Marinette County* 1972).

In contrast, other cases have declared regulations to prevent the development of marshland as a taking because they left the owner with no use for the property (*Maine v. Johnson* 1970). Despite considerable litigation over the taking issue, the citation of Justice Holmes is still appropriate: "The general rule at least is that, while property may be regulated to a certain extent, if regulation goes too far it will be recognized as taking" (*Pennsylvania Coal Co. v. Mahon* 1922). The position on the balance between the government's power to regulate and a citizen's power to not be harmed that is most consistent with preconstitutional precedents in the colonies and the philosophy of the Constitution is a strict interpretation of no taking without compensation (Bish 1980). A strict interpretation of "no taking without compensating" would not prevent government regulation, but it would require that when new regulations "took" away a property owner's right to do something that was formerly permitted, he would be compensated for his loss. This way the cost of regulation to benefit the public welfare would not be borne disproportionately by just one or a few property owners—but would instead be borne by the general treasury. Thus the public decision-makers would see both the costs and benefits of their regulations as well as treat all citizens fairly (Bish 1978).

Fair Decision-Making

When citizens are affected by government action, they generally have the right to be heard and to be treated fairly during decision processes. When government officials hold hearings, for example, the hearings must be fair; and in Washington State, governmental officials must also present the appearance of fairness at all times. While such traditions extend back into common law, the Washington Supreme Court has extended the concept of "appearance of fairness" to include administrative decisions and has enforced a strict standard of conduct

for public officials—not hesitating to overturn zoning and land use permit decisions on Puget Sound when the appearance of fairness was lacking (Wienker, n.d.; Bish et al. 1975). For example, courts reversed Skagit County's rezoning to permit Northwest Aluminum to locate an aluminum reduction plant on Guemes Island (*Smith* v. *Skagit County* 1969) and Snohomish County's rezoning to permit an ARCO oil refinery on Port Susan Bay (*Chrobuck* v. *Snohomish County* 1971) on grounds that the appearance of fairness was lacking in county decision processes.

Political Participation

In Washington State, citizens play a major role in government processes. They not only vote to elect federal, state, and local officials, but have rights of referenda, initiative, and recall as provided in the state constitution. The initiative process, for example, permits citizens to submit a measure directly to the electorate and, if approved, the measure becomes law—completely bypassing the legislature and governor. One version of the shoreline management bill of 1971, for example, was a citizen-sponsored initiative. Citizens, through voting, must also approve all changes in the state constitution.

In addition to electoral participation, citizens may attend public hearings that are part of many regulatory permit processes at the federal, state, and local level. These hearings provide an opportunity for citizens to voice their concerns directly as a part of regular decision processes. Such hearings have played a major role in bringing together concerned individuals and in resolving difficult conflicts over the use of Puget Sound resources and the development of its shoreline management processes.

The degree of citizen participation is one aspect of American government, especially in western states, that differs significantly from English common law. In most common law countries, parliament simply assumed the prerogatives formerly exercised by the king. Citizens are generally limited to electing representatives rather than participating directly in law-making processes.

Role of the Courts

This review of the basic concepts of sovereignty, property, and citizen rights illustrates the importance of the courts for interpreting the U.S. Constitution, laws, and regulations and adjudicating disputes in the American federal system. In subsequent chapters it will become even more apparent that specific court decisions have made major differences in the use of Puget Sound's resources.

In the drafting of laws and constitutions, it is impossible to anticipate every future problem or contingency. In many cases, changing

conditions are dealt with through regular legislative or bureaucratic processes. In other cases, however, disputes arise that end up in the court system for adjudication. A citizen who is harmed by a government or by another citizen's action, or a representative of one government whose interests are harmed by officials of another government, may bring suit in court to have the harm alleviated. The requirement that harm be shown to permit a suit to be brought, called "standing," tends to limit the court's jurisdiction to real and not abstract or frivolous problems. Thus it is possible to hold government officials as well as citizens accountable for their actions, and it is even possible for a citizen to have entire laws passed by both houses of Congress and signed by the President declared null and void by the courts if the law violates the Constitution.

The precise role of the courts for interpreting the Constitution and laws passed by Congress is not clearly specified in the Constitution itself. However, beginning with adjudication of *Marbury* v. *Madison* (1803), the courts have taken upon themselves a broader and broader role. They have accepted and adjudicated cases involving the due process of administrative decisions, as well as cases involving every conceivable aspect of the Constitution to resolve disputes between the state and federal government and between citizens and government. It is often said that the changing interpretation of the Constitution provided by the courts over time is an adaptive response to changing conditions. Others have concluded that "the single most significant factor accounting for the changes in the Constitutional law of federalism over the years has not been responsiveness to changing social needs; it has been intellectual confusion" (Engdahl 1974, p. ix). In either case, the trends have clearly extended the authority of the national government relative to authority of the states.

Whether or not one agrees with these trends, courts perform a critical role as one component in a complex federal system. It is hard to imagine a system of government in which governmental officials and legislative and executive policies are constrained by a constitution enforceable by citizens functioning without the courts.

Philosophy of a Constitutional System

The drafters of the U.S. Constitution had recent experience with the most difficult problem of governance: the abuse of authority by both a monarch and parliament. It was their contribution to the theory of government to design a system in which sovereignty resided first with the people, and in which the separation of powers and federal system were to provide checks on the authority of government as well as provide a set of institutions to deal with problems of different magnitudes. This is the system within which decisions over the use of Puget Sound's resources occurs.

The following three chapters will examine the programs and regulations of the federal, state, and local governments as they utilize their constitutional authority to regulate and make resource use decisions. Following these descriptions, an examination of the interaction among components will attempt to make comprehensible the operations of this complex constitutional framework on Puget Sound.

Notes

The philosophy of the American constitutional system is still best presented in *The Federalist* by Alexander Hamilton, John Jay, and James Madison. A concise derivation of the political theory developed in *The Federalist* is presented by Vincent Ostrom in *The Political Theory of a Compound Republic* (1971).

Many important topics are treated briefly in this chapter. A useful overview of constitutional issues is David Engdahl's *Constitutional Power: Federal and State* (1974), and Garrett Power's *Chesapeake Bay in Legal Perspective* (1970) provides a history of property and sovereignty issues with respect to coastal resources. *Environmental Law* (1977) by William H. Rogers, Jr. and *Coastal Zone Law and Policy* (1977) edited by Ralph W. Johnson and Richard J. Goldsmith include more detailed contemporary case analyses.

CHAPTER 4

Exercise of Federal Authority

One must be very careful to avoid thinking of the federal government as a single organization. Constitutionally, the Congress, the executive branch, and the courts are independent of one another. Even Congress itself consists of both the Senate and House, and individual committees within each body possess considerable independence. The executive branch appears more like a single organization on organizational charts, but its sheer size forces it to be subdivided into a multiplicity of bureaus, agencies, and departments, many of which operate with considerable autonomy and others of which go directly to Congress for program support when they disagree with their superiors—including cabinet officials or even the president. In addition to the many executive agencies, there are many independent commissions that carry out their activities within enabling legislation but outside the day-to-day control of either Congress or the executive branch.

Many observers criticize federal programs or regulations for inconsistency—often in such terms as "the right hand does not know what the left hand is doing." This criticism, however, assumes that there is a single organism with a head—and expectations based on this assumption are bound to be disappointed. The federal government of the United States is a multiorganizational system in which programs and regulations require concurrent agreement among some subset of organizations. When there is disagreement with a federal program or policy, such disagreement is just as likely to be articulated by another federal agency as by a private citizen. It is a system in which the exercise of one authority is constrained by the authority of others.

Despite their multiplicity, federal government agencies function within a reasonably clear body of constitutional law, statutory law, and constraints imposed by other organized units. Furthermore, these laws and constraints sufficiently bind the behavior of different organizations so that programs and policies become predictable enough that officials understand how their agency's actions will affect others. The relationships among agencies are a major factor in program design, and it is seldom possible to understand the activities of any single organization without knowing its relationship to other organizations. This poses a severe problem for an outside observer because there is no way an out-

sider can possess as much knowledge about any single decision as those participating in it. At the same time, however, an outsider can observe patterns of decisions over time and gain considerable insight as to how agencies relate and how the system operates. Outcomes can be understood instead of being viewed as a series of unconnected events.

Constitutional Relationships

The separate branches of the U. S. Government exercise independent authority. Each program, whether proposed by an executive branch official or a congressman, must receive several approvals. First, because of the total volume of business, each house of Congress has divided itself into committees and subcommittees that examine the substantive nature of prospective legislation. It is common for congressmen with a special concern or constituency to obtain membership on the committee that treats those matters, and hence committees are seldom representative of the entire Congress. They are often, instead, advocates of particular interests. This structure, by itself, contributes significantly to the design of programs for specific constituencies with little concern for any "public" or "national" interest. In recent years the responsiveness of congressmen to specific constituencies has been important for guiding federal policies on Puget Sound. In the recent past, Washington Senators Magnuson and Jackson had sufficient seniority to guide Senate legislation affecting the Sound, and three of Washington's seven representatives serve on the House Merchant Marine and Fisheries Committee – which supervises all activities of the Department of Commerce and its National Oceanic and Atmospheric Administration.

Prospective legislation passed through committees is treated on the floor of each house, and because each law must be passed by both the House and the Senate, conference committees consisting of members of both bodies are used to reconcile differences. Conference committee agreements are usually passed without further debate by each body. After prospective legislation is passed by both houses, it goes to the President, who must sign it before it becomes law. If he vetoes a law, a two-thirds vote in each house may override the veto.

The enactment of a program into law, however, does not necessarily mean that anything will be done if the program requires any expenditure. Since the total budgetary requirements of all programs authorized would greatly exceed what most congressmen would agree to spend, separate appropriations legislation must go through different committees in each house, be passed, reconciled with the other house, passed again, and forwarded to the president. Thus it is quite possible to authorize programs that are never funded. This separate appropriations process places some check on committees of congressmen who

support particular interests in the congressional decision-making process.

Once laws have been passed and signed (or a veto has been overridden) and appropriations have been passed and signed, the agency designated for implementation develops the regulations to implement the program. Agency regulation processes are also complex. Agencies draft prospective regulations and publish them in the *Federal Register*. All other organizations affected by a particular program, including other executive branch agencies such as the Office of Management and Budget and the Attorney General, state or local governments, private firms, interest groups, and even congressmen involved in the initial legislation may comment on the regulations. Comments must then be responded to, and the reasons for rejection of a criticism or modification of a proposed regulation to take the criticism into account are also published in the *Federal Register* prior to issuance of the final regulations under which the program will be run. Thus, even the administrative implementation of laws by an agency is a highly interactive process among a multiplicity of interests. If a different set of interests is more influential in the regulation than congressional process, it is also possible to use regulations to alter the congressional intent of the legislation.

Finally, programs are ready to begin. When an agency begins actual operation, it must keep in mind that if it antagonizes another agency or constituency, those injured may begin processes to alter agency behavior. In addition, if it violates some other agencies' rules (such as not providing a comprehensive environmental impact statement for any significant action) or some citizens' constitutional rights (including due process), it may find itself in court defending its actions. This environment of consensus, checks and balances is one within which all government officials must operate. All federal government activities directly using, enhancing, or regulating uses of Puget Sound's resources have gone through this legislative and administrative process.

Direct Uses of Puget Sound

The direct use of Puget Sound resources by federal agencies is a very small part of federal activity affecting the Sound. The most significant direct uses are twenty-eight military reservations, especially the Bremerton Naval Shipyard, the Naval Submarine Base at Bangor in Kitsap County on Hood Canal, and several submarine and torpedo testing areas in nearby areas. The Army's Fort Lewis in Pierce County is also a major installation. Other bases are smaller, such as Fort Lawton in Seattle, or the Ault Field Naval Base on Whidbey Island. Given the preemptive authority of the federal government and the importance of national security, the military organizations exercise considerable discretion

over their own activities and are less constrained than other agencies in determining their courses of action.

Other direct uses are primarily support facilities for federal resource enhancement or resource regulation. The National Oceanic and Atmospheric Administration's research laboratories and docks in Seattle, and Coast Guard bases and lighthouse stations are examples of such direct uses. These latter uses, however, are best understood in the context of the specific enhancement or regulatory mission of the agency of which they are a part.

Commerce and Navigation

The federal government's exercise of authority related to interstate and international commerce and to navigable waters is the largest and most comprehensive area of federal activity on Puget Sound. Much of this activity is carried on by the Army Corps of Engineers and the U.S. Coast Guard.

Corps of Engineers

The Army Corps of Engineers was established in 1779 and the Civil Works Program began in 1824. The Corps has more than fifty projects on Puget Sound, over half of which are maintenance dredging of waterways. One of its waterway projects was the construction of the Hiram M. Chittenden Locks connecting Lake Union and Lake Washington to Puget Sound, and it is responsible for their continued operation. The next most numerous type of Corps activity is the development and maintenance of small boat basins, followed by beach erosion control. There are projects not only in all major ports, but Corps activities are also spread throughout the region to include smaller facilities at places like Kingston, Blaine, Port Gamble, Port Townsend, and LaConner. A majority of the projects, including both dredging and small boat basins, are oriented primarily toward fishermen and recreational boaters, but they are also important for maintaining the waterfront vitality of small towns. Most of the beach erosion control projects are to protect public park beaches such as Lincoln and Lowman parks in Seattle, Sunnyside Beach in Steilacoom, and Titlow Beach in Tacoma. The construction and maintenance activities of the Corps of Engineers, more than the activities of any other single agency, have provided access for shipping, commercial fishing, and recreational boating on Puget Sound.

In addition to its construction and maintenance roles, the Corps also has a major part in the regulation of projects or discharges in navigable waters. In the Rivers and Harbors Act of 1899, the Corps was designated as the federal agency from which anyone wishing to undertake construction in, or discharge into, navigable waters had to obtain a permit. This authority was to assure that no one would interfere with navi-

gation on navigable waters of the United States. The navigation focus placed emphasis on the discharge of solids, especially dredge spoils, and not upon liquid pollution. Only in 1966 in *United States* v. *Standard Oil Co.* was it decided that permits were required for any discharge into navigable waters, and thus the Corps became the major regulator of pollution discharges into waterways. Not all environmentalists were pleased with having the Corps as the major federal water pollution control agency because of the potential for a conflict of interest between pollution control objectives and its own construction activities.

In the Federal Water Pollution Control Act Amendments of 1972, responsibility for discharge permits was transferred to the Environmental Protection Agency (EPA). The Corps, however, remains the agency responsible for issuing permits for any facility in or over navigable waters and for any dredging, diking, or dredge spoil disposal. When processing these permit applications, the Corps solicits opinions from affected agencies, including the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and state fish and game departments. Thus, even though the Corps' permit is not the only one required for alterations in navigable waters, it remains the primary coordinator for taking the views of other agencies into account in its regulatory processes.

U.S. Coast Guard

The U.S. Coast Guard was established as the "Revenue Cutter Service" in 1790. Its role was primarily to enforce the collection of customs revenues and its home was the Treasury Department. Since its beginning, it has assumed major roles in maritime law enforcement, saving and protecting life and property, enhancing and regulating navigation, and enforcing federal pollution control laws on navigable waters. The Coast Guard was moved to the Department of Transportation in 1967, and given the major federal responsibility for oil pollution control and cleanup in the Federal Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970. The Coast Guard regulates the shipment of dangerous cargos, including the regulation of and inspection of ship construction. The Coast Guard is also responsible for enforcing EPA rules eliminating untreated sewage discharge from marine heads on pleasure boats.

To improve navigation and maritime safety, the Coast Guard maintains an extensive system of navigational aids, including twelve stations or lighthouses in the Puget Sound region. Most of these aids are designed to facilitate identification of navigational hazards or determination of one's location. Beginning in 1972, however, the Coast Guard has moved toward a more direct management of ship movements on

crowded waterways. On Puget Sound, for example, one-way shipping lanes much like highway traffic lanes have been indicated on marine charts and marked with buoys. Large ships are also required to indicate their position via VHF radio to the Coast Guard Vessel Traffic System office in Seattle or the Canadian Coast Guard station in Vancouver. These two Coast Guard stations are in direct communications with each other. This system has been expanded to include radar monitoring of all ships—similar to control systems at major airports. This radar monitoring system should further improve navigational safety from the Strait of Juan de Fuca and the Strait of Georgia, down through the main basin of Puget Sound to Tacoma.

Supporting Agencies

The Corps of Engineers and Coast Guard are not the only federal government agencies oriented toward navigational concerns on Puget Sound. The Maritime Administration of the Department of Commerce aids the U. S. Merchant Marine and is the major federal agency with authority to engage in port planning. Because most port planning is done by state or local agencies, however, the Maritime Administration has not been active in this area.

Another federal agency that affects commerce on Puget Sound is the Federal Maritime Commission (FMC). The FMC acts as a regulatory agency for setting shipping rates. Its treatment of multimodal freight movements can have a major impact on port volumes. For example, its approval of a Portland all-water rate for containers unloaded in Seattle and delivered to Portland by truck could lead to container ships simply skipping Portland as a regular port and unloading in Seattle instead. If the Maritime Commission had not approved the all-water rate for the multimodal trip, it is unlikely that such transfers would be undertaken because the combination of the Seattle waterborne rate and the Seattle to Portland truck rate would be much more expensive. Continued approval of all-water rates for multimodal shipments has the potential of concentrating shipping in a few major ports such as Seattle equipped to transfer containers efficiently.

Another federal agency engaged in supporting commerce and navigation is the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA), which includes the National Ocean Survey and the National Weather Service. The National Ocean Survey compiles and publishes navigation charts, and the National Weather Service provides current weather and sea condition observations and forecasts of future weather. These services are essential for both commercial ships and recreational boaters.

Fisheries

Fish within three miles of the Pacific Coast, including those within Puget Sound, are owned by the state in common law but are shared with Indian tribes under treaty agreements. The Washington State Department of Fisheries (and increasingly the Northwest Indian Fisheries Commission and tribal governments) has been the major resource developer and regulator of saltwater fisheries. Federal government involvement with fisheries, however, has evolved in relation to several federal concerns. The Department of Interior's Fish and Wildlife Service is concerned with game and fish management on federal lands and Indian trust lands, and it also administers several grant programs such as the Anadromous Fish Conservation Act to provide funds for state agency activities. The Department of Commerce's National Marine Fisheries Service (also part of NOAA) also has a longstanding concern for commercial fisheries resources, especially when fish range beyond the waters of a single state as do salmon spawned in Puget Sound tributaries.

Beginning with the Fish and Wildlife Coordination Act of 1958 and continuing in the Corps of Engineers and Environmental Protection Agency permit-issuing and environmental impact statement review processes, the Fish and Wildlife Service and National Marine Fisheries Service have assumed an additional important role in fisheries management and environmental protection. This role is one of reviewing and commenting on the impact of other activities on fish and wildlife. This expanded authority to protect fisheries resources from damage is an important one and is absorbing an increasing proportion of these agencies' resources. For example the number of Corps permit applications on Puget Sound waters reviewed by Fish and Wildlife increased from fewer than 100 in 1968 to more than 600 in 1979.

Both the Fish and Wildlife Service and the National Marine Fisheries Service cooperate with Washington State departments, and with the U.S. Department of State in negotiating and implementing fisheries treaties with foreign countries. At present, the International North Pacific Fisheries Commission, established by the United States, Canada, and Japan, and the International Pacific Salmon Fisheries Commission, established jointly by the United States and Canada to regulate the catch and escapement of Fraser River sockeye, both provide a constitutional basis for federal preemption of Washington State's management of its salmon stocks on Puget Sound.

In 1976 the federal Fishery Conservation and Management Act (FCMA) extended the authority to regulate fisheries between the traditional three-mile limit and the new two-hundred mile limit off the coast to the National Marine Fisheries Service and created regional fisheries management councils (*Washington Law Review* Symposium

1977). Because salmon from Puget Sound travel through this 197-mile zone, the claim has been made that the regional fisheries management councils may manage salmon anywhere. While this claim is less likely to be recognized by the courts than a state's claim that it should have the right to regulate salmon fishing anywhere because it owns fish spawned over its submerged lands (*Skiriotes* v. *Florida* 1941), the federal government could use a treaty power rationale to turn salmon management on Puget Sound over to the regional fisheries management council.

Federal preemption must be considered a possibility, especially following the dispute between Washington State and Indians demanding their treaty-guaranteed fishing rights. In this dispute U.S. District Judge Boldt ruled in 1974 (*United States* v. *Washington*) and the U.S. Supreme Court upheld in 1979 (*Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n.*) that treaty Indians were entitled to one-half the salmon catch and were not subject to steelhead catch restrictions in treaty waters except for purely conservation purposes. He also ruled that the departments of Fisheries and Game not only precluded Indians from obtaining their share, but that state regulations and the behavior of state officials, especially in the Game Department, were highly discriminatory against Indian fishermen. Because court suits brought by white fishermen prevented the departments of Game and Fisheries from abiding by Judge Boldt's decision, federal officials assumed control over all salmon fishery regulations under treaty authority until state agencies were able to resume management and recognized Indian rights. Such federal assumption of fisheries regulation could happen again.

Water Quality Management

Even though an oil pollution control act had been passed in 1924 (Oil Pollution Act), prior to the 1960s federal regulations affecting water quality were more accurately viewed as by-products of regulation for other purposes. The discharge permit process of the Corps of Engineers to prevent interference with navigation is a good example. Corps authority to control discharges into navigable waters was gradually extended to cover all impacts from changes in water quality—including impacts on fish and wildlife which require higher water quality than does navigation.

Beginning in 1965 with the procedures to establish water quality standards for interstate waters (P.L. 79-903) and the National Environmental Policy Act of 1969, the federal government began to focus directly on water quality. This concern was reinforced by the establishment of the Environmental Protection Agency (EPA) in 1970, and water quality objectives were provided in the Federal Water Pollution Con-

trol Act Amendments of 1972. It was also this Act that transferred pollution discharge permit administration to EPA and extended Corps authority to regulate dredging and spoil disposal to wetlands and tributaries above the boundaries of navigable waters. Thus instead of relying on protection of fish, wildlife, or navigation to prevent environmental destruction, the federal government, for the first time, had an agency whose primary mission was the preservation and restoration of environmental quality.

The ambitions stated in water quality legislation are very high: the complete elimination of polluting discharges into navigable waters by 1985—regardless of the cost or effect on the quality of the receiving waters. To offset some of the costs for local governments, the U.S. Department of Housing and Urban Development (HUD) provides some matching grants to construct or improve sewage treatment facilities to serve existing populations. However, federal authorizations and appropriations have been insufficient to cover the costs of required facilities and any additional treatment facilities to accommodate population growth must be met from local funds. Such costs can be very high. It is unlikely that the "no discharge" objective will be achieved, and compromises related to both the cost of facilities and the quality of receiving waters should be anticipated. One major area where such compromises are likely is on Puget Sound, since in several places full sewage treatment at very high cost is unlikely to result in identifiable changes in water quality (Subcommittee on Environmental Pollution, *Hearings* 1977).

While the federal government has legislated water quality goals and provided EPA with the authority to implement appropriate regulations, the legislation also provides for EPA to approve state-developed water quality plans and regulations and to turn administration of the pollution discharge permit system over to a state agency. On Puget Sound the Washington State Department of Ecology has developed an approved plan and permit procedures and is administering the permitting process for EPA. Thus a difficult and costly task is being administered by a sharing of responsibility between the state and federal government.

Other Federal Programs

Federal government programs to encourage or regulate navigation and fisheries and to preserve water quality are the most important programs in terms of their influence on Puget Sound resource uses. There remain many other programs, however, that may affect the use of Puget Sound resources. Each of these programs may exercise considerable influence in a particular decision or dispute, but their impact on the future of the Sound and its environment is unlikely to be major, and will be constrained by the network of other agencies whose major concerns are for navigation, fisheries, and water quality.

Several federal agencies are concerned primarily with development or regulation of physical projects. One is the Department of Housing and Urban Development's Flood Insurance Administration, which provides insurance, and hence may encourage developments in flood-prone areas. Another program has been the Economic Development Administration's (currently scheduled for elimination) provision of grants and loans to stimulate job growth in areas with high unemployment rates. The Nuclear Regulatory Commission both promotes and regulates nuclear power plants—of which there are not yet any on Puget Sound or its tributaries; and the Office of Pipeline Safety in the Department of Transportation sets standards for and inspects oil and gas pipeline construction. Its role could become very important if the oil pipelines of Northern Tier or Trans Mountain are constructed from the Olympic Peninsula across Puget Sound.

Other federal agencies involved with Puget Sound's resources are oriented toward preservation or recreation. The Heritage, Conservation, and Recreation Service (scheduled for elimination in 1981 or 1982) of the Department of Interior administers the Land and Water Conservation Fund for direct federal purchases of historic or wildlife areas and provides matching grants to state and local governments for them to make such purchases. Since its beginning, this program has authorized $24 million for 201 projects in the Puget Sound region. Projects range from boat ramps to entire state parks. The National Park Service administers national parks (none of which directly front Puget Sound) and national historic sites—of which there are two on San Juan Island. The Advisory Council on Historic Preservation, in cooperation with state and local governments, designates and regulates change in historical areas. The first national historical reservation under the National Parks and Recreation Act of 1978 has been established at Ebey's Landing on Whidbey Island. Wild and scenic rivers—including the Skagit above Sedro Woolley—are designated by Congress and administered by the Department of the Interior. And finally, the Department of Interior's Fish and Wildlife Service maintains three wildlife refuges (Dungeness, Nisqually, and San Juan) and regulates hunting of migratory birds under terms of agreements with Canada, Mexico, and Japan. In Washington State, administration of the regulations is shared with the state's Department of Game.

One additional agency whose policies affect Puget Sound is the National Forest Service of the Department of Agriculture. The Mt. Baker, Snoqualmie, and Olympic National Forests encompass mountain areas on the west slope of the Cascades and the Olympic Mountains that drain into the Sound. Forest land management and logging policies affect water quality and fish productivity in the rivers draining into the Sound.

Federal Coordination Processes

There are a multiplicity of agencies from nearly all federal departments involved in enhancing or regulating the use of Puget Sound's resources. Most of the agencies discussed so far are oriented toward one or a very few closely related resource uses, but their decisions in pursuing their mission affects other users, and hence other federal agencies. Although the scope and complexity of federal government activity is too vast to provide for fully planned coordination, a variety of mechanisms have been created to facilitate a flow of information among agencies and to increase the chances that the programs and policies of different agencies will be mutually compatible. Most of the coordinating processes also permit discussion and alleviation of actions by one agency that would be particularly harmful to another.

Coordinating agencies and processes have been developed along several lines. Some are general and work primarily at the congressional and executive decision-making levels, others operate on strictly functional lines, others are organized regionally, and some are processes to coordinate individual projects.

Primary responsibility for coordination of expenditures in the executive branch lies with the Office of Management and Budget (OMB). It reviews proposed expenditures and also requires the circulation of information forms (called A-95 forms) to affected agencies whenever federal funds are being spent or are being granted to a state or local government. The Congress also has the Congressional Budget Office, General Accounting Office, and Congressional Research Service to help provide information on the relationship among programs. There is nothing as specific as the A-95 process in place, however.

The most important coordinating agency for federal water-related projects is the Water Resource Council, established by the Water Resources Planning Act of 1965. The council consists of the heads of six agencies—the Departments of Interior, Agriculture, Army, Transportation, and Health and Welfare, and the Federal Energy Regulatory Commission—plus associate members from the Department of Commerce, EPA, the Attorney General, OMB, and the chairmen of the seven regional river basin commissions. The Water Resources Council's major purpose is to develop standard criteria for evaluating the costs and benefits of water resources investments. This standardization of criteria then facilitates congressional and executive comparison of projects proposed by different agencies.

In addition, there are two federal coordinating agencies at the regional level—but both are larger than the Puget Sound area. The Pacific Northwest Regional Council consists of regional federal department heads and, more important, the Pacific Northwest River Basin Commis-

sion (PNWRBC) consists of federal and state agency heads concerned with resources in Washington, Oregon, Idaho, Wyoming, and Montana. In the late 1960s and early 1970s, the PNWRBC sponsored the Puget Sound and Adjacent Waters Study—which brought together state and federal officials for a multivolume analysis of Puget Sound uses and trends. These regional councils provide the opportunity for federal officials—and in the case of the PNWRBC—federal and state officials—to meet each other and engage in discussions over programs and policies. As such they are useful to facilitate the exchange of information, but they do not serve as major forums for resolving disputes or planning joint activities. Dispute resolution and joint planning are more likely to be undertaken by the few agencies directly involved than by the regional councils.

There are four specific federal coordinating processes that may be brought to bear on specific federal agency decisions. The Fish and Wildlife Coordination Act of 1958 requires that the Corps of Engineers circulate permit applications for projects in navigable waters to the federal Fish and Wildlife Service, the National Marine Fisheries Service, and appropriate state agencies—which in Washington are the departments of Game and Fisheries. These fish and wildlife agencies then comment on the projects, and they may propose modifications or object to a permit being issued. In most cases an objection results in denial of the permit by the Corps, but appeals may be made to progressively higher levels in the Department of Army and Department of Interior until the respective secretaries must make final resolution of the issue. This coordinating procedure—which is backed by the potential to veto unsatisfactory projects—clearly introduces fish and wildlife concerns to a status equal to that of navigation concerns for modifications to navigable waters.

A second major federal coordinating process is the environmental impact statement (EIS) required by the Council on Environmental Quality pursuant to the 1969 National Environmental Policy Act (NEPA). For each project utilizing federal funds or requiring a federal permit, an initial assessment of environmental impacts must be made. If the impacts could be significant, a full environmental impact statement must be prepared and circulated to affected agencies for their comments. If any impacts are controversial, a public hearing is also held. While the EIS requires the identification of alternative policies and ways to mitigate undesirable environmental effects, the statement is designed only to force consideration of alternatives and the production and circulation of information to affected agencies. It does not in itself impose any environmental regulations or standards. At present the EIS process may, in fact, be the most significant of the federal coordinating processes.

A third functionally oriented coordinating agency that could be important on Puget Sound is the Federal Energy Mobilization Board. This board was created in 1979 to coordinate the processing of permits for energy facilities in federal agencies. (The Department of Energy, created to expedite energy projects in 1977, was considered by Congress and the President to be too poorly administered and too cumbersome to perform such a function). For example, it is the Federal Energy Mobilization Board that is assisting Northern Tier Pipeline Company with the processing of their permits for a port facility and pipeline to transship oil from Port Angeles to Minnesota. It should be noted that Federal Energy Mobilization Board coordination does not eliminate the need for local, state, or federal agency permits—it only helps with the processing of federal agency permits to speed up the potential approval process.

The fourth federally sponsored coordinating process is the Coastal Zone Management Act of 1972, administered by NOAA. Through this program the federal government provides planning and operating grants for states to develop their own coastal zone management procedures. The state of Washington has moved rapidly under this act, building on the state Shoreline Management Act of 1971. Washington's was the first federally approved program in the country. Because this program is a primary coordinating process for all federal, state, and local government activities in coastal areas, it will be analyzed in further detail in Chapter 8.

Summary

Although the federal government is not organized to treat Puget Sound as a specific policy area, federal programs and policies do play a major role in enhancing and regulating Puget Sound resource uses. Most of the federal activity stems from a constitutional concern with commerce—which was expanded to include navigation, navigable waters and water quality regulations—and fisheries. A variety of other programs may also influence specific resource use decisions.

Along with the multiplicity of functionally organized agencies, there are federally sponsored attempts to improve coordination and provide for conflict resolution. The most important of these processes are the Fish and Wildlife Coordination Act requirements for review of projects in navigable waters and NEPA's general environmental impact statement process. Both of these processes, it should be noted, also include participation by affected state and local government agencies. The next two chapters will examine in detail activities of state and local governments.

Notes

The most comprehensive description of federal government activities on Puget Sound is presented in the appendices to the Washington Coastal Zone Management Plan. A history of agencies and their activities involved in navigation is Marcus et al. *Federal Port Policy in the United States* (1976). Fisheries issues are analyzed in the *Washington Law Review*'s Fisheries Symposium issue (1976) and in Judge Boldt's decision in *United States* v. *Washington* (1974). Water quality and National Environmental Policy Act activities are presented in Rogers *Environmental Law* (1977). Copies of virtually all relevant U.S. laws are contained in the Committee on Merchant Marine and Fisheries' 1977 compilation of federal laws on fish, wildlife, environmental quality, and oceanography.

While copies of laws, court decisions and sometimes agency histories, are available, there is little published material on agency activities on Puget Sound. Information on agency activities was compiled from newspapers, phone conversations, and informal materials provided by agency officials.

CHAPTER 5

Washington State Government

Washington joined the United States as a separate state in 1889. According to law, a new state is entered on an "equal-footing" with existing states and thus possesses all of the common law attributes of a sovereign nation except those delegated to the United States in the U.S. Constitution. In fact, like most other western states, Washington Territory was already subject to federally negotiated Indian treaties and vast land ownership by the federal government—land which has not been transferred to individual citizens as originally intended when the federal government was granted control over lands west of the thirteen original states. Thus Washington is subject to relatively more federal regulation and federal preemption of state law than were the original states.

State Government Organization and Politics

The constitution and organization of Washington State government reflect even more distrust of the abuse of governmental power by officials than is reflected in the U.S. Constitution. Not only does the state have two legislative houses, an elected executive—the governor—a court system, and a strong Declaration of Rights, but there are eight other separately elected executive officials—the lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, commissioner of public lands, and insurance commissioner. Voters may also pass their own laws, reject legislature-passed laws, and recall elected officials. These latter provisions for initiatives, referenda, and recall petitions are not present in the U.S. Constitution and are unusual in American state constitutions.

Initiatives, or citizen-written legislation, may be either direct or indirect. Either kind of initiative requires support by a petition signed by a number of voters equal to eight percent of the votes cast for governor in the last general election. Direct initiatives are then submitted to a citizen vote and require a simple majority to pass. Any amendments by the legislature require a two-thirds vote. Of the 279 direct initiatives filed through 1979, only 29 have been enacted into law. Three of these have been important for Puget Sound resource use: Initiative 62 creating the Department of Game in 1932, Initiative 77 outlawing fish traps

in 1934, and Initiative 215—the Marine Recreation Lands Act—in 1964.

Indirect initiatives are submitted to the legislature. The legislature may enact the initiative into law, do nothing and let it go to popular vote like a direct initiative, or submit it—along with a legislative-designed alternative—to the voters. When voters are presented with both an initiative and a legislative alternative, two votes are cast: one "for either" or "against both"; the other for the initiative or the alternative. If a majority is cast "for either," then the law with the most votes is enacted. Of the forty-four indirect initiatives only five of those filed and two legislative alternatives have passed. This is the process by which the Shoreline Management Act of 1971—the legislative alternative to Initiative 43—became law in Washington.

A referendum is a process to nullify legislature-passed laws. Submission of a petition, with signatures equalling at least four percent of the votes cast for governor in the last election, requires that the law be submitted to voters. Unless the law receives a majority of the votes cast, it is nullified. Recall of elected officials is also provided for in the constitution, but no major state official has ever been recalled. Its use at local elections is more common. A majority of the Tacoma City Council were recalled in 1970, and Seattle Mayor Wes Uhlman survived a recall election in 1975.

In addition to the constitutional provisions that facilitate voter and citizen control of government, the structure of supervision for several state departments by appointed commissions further decentralizes the policy-making process. The Game Commission, for example, sets policies for and supervises the Department of Game, and the Board of Natural Resources, Ecological Commission, Salmon Advisory Council, and the Commerce and Economic Development Advisory Council all play important policy roles for departments. In one case, that of the State Parks and Recreation Commission, the Commission itself has administrative as well as policy-making authority for state parks and recreation activities.

The existence of independently elected state executive officials and appointed commissions, and also the potential for the use of initiatives, referenda, or recall by citizens all constrain state officials to pay attention to citizen concerns in their policy-making processes. These decision-making access points also open the way for interest groups to draft laws directly and attempt to get them passed.

The potential of influencing state government policy by so many different access points could be reduced by strong, well-organized political parties, but political parties are not strong in Washington. They do not possess loyalty from voters, nor is there any discipline over officials elected to office under the party label.

The statutory election rules under which parties operate contribute to their weakness and make it difficult for them to strengthen their positions. All local government elections except for county offices are nonpartisan. No party affiliation is listed on the ballot, and candidates are barred from soliciting or accepting support from political parties. These rules eliminate the usual role of parties for selecting and supporting candidates in their first attempt at elected public office—which is usually at the local level. Thus local elected officials, from whom candidates for state or federal offices usually emerge, have no strong party allegiance and often have their own political base as a substitute for party support.

In addition, Washington's unique "blanket primary" reduces the ability of a party to control who gains the party nomination for county, state, or federal office. Citizens are not required to register as members of a party to vote in party primaries. Instead, a voter can vote in whichever primary election he chooses for each office. Thus a candidate may be able to win a primary with a popular base developed as an elected nonpartisan local official instead of working his or her way up through a political party. Party nominations are really captured by a nominee rather than bestowed by the party. Hence in general elections, identification with other party nominees and strong support for a party's platform by its own candidates are often lacking. The parties resemble coalitions to assist candidates in final state and federal elections instead of organizations with identifiable positions on policy issues supported by all party candidates. In this system, even if a single party were to carry the House, Senate and governorship, there is still no assurance that a majority of party members would support the party platform or agree with one another on major policy issues.

The combination of nonpartisan local elections and the open primary prevents the emergence of strong party organizations that might attempt to consolidate decision-making to reduce the influence of commissions and interest groups representing independent constituencies. When combined with initiatives, referenda, and recall, policy making is left open to citizen and interest group influence, and both play a major role in raising public policy questions and determining public policy outcomes. The Washington Environmental Council (comprised of representatives of more than 100 environmental organizations), for example, played a critical role in raising the issue of shoreline management and, through its initiative, provided the opportunity for citizens to vote on a shoreline management alternative after several years of legislative stalemate.

Washington's fragmented executive structure and electoral processes are often criticized by professional politicians and political scientists—and many recommendations for "reform" and "moderniza-

tion" have been made (Lovrich in Mullen et al. 1978). Reform recommendations, however, offered no proof that state governments with strong parties, a single elected executive, and no potential for initiatives, referenda, and recall are any more responsive to citizens or more effective in resolving complex problems than are those (Ostrom 1973) such as Washington's. Citizens have not been receptive to proposals to reduce their influence by creating a more tightly organized state government. Furthermore, studies matching citizen preferences with those of elected officials indicate that only seven of the fifty states had higher levels of agreement between citizens and officials than Washington (Pierce in Mullen et al. 1978). In a world of large integrated bureaucracies, Washington's system stands out for its openness, flexibility, and responsiveness.

It is within this popularistic and pluralistic structure that state government decisions influencing Puget Sound's resources are made. The state system has more access points for citizens than the federal one, but, as with federal officials' actions, state officials' actions are constrained by the authority and interests of others within the state government. In addition, state officials are constrained by federal rules or regulations in areas of enumerated federal Constitutional authority. Within this system, however, the departments and programs with the greatest influence on Puget Sound resource-use decisions are clearly identifiable; these activities will be examined next.

Management of State Property

When Washington attained statehood, it became the owner of all shorelands, tidelands, and lands underlying navigable waters and their resources not previously sold by the federal government. These aquatic lands are held and managed as a public trust by the Division of Marine Land Management of the State Department of Natural Resources (DNR). It is this owner and public trust manager role that provides the state government with one of its major voices for influencing the use of Puget Sound's resources. It is also as the owner of shorelands, tidelands, and submerged lands that the state possesses a concurrent voice with the federal government in dealing with improvements in navigable waters. While a federal Corps of Engineers permit is a requirement to assure noninterference with navigation, a developer must also obtain a lease from the Department of Natural Resources because the state owns the lands upon which the improvements would be made.

The assumption of ownership of shorelands, tidelands, and submerged lands by the state is explicitly stated in Article XVII of the Washington State Constitution, and Article XV also sets out a basic framework for state policies in harbor areas. Other policies are a combination of state legislation and DNR regulations. These policies are ex-

plicitly related to the location of the lands in relation to cities and the kinds of uses that are most appropriate in different areas.

Harbors

Article XV of the Washington State Constitution directs the legislature to provide for the appointment of a commission to establish harbor lines in front of or within one mile on either side of the corporate limits of any city. The inner harbor line is usually the low water line and the outer harbor line is designated to encompass the harbor area. The constitution then forbids selling or leasing submerged lands directly outside or within one mile on either side of the outer harbor line because activities in this area could potentially interfere with navigation access to the harbor or with future harbor expansion. The constitution also forbids selling or relinquishing control over the tidelands behind the inner harbor line. This area "shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce."

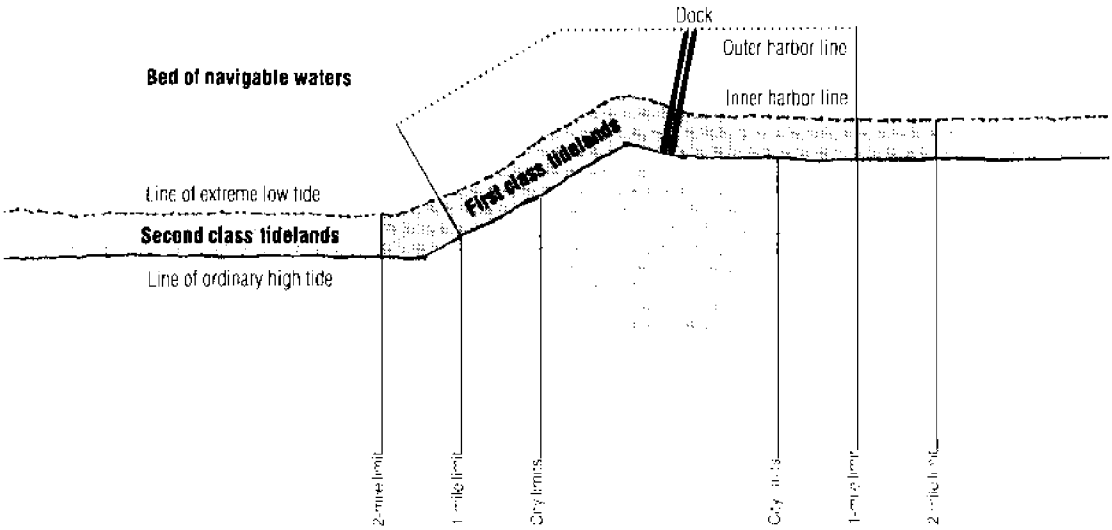
The functions of the Harbor Line Commission are carried out by the Board of Natural Resources, and leases to promote commerce and navigation behind and within harbor areas are administered by DNR after concurrence with port commissioners if the area is within a local port district. Current DNR policy allows leases of up to 30 years for constitutionally permitted uses. Charges are based on a percentage of market value, and the market value may be updated every five years. When no constitutionally designated use is practical, DNR will also provide shorter leases for other public uses, such as a fishing pier (Welch 1979). The clear priority for harbor areas, however, is for commerce and navigation. This priority is designated in the constitution and subject to change only by constitutional amendment rather than by simpler changes in legislation or DNR regulations.

Tidelands, Shorelands, and Beds

For management purposes, aquatic lands have been divided into several categories. Tidelands are the lands from mean high tide to the line where the tide cannot reasonably be expected to recede further. Shorelands are differentiated from tidelands in that shorelands are lands adjacent to navigable waters where there is no tidal influence. Shorelands are between the high water mark and where the water becomes deep enough for navigation. The beds of navigable waters are where the water is deep enough for navigation adjacent to shorelands in fresh water or beyond the low tide line in salt water.

Tidelands and shorelands are further designated as first class or second class. First-class tidelands and shorelands are those within two miles of an incorporated city. Priority uses of these lands are navigation, commerce, or other development uses. Leases for first-class tide-

Designation of Harbor Lines and Tidelands in Washington State



lands and shorelands may be for up to 55 years, and leases for adjacent beds may be for up to 10 years. The Department of Natural Resources gives preference to water-dependent uses and to several users rather than to single users.

All tidelands and shorelands not within two miles of an incorporated city are designated second class. These lands and adjacent beds may also be leased for up to 55 years, but DNR policy is to concentrate development on first-class lands and provide priority for recreation, aquaculture, and protection of the marine environment on second-class lands. The department also has special lease policies for raising oysters on racks and for geoduck harvesting areas. These policies on second-class tidelands have been developed since 1971, prior to which tidelands could be sold to private owners. Because of pre-1971 sales, only about 40 percent of Puget Sound's tidelands are state-owned and under DNR management. The remainder usually belong to the owner of the adjacent uplands.

While DNR is primarily the manager of Washington's public lands, in recent years it has become involved in encouraging specific uses of its lands. A beach-marking program is underway on second-class tidelands on Puget Sound so that recreational users may easily identify public—as distinguished from private—tidelands. The department has also supported the creation of artificial reefs to improve sport fishing, and supported research on shellfish and seaweed aquaculture. These activities, like other marine resource management, are supported by DNR lease and user charge revenues.

The Department of Natural Resources is only one of several resources-related departments in Washington State government, and the Division of Marine Land Management is only a small part of DNR—most of which is concerned with the management of state-owned forest lands. Because of the necessity of obtaining a DNR lease for improvements over the beds of navigable waters or on state shorelands or tidelands, however, DNR occupies a very important and influential position with regard to the use of Puget Sound's resources.

The Department of Natural Resources is not the only state agency that owns and manages land in Washington. Other agencies own and manage state land to achieve their particular objectives. The Department of Game, for example, owns wildlife refuges, both Game and the Department of Fisheries own and manage fish hatcheries; and the State Parks and Recreation Commission owns and manages state parks, recreational and historical areas. This kind of state agency property ownership will be examined in the context of the agencies' role in the enhancement and regulation of Puget Sound resources.

Resource Enhancement and Regulation

Unlike the federal government, which is constitutionally restricted to enumerated concerns, state governments can undertake any activities that are not forbidden by their own constitutions or the U. S. Constitution, or preempted by federal law. Given this broad authority and the importance of Puget Sound resources to Washington State, the state government has developed several major programs for the enhancement and regulation of Puget Sound's resources. These programs, like those of the federal government, have evolved over time in response to specific problems. At present the most important state agency activities on Puget Sound are the enhancement and regulation of fisheries, the provision of recreation and transportation, the regulation of adverse environmental impacts, and the coordination of state and local governmental activities that affect the Sound. The state agencies most involved in these activities are the departments of Fisheries, Game, Natural Resources, Transportation, Ecology, Social and Health Services, the Interagency Committee on Outdoor Recreation (IAC), the State Parks and Recreation Commission, and the Energy Facility Site Evaluation Council.

Fisheries and Wildlife

The regulation of fisheries and wildlife was a concern of the territorial government prior to statehood and in 1890 the Department of Fisheries was established. The department began its salmon hatchery program on the Baker River on the upper Skagit in 1896. Additional hatcheries on Puget Sound rivers—the Nooksack, Skokomish, Samish,

Snohomish, White (now Green) and Nisqually—were developed shortly thereafter. Currently Fisheries is operating twenty-four salmon hatcheries in greater Puget Sound.

Many of the hatcheries, although operated by the Department of Fisheries, were cooperatively financed. For example, the Issaquah and Minter Creek hatcheries were WPA projects in the 1930s. The City of Seattle contributed to funding the Skagit hatchery to make up for fish run reductions due to hydroelectric production on the Skagit River, and the George Adams hatchery near Shelton was three-fourths paid for by the City of Tacoma to replace fish lost because of its North Fork Skokomish dam. Two of the hatcheries (Garrison Springs and the Soleduck) are also operated in cooperation with the Fish and Wildlife Service of the U.S. Department of the Interior. The Department of Fisheries hatchery program has been critical for maintaining salmon runs as logging, dams, and siltation from urban development have reduced natural reproduction in salmon streams around the Sound. Although most Department of Fisheries enhancement programs are devoted to salmon, the Department assisted with the transference of Japanese oysters to Puget Sound to replace the declining stocks of native Olympia oysters. Through natural processes and some planting in the southern Gulf of Georgia, Japanese oysters have now spread as far north as Desolation Sound in British Columbia– and are the basis of a commercial shellfish industry in both Washington and British Columbia.

The Department of Fisheries is engaged in extensive regulation as well as enhancement of salmon and shellfish. It regulates fishing times, and gear and catch for commercial and recreational fishermen. In addition, its fisheries patrol is a policing agency. Because of its concern with salmon in Washington waters and its interdependencies with other jurisdictions because of salmon migratory patterns, the Department of Fisheries cooperates with the National Marine Fisheries Service and has a representative on the International Pacific Fisheries Commission, the International North Pacific Fisheries Commission, and the federal Pacific and North Pacific regional fisheries management councils.

In addition to directly enhancing and regulating shellfish and finfish, the Department of Fisheries, along with the Department of Game, plays a major role in supervising other uses of water resources that could damage the fishery. Any dredging or pumping of water from state rivers, for example, requires a hydraulics permit from the two departments. The departments can withhold permits if damage would be done to fisheries and can control the timing of in-stream work relative to fish runs. This permitting activity is a major one for Fisheries, which has been processing over 4,000 permits annually in recent years. Closely related to the formal permitting of in-stream works, Fisheries

reviews Corps of Engineers permit requests, federally and state required environmental impact statements and other permits—such as those issued by the Department of Ecology for wastewater discharges - to be sure consequences for fish are considered in decision processes.

Prior to 1932 the Department of Fisheries was responsible for managing all fish and wildlife resources of the state. In 1932, however, Initiative 62 created the State Game Commission and Department of Game to give a greater voice to sportsmen in fish and game management. The mission of the Department of Game is to manage wildlife resources in order to provide wildlife recreation, and it is responsible for sport fisheries - which are freshwater species except for steelhead and sea-run cutthroat trout—and for wild animals, birds, and waterfowl.

The Department of Game's activities are not as concentrated on Puget Sound as are those of the Department of Fisheries, but Game does regulate sport fishing for steelhead and hunting for waterfowl. It cooperates closely with the federal Fish and Wildlife Service on waterfowl management, and under contract to Fish and Wildlife, administers part of the Marine Mammal Protection Act in Washington waters.

Among the most important activities by Game on Puget Sound are its purchase and maintenance of wildlife refuges, its administration, along with Fisheries, of hydraulic permits for in-stream works, its participation in the review of Corps of Engineers and Department of Ecology permits, and its comment on environmental impact statements. Game's purchases of wildlife refuges in the Nisqually Delta and Padilla Bay areas are significant for preserving those areas in a natural state, and Game plays an active pro-environmental role in its review of permit applications. Its special constituency of hunters and fishermen, who are organized into sportman's clubs and the Washington State Sportsman's Council, also provides a network of grass roots support for its policies that gives it considerable impact in environmental disputes.

Prior to the explicit popular concern for the environment of the past two decades, it was the departments of Game and Fisheries—and their constituencies of hunters, recreational and commercial fishermen—that played the major role in protecting Puget Sound's natural resources and water quality. Their assigned roles in permit-issuing processes by other agencies formalize and strengthen this conservationist role on Puget Sound.

Recreation

Closely associated with fisheries and wildlife and of major importance to state residents are state programs to improve recreational access to Puget Sound. Five state agencies play an important role in recreation, three (the Interagency Committee for Outdoor Recreation, the State Parks and Recreation Commission, and the Department of Game)

because enhancement of recreational opportunities is their primary mission and two (the departments of Fisheries and Natural Resources) because regulation or enhancement of recreation is directly related to their other activities. These five agencies, along with federal agencies and local governments, have created a network of interdependencies and cooperation that ties the departments of Game and Fisheries enhancement and regulation programs closely to the other three agencies.

The Interagency Committee on Outdoor Recreation (IAC) was created as part of the Marine Recreation Lands Act by Initiative 215 in 1964. Its membership consists of the directors of the departments of Commerce and Economic Development, Ecology, Fisheries, Game, Natural Resources and the State Parks and Recreation Commission plus five citizens appointed by the governor. The IAC's major activity is to administer funds from initiatives, the unclaimed tax refunds from marine fuel sales, and grants from the Federal Land and Water Conservation Fund, to provide for the purchase of marine recreational lands by other state agencies or local governments. The state departments that receive funds are Game, Fisheries, Natural Resources, and the State Parks and Recreation Commission. In general, the IAC allocates its funds among requests from the operating agencies, with priority given to purchases of land that would otherwise be removed from potential future use for marine recreation.

The State Parks and Recreation Commission consists of seven appointed members who supervise general policies of the department. State Parks is the major provider of parks in the state and on Puget Sound—where it has established forty-one marine parks with boat moorages, nine underwater parks, and many boat launching ramps. State Parks purchases potential park lands directly and leases lands from other agencies—including the Federal Bureau of Land Management, Corps of Engineers, and Coast Guard—for development and administration as recreational areas. In addition to its provision of parks, the department also purchases and manages historic properties and runs the state boating safety program. State Parks was also instrumental in establishing the Washington Parks Foundation in 1972, which became independent in 1976. The foundation receives donations and purchases potential park property when it becomes available. Because of the foundation's independent status, it can undertake purchases more quickly than the State Parks and Recreation Commission, which is dependent on much slower legislative processes.

As a by-product of its management of state lands, the Department of Natural Resources has increasingly become involved in recreation. It provides some recreation areas on Puget Sound, and it withdraws from lease availability tidelands and submerged lands in front of parks administered by other agencies. The department, through its beach-mark-

ing program, is also attempting to increase the use of state-owned tidelands for recreational use on Puget Sound.

Washington's state agencies play a major role in enhancing recreational access to Puget Sound's resources. This is also one major area of Puget Sound resource use in which state activities have developed independently of federal activities, even though in recent times federal funds and legislation have had greater impact.

Transportation

The role of state government in Puget Sound-related transportation is less dominant compared to other governments than it is in the areas of property management, fisheries, and recreation. The federal government's preemption of the regulation of commerce and navigation, the Corps of Engineers' construction to enhance water transportation, and local port district provision of port facilities and management of local harbors have left the state with two primary concerns --highways, including bridges, and the ferry system. Both of these activities are managed by the State Department of Transportation and supervised by the State Transportation Commission.

Highways are not generally thought of as a marine-related use, but they do provide land access to shoreline sites and facilitate the shipping of products within and beyond the Puget Sound region. As would be expected, the general highway network is most highly developed in the urbanized and industrialized parts of King, Pierce, and Snohomish counties adjacent to the ports of Seattle, Tacoma, and Everett on the main basin of Puget Sound. Only one major land highway provides access around southern Puget Sound and up the west side.

Access to the Kitsap Peninsula, the west side of Puget Sound, and the islands is provided by a combination of bridges and ferries. The Tacoma Narrows Bridge is the only bridge actually crossing Puget Sound, and it has oriented much of the growth on the Kitsap Peninsula to Tacoma instead of Seattle. The late Hood Canal Bridge (which was administratively part of the ferry system) from the Kitsap Peninsula across to Jefferson County also made Port Angeles and Olympic Peninsula locations much more accessible to either Seattle (via ferry) or Tacoma. The destruction of the Hood Canal bridge in 1979 and the provision of a substitute service with ferries while a new bridge is constructed have certainly raised the visibility of the Department of Transportation as important in the use of Puget Sound's resources.

The most obvious state transportation use and impact on Puget Sound is the Washington State ferry system. The system was the largest in the world in 1951 when the state purchased it, and it has continued to expand in size. The ferry system plays two critical roles on Puget Sound. First, it provides year-round services for businesses, residents,

and commuters across the Sound and to Vashon, Bainbridge, Whidbey, and the San Juan Islands. This has facilitated some economic integration of the Kitsap Peninsula, the west side of the Sound, and the islands with the urban core. For example, over 4,000 commuters regularly ride from Winslow and Bremerton to Seattle and back.

The second major role of the ferry system has been to increase access to attractive less developed areas for recreational uses by residents from the urban core. In summer, for example, ferry ridership increases 60 percent—most of which is for recreational purposes. During this season, limited ferry system capacity can itself be an important rationing mechanism for limiting the recreational pressures and uses of island resources. The rate at which ferry capacity is expanded or ferry trip prices raised, in addition to the provision of access by highways and bridges, will be an important determinant of the future use of Puget Sound resources in lesser developed areas.

Waste Disposal and Water Quality

A major use of Puget Sound's waters is for liquid waste disposal. To some, but not unlimited, extent the discharge of wastes into the Sound is compatible with other uses of the Sound and is the least costly way of disposing of such waste. Such discharges, however, have the potential to damage other uses and users and are regulated by two different state departments: the Department of Ecology (DOE) and the Office of Environmental Health of the Department of Social and Health Services (DSHS). Each of these departments functions under the supervision of an appointed board—the Ecological Commission for DOE and the State Board of Health for the Office of Environmental Health.

The water pollution control activities of DOE and the Office of Environmental Health are closely related. Creation of the State Board of Health was required by the Constitution. Environmental Health approves and monitors public water supplies, waste disposal systems, pesticides and sanitation facilities at marinas, campgrounds, or other recreation facilities. Its main objective is to protect human health. It also monitors commercial shellfish beds and the processing of shellfish products by continual sampling and testing to assure that no health hazards—especially paralytic shellfish poisoning—are present. Other governments, as well as private activities, come under Environmental Health regulations.

Water pollution control in Washington is separate from the simple protection of human health begun under the Water Pollution Control Board in 1945. A discharge permit system was begun in 1955, and in 1971 the Department of Ecology was created to bring together state agencies concerned with water pollution control, water management, and air pollution control. For the regulation of discharges into navig-

able water, DOE operates under both state law and as the administrator of the National Pollution Discharge Permit System for the federal Environmental Protection Agency. While the objective of the National Pollution Discharge Permit System is to eliminate waste discharges by 1985 regardless of the cost or quality of receiving waters and regardless of the availability of federal funds—state law requires DOE to compare carefully the benefits from reducing the discharge with the costs of eliminating it in its permit decision processes. As part of its monitoring of all discharges into state waters, DOE is also responsible for approving sewage and industrial waste treatment facilities and waste discharges into public sewer systems.

In addition to its permit and approval programs, DOE is responsible for coordinating planning to improve water quality throughout the state. For most areas DOE does planning directly with existing local governments, but in some areas it cooperates with local governments and the governor to designate subareas for special joint-agency regional planning. In the Puget Sound region, parts of the Stillaguamish, Snohomish, and Snoqualmie River basins and the Green-Cedar Basin have been designated regional planning areas. It is important to note that although DOE is a state agency, it is administering federal laws. Hence other federal agencies as well as state and local agencies are subject to DOE permit requirements. This gives DOE relatively more authority than other state agencies on major project evaluations requiring discharge permits.

Related Agencies

The state departments and agencies concerned with the management of state lands, fisheries, wildlife, recreation, transportation, and water quality all possess clear mandates and constituencies directly related to the use of Puget Sound. A number of additional mission-oriented state agencies also influence Puget Sound. For example, in 1967, the state created the Oceanographic Commission of Washington and its research arm, the Oceanographic Institute of Washington. The Commission (not funded for 1982-83) was a single-purpose agency to promote oceanographic activity in Washington. The Institute undertook research and education on specific marine resource use problems. Its research has been an important source of information on several major issues—the most recent of which include meeting moorage demands of recreational boaters and the harvesting of clams and mussels.

The Trade Division of the Department of Commerce and Economic Development promotes foreign and domestic trade and may work with a local port authority to solve a shipping problem or to find a location for a new firm in a port area. The Air Pollution Control office of the

Department of Ecology may also influence the location of an oil transshipment facility through its control over air pollution emissions and standards in relation to different levels of air quality currently existing in the region. In general, however, while additional agencies may influence or even be critical for a single decision, it is the policies of the more directly concerned agencies and coordination processes that provide state government with its greatest influence over the future of Puget Sound.

Coordination Agencies and Processes

As already indicated, Washington State has an extremely fragmented governmental structure organized around specific constituencies. While such a system is very open to citizen and interest group influence, such a system also requires systematic as well as *ad hoc* coordination among its components.

The governor's office has developed two coordination agencies and a cabinet structure to assist the executive to coordinate state agency programs. One agency, the Office of Financial Management, works as a budget and policy analysis arm of the executive to scrutinize each state agency's expenditures. The performance of this office may result in some coordination, but its focus is not specifically on Puget Sound or Puget Sound resources.

The second executive agency that promotes general coordination is the Planning and Community Development Affairs Agency. This office functions specifically to promote integration and coordination among local governments and between state agencies and local governments. As the distributor of federal Department of Housing and Urban Development 701 planning funds, Planning and Community Affairs has played an important role in the development of local shoreline management plans by allocating funds specifically to foster that activity. The Planning and Community Affairs Agency also processes the federally required A-95 information forms when local governments apply for federal funds for local projects.

The third general coordinating process at the state level is the governor's separation of the cabinet into five sections. All of the agencies directly concerned or with major impact on Puget Sound's resources except transportation and health are part of the Natural Resources and Recreation section, and its meetings every five weeks provide an opportunity to discuss the impacts of agency programs on Puget Sound.

Beginning in 1970, four major state processes have been developed to coordinate state agency activities where there are important environmental impacts. These processes or programs are the Energy Facility Site Evaluation Council (begun as the Thermal Facility Site Evaluation Council in 1970), the state environmental impact statement process

(1971), the Shoreline Management Act of 1971, and the master permit procedures of the Environmental Coordination Procedures Act of 1973. The administration of three of these processes—environmental impact statements, shoreline management, and master permits—rests with the Department of Ecology. Thus the Department of Ecology, which was created by combining state water management, water pollution control, and air pollution control agencies in 1970, has become the major administrator of coordinating processes—as well as the regulator of air and water quality—in Washington State and for major decisions on Puget Sound. In this chapter all of the coordinating state processes, except shoreline management, will be discussed. Shoreline management—which relates to both federal and local activities as well—is the topic of a later chapter.

State Environmental Policy Act of 1971

The State Environmental Policy Act of 1971 (SEPA) provides for environmental impact statements whenever a state or local government is involved in a project or activity that has significant environmental consequences. The act parallels very closely the federal environmental impact statement requirements of the National Environmental Policy Act of 1969. Since 1971 the state act has been modified legislatively (1974) and interpreted to apply to any project with significant impacts for which state or local governments issue permits except construction of a single dwelling unit. Given the ubiquitous requirements for building or subdivision permits, this brings most private activity under the act as well. The act has been administered by the Department of Ecology since 1976.

The state act, like the federal one, does not appear to apply any environmental standards. The public official responsible for the project—or for issuing the permit for the project—must first make a determination as to whether the project is a minor or major one. If the project is a major one, then the official must decide if environmental effects are significant and, if so, a report must be prepared that:

- describes the environmental impact of the proposed actions
- notes adverse impacts that cannot be avoided
- indicates alternatives to the proposed action
- indicates the relationship between short- and long-term impacts
- indicates any irreversible effects

A draft impact statement is to be completed when planning of a project is far enough along to make a statement possible, but prior to making final decisions on the project.

After the draft impact statement is filed with the Department of

Ecology. DOE circulates the statement to potentially affected agencies and interest groups for their information. All of the agencies previously mentioned in this chapter, plus the departments of Emergency Services and Agriculture, receive such statements for review. These agencies and affected parties then make their own written comments on the impact statement. Then the draft statement is revised into a final statement and it, together with previous comments, accompanies the project proposal through all permit processes, such as those by DOE for discharges into water or by Game and Fisheries for any work in water such as dock or irrigation diversion construction.

It is important to note that while the state environmental impact statement process does not appear to impose any constraints other than that of an impact statement for major projects with significant effects, the process was designed to greatly increase the knowledge of proposed projects by all affected parties. This increased level of knowledge also makes it necessary for the acting agency to anticipate problem areas and to try to mitigate them during project design—because if it does not, the project is unlikely to receive the necessary permits from affected agencies later on. The impact statement process itself then provides feedback so that the project design can be modified before applications for formal permits are submitted.

The National Environmental Policy Act (NEPA) and the State Environmental Policy Act (SEPA) are not precisely drafted laws. Initial problems occurred with SEPA over whether or not private activities were subject to its requirements (*Eastlake Comm. Coun. v. Roanoke Assoc.* 1973); over legislative discretion in defining "significant effects" (*Norway Hill* 1976), and most recently, over whether a building permit for a building meeting all code and zoning regulations could be denied on purely environmental grounds under SEPA (*Polygon Corporation v. City of Seattle* 1978). In each case the courts responded "yes."

Thus what was originally an information producing policy has been redefined by the courts to become a new constraint on any development (Hillis et al. 1976; Hammer 1978). While environmentally oriented constraints exist throughout the system, SEPA has been more disruptive than most because of the uncertainty surrounding its application. Developers find it more difficult to obtain front-end financing because no one knows how long the process will take; or even if a project meeting all regulations will be permitted. This, unfortunately, is precisely the kind of legislation and court interpretation that have contributed so much to increasing costs of new construction and to squeezing small developers out of the market elsewhere (Frieden 1979; Richardson 1976; Bish and Nourse 1975, Ch. 9), and similar consquences should be anticipated in Washington. Despite some revisions of SEPA since its introduction, the uncertainty introduced by court in-

terpretations has created a situation in which the two-year study currently under way, hopefully to be followed by legislative clarification and a return to its original purpose, would be highly desirable.

Master Permits

For any major project on Puget Sound, many permits from several state agencies are required. In recognition of the difficulties inherent in dealing with many different agencies, The Environmental Coordination Procedures Act of 1973 provides for a single master permit process administered by the Department of Ecology.

The master permit process is essentially a processing of all state agency permits simultaneously with one comprehensive set of hearings. An applicant, at his own discretion, may choose to use this process. First the applicant obtains any necessary local government permissions. He then submits an application directly to DOE. The information required is essentially the same as would be required by all of the agencies that must issue permits for the project—but the application goes to a single department. The Department of Ecology circulates the application to all affected state agencies and interested public parties. A single joint public hearing follows, after which all state agencies forward their decisions to DOE. This simultaneous process, it is hoped, will make permit-processing quicker and facilitate negotiation among affected agencies and the applicant in a concentrated process. As with impact statements, however, the master permit process is one of coordination—not of substitution or elimination of constraints and potential vetoes by individual regulating agencies.

Energy Facility Siting

Large energy facilities are both important and controversial. They also possess the potential for major environmental impacts—and hence require many state permits. In order to reduce the time it takes to make decisions on large energy facilities, the legislature established the Thermal Facility Site Evaluation Council in 1970 and amended it to become the Energy Facility Site Evaluation Council in 1976. This Council consists of directors or representatives from the departments of Ecology, Game, Fisheries, Natural Resources, Agriculture, Commerce and Economic Development, Emergency Services, Social and Health Services, Planning and Community Affairs, Financial Management, the Interagency Committee for Outdoor Recreation, the State Parks and Recreation Commission, and the Transportation Commission, plus a member of the city or county and port district within which the proposed project would be located. This council has the authority to issue a single permit in lieu of other *state* permits.

The processes of the Energy Facility Site Evaluation Council are similar to those of the master permit program in that first the applicant seeks local permits and then makes a single application, with an accompanying environmental impact statement, to the Evaluation Council. The application and statement are then circulated to affected agencies. The Attorney General appoints a lawyer to act in an advisory capacity as the "people's advocate" during the public hearings. A first hearing is held to determine if the proposal is in fact consistent with local zoning and permit requirements—such as shoreline management. (However, according to Attorney General Opinion 1977, No. 1, the Energy Facility Site Evaluation Council can issue a permit *even if* such consistency is not found, but it is virtually certain that such a permit would be challenged in court.) A second hearing is then held to evaluate the proposal—and if it is viewed favorably, a permit is issued. While this permit can clearly substitute for other permits required by state law and probably overcome conflicts with local law, it cannot substitute for federal law even when the federal law is administered by the state. Thus DOE's water and air discharge permits are still required because they are required by federal law administered by a state agency. It is also possible that shoreline management permit requirements—which are part of the federally approved Coastal Zone Management Program—could be interpreted in a similar light by a court. Thus far, however, there is insufficient experience with the process to have developed legal precedent or court interpretations.

The Energy Facility Site Evaluation Council has considerable state authority, but one must remember that the Council is itself composed of representatives of other state agencies—each of which has its own policies and constituents. Thus it is best viewed as a structured coordinating forum designed specifically for a single function. Whether or not such a forum really speeds up permit processing remains to be seen.

In an attempt to quicken the pace of hearings on Northern Tier's pipeline proposal, for example, rules have been adopted by the Council that limit cross-examination and the adversary process legislated into the system. It is highly likely that such expediting measures will simply open any Council decision to court challenge, with the net result being an even longer and costlier decision process in which the outcome depends on procedure rather than on the merits of the case. There is simply no quick way to examine all aspects of major energy facility proposals.

All of the major coordinating processes for state agencies on Puget Sound were created during the 1970s. Thus, from the perspective of institutional analysis, they are relatively new. It would appear, however, that as the master permit process and Energy Facility Site Evaluation Council operate and are modified, they possess the potential to

evolve into useful governmental mechanisms for decisions on Puget Sound. SEPA, in contrast, has not yet evolved to function smoothly, and its costs have been much higher than should be necessary to accomplish its purpose.

Summary

Washington State government possesses an exceptionally fragmented and open structure. This structure provides citizens and interest groups with a degree of access not found in most states nor at the federal level. As with the federal government, the dominant state agencies on Puget Sound are functionally oriented and possess their own missions and constituencies. Within this system, the multiple permit requirements protect the interests of all major users and force considerable interdepartmental negotiation and trade-offs. At the same time, several more formal coordinating processes have been developed for making decisions on major projects. The net result is an open and visible, but complex and often time-consuming and costly state governance framework.

Notes

A recent collection of essays (Mullen et al. 1978) provides information on the constitutional framework and politics in Washington. For more detailed information on what agencies do, one must go directly to agency sources to supplement descriptions provided in the Washington Coastal Zone Management Plan. The Department of Natural Resources has several mimeographed papers on tidelands, shorelands, and submerged lands law and policy, and most agencies have some information on what their activities on Puget Sound are. As with federal agency activities, most information in the chapter comes from annual reports, internal working papers, memos, and phone conversations with agency personnel.

Table 6.1 Local governments in the Puget Sound region

	Clallam	Island	Jefferson	King	Kitsap	Mason	Pierce	San Juan	Skagit	Snohomish	Thurston	Whatcom	Total
County governments	1	1	1	1	1	1	1	1	1	1	1	1	**12**
City/town governments	3	3	1	29	4	1	18	1	8	18	7	7	**100**
Cities/towns adjacent to Puget Sound	*1*	*3*	*1*	*3*	*4*	*1*	*5*	*1*	*2*	*4*	*1*	*2*	*28*
Special Districts													
Total port districts	1	3	2	1	17	6	1	3	2	2	1	1	**40**
Inactive port districts			*1*		*10*	*2*		*2*					*15*
Water districts		7	2	53	18	1	4	1		12	2	10	**110**
Sewage districts		2		19	7		4	1	2	7			**42**
Diking districts		3					1		15	5		1	**25**
Drainage districts		1	1	7			9		8	10	5	9	**50**
Flood control districts				10		1				2		2	**15**
Soil/water conservation	1	1	1	1	1	1	1	1	1	1	1	1	**12**
Park/recreation	1			2	3		6			1		1	**14**
Public utility districts	1		1		1	2			1	1	1	1	**9**
Other[1]	18	12	11	67	25	20	40	9	33	32	26	39	**332**[1]
Total	26	33	20	190	77	33	85	17	71	92	44	73	**761**

Source: Washington State Research Council. *The Research Council's Handbook: State and Local Government in Washington*. 1976 Update, pp. 547-548, with some corrections.

[1] Primarily school, fire, hospital, or cemetery districts which are unlikely to use or have an impact on Puget Sound resources

CHAPTER 6

Local Governments

At last count, there were more than 750 local governments in the Puget Sound region. They are the governments of the 12 counties that delineate the region; 100 incorporated cities or towns, of which 28 are adjacent to the Sound, and 649 special districts. Many of the special districts have no effect on Puget Sound's resources (school districts, fire districts, hospital districts). However, there are 308 special districts directly concerned with ports, water resources, or recreation; and most of these districts carry on their activities adjacent to the Sound or on drainage basins directly connected to the Sound. Some, such as the 25 active port districts, are directly involved in the use of Puget Sound's resources for trade, commerce, and recreational boating, and they are a critical part of the governance process. Others, including many of the 42 sewer districts, discharge wastes into the Sound or its tributaries; and 90 diking, drainage, and flood control districts, 4 irrigation districts (all in Clallam County), and all 110 water districts affect the flow of water in tributaries to the Sound.

The activities of these special districts, plus the activities of the city and county governments surrounding the Sound, create a complex system that plays a major role in enhancing the use of Puget Sound's resources.

Special Districts

Washington State law provides for citizens, through petitions and a vote, to establish special districts for a variety of purposes under a number of different statutes. These districts are created where people share a common problem or want a public service provided, but their geographic area of concern may not be the same as that of an incorporated city or county. The most numerous special districts are those created to provide "urban" services in rural areas (fire, hospitals, water supply, sewage and waste disposal, parks) or to enhance land management (diking, drainage, and flood control) in agricultural areas.

Once established, special districts are governed by a small board of elected officials. Their taxing authority varies; some are permitted to levy a low rate of property taxation, others are financed primarily from user charges. Some also receive grants from the state or federal govern-

ment for major facilities. Special districts provide citizens with an organizational framework for addressing problems and paying for their own services. As a result, county governments are not troubled with providing special services to small areas. The variety of purposes permitted and the ease with which special districts may be created by citizens to resolve common problems are further reflections of the openness of Washington's governmental structure to direct citizen influence and involvement.

Many special districts do use or have an impact on Puget Sound's resources. It is important to note, however, that state and federal laws on resource use apply to these districts and their activities just as they apply to other resource users. For example, a water district requires a permit from the Department of Ecology to withdraw water from a river and a hydraulics permit from the Fisheries and Game departments to install diversion works; sewer districts facilities must meet the standards of the Department of Social and Health Services and any discharges into water must have a permit from DOE. All major projects, in fact, require an environmental impact statement. Thus this network of special districts serves to enhance access to Puget Sound resources, while state or federal agencies with different missions regulate potentially adverse impacts of special district activities.

Metropolitan Municipal Corporations

In 1957 the legislature authorized the creation of large, multipurpose special districts. These districts must encompass two or more cities, one of which has a population of more than 20,000. Such districts are governed by a council composed of members from, or appointed by, the county and city officials of the local governments within their boundaries. Voters may authorize such districts to undertake sewage disposal, water supply, public transportation, garbage disposal, parks and parkways, or comprehensive planning. Any function not performed by the district remains with the other local units within its boundaries.

The ability to form metropolitan-wide special districts provides an institutional mechanism for dealing with problems in urban areas that encompass areas larger than a single city but do not fit county boundaries. County boundaries may also be crossed.

The Municipality of Metropolitan Seattle was created in 1958 and voters authorized its assumption of sewage and industrial waste disposal. The original boundaries contained 231 square miles of western King County and 14 cities. At that time, over one-fourth of the state's population lived within its boundaries. Since its creation, METRO has developed an extensive sewer system within its area, and its installation of sewers around Lake Washington resulted in a major improve-

ment in the lake's water quality. Its boundaries have since been enlarged to include all of King County and it has become the major planner and coordinator for improving water quality in its area. It has also assumed responsibility for public transportation.

Port Districts

In 1911, the Washington State legislature passed laws enabling the creation of port districts. Creation of a district must be approved by voters in the district, and up until 1972 a district could encompass part or all of a county. Since 1972 new port districts must be county-wide. Seventy-eight port districts have been organized in thirty-two of Washington's thirty-nine counties and forty have been organized in the twelve counties of the Puget Sound region. Some of the smaller port districts have become inactive, or been phased out under the 1971 legislation providing for the dissolution of inactive districts. Some appear to have been created to prevent local port development. At present there are twenty-five active port districts on Puget Sound ranging in size from the Ports of Seattle and Tacoma down to Coupeville on Whidbey Island and Brownsville in Kitsap County. No Puget Sound county is without an active port district—although the scope of activities varies widely.

Port districts have a governing body of three nonpartisan elected commissioners (five for Seattle) who are usually interested in the promotion of trade and business. The districts may levy local property taxes up to $.45 per $1,000 assessed valuation for general port purposes. They may also levy up to $.45 per $1,000 assessed valuation for up to six years for the formation of industrial development districts. Additional limited property taxes may be levied for dredging, land fills, and canal construction subject to voter approval, but this authority has yet to be used. Most port revenues, however, come from charges to facility users, including 10 percent of the state Department of Natural Resources' lease fees collected in the port area.

Port districts may take on an extensive range of functions to further commerce, trade, industrial, and recreational developments. They may maintain foreign trade zones; and they may deal with all forms of air, marine, or land transfer facilities including not only airports, docks, and harbors, but warehouses, cold storage plants, belt railways, and facilities for processing or freezing agricultural products.

A port district may also provide its own industrial waste disposal, sewer, water, and other utilities. The Port of Seattle maintains its own police force and fire department, which are among the largest in the state. Legislation was passed in 1972 permitting port districts to issue revenue bonds to finance pollution abatement facilities for private companies, but such use of government credit for private purpose was

Table 6.2 Active public port districts in the Puget Sound region

County	Port District	Year Established
Clallam	Port Angeles[1]	1923
Island	Coupeville	1967
	Mabana	1926
	South Whidbey	1961
Jefferson	Port Townsend	1924
King	Seattle[1]	1911
Kitsap	Bremerton	1912
	Brownsville	1917
	Illahee	1922
	Kingston	1919
	Manchester	1923
	Poulsbo	1951
	Silverdale	1920
Mason	Allyn	1921
	De Waltc	1946
	Shelton	1948
	Tahuya	1972
Pierce	Tacoma	1919
San Juan	Friday Harbor	1950
Skagit	Anacortes	1926
	Skagit[1]	1964
Snohomish	Everett[1]	1918
	Edmonds	1949
Thurston	Olympia[1]	1922
Whatcom	Bellingham[1]	1921

Sources: Department of Commerce and Economic Development, "Public Port Districts," 1975; Williams-Kuebelbeck and Associates, *Washington Public Ports Economic Study*; Washington Public Ports Assn., 1978; Washington Public Ports Assn., *1979 Port Directory*; and phone calls to commissioners, 1980.

[1] Industrial development district also operated by port.

declared unconstitutional by the Washington State Supreme court in the 1974 *Port of Longview* case. There is currently under way an effort to remove this restriction from the constitution.

Port districts may also develop and maintain parks and recreational facilities to utilize more fully harbors and other improvements in the district. In short, port districts have authority to be the major planners and developers of harbor area transportation and industrial support facilities on Puget Sound.

To complement transportation-related activities, since 1955, port districts have had the authority to create industrial development districts within their boundaries. These are operated by the port commissioners just like the rest of the port. Within these districts, the port may provide virtually any industrial, commercial, or trade facility, including the construction and lease-back of buildings and plants. On Puget Sound, the ports of Bellingham, Skagit, Everett, Seattle, Tacoma, Olympia, and Port Angeles have created industrial development districts to further expand their range of activities.

The Port of Seattle is an example of a port that has fully utilized port district enabling legislation. It became a public port district in 1911, immediately upon passage of enabling legislation. Since then it has developed Elliott Bay, the Duwamish Basin, and Shilshole as well

as facilities on the Lake Washington Ship Canal, Lake Union, and Lake Washington. In assets it is the largest port on the West Coast and has become sixth in the world as a container port—second only to New York in the United States. Seattle even handles approximately one-half of the containers entering Canada from the Pacific Coast. The Port of Seattle operates all kinds of warehouses and industrial facilities, including grain elevators, and it maintains one of the foreign trade zones on the West Coast. It also provides facilities for naval vessels and the Coast Guard's vessel traffic system. In addition to its industrial and shipping facilities, it operates the second largest marina on Puget Sound at Shilshole Bay with slips for 1,500 boats and the fourth largest marina at Fishermen's Terminal in Salmon Bay on the Ship Canal, with the largest concentration of fishing vessels in the state. The port has also cooperated in the redevelopment of the Seattle waterfront with the creation of a waterfront park and a recreational fishing pier. The Port of Seattle is clearly a major enhancer and user of Puget Sound resources.

While the Port of Seattle operates the largest port complex on the Sound, other port districts are equally important for their particular areas. The Port of Tacoma has become the major Northwest port for break-bulk cargo, automobile imports, and service to Alaska. It owns nearly twice as much industrial development land adjacent to the harbor as Seattle and has applied for free-trade zone status to increase industrial assembly activity from imported parts. Other port districts on the Sound operate similar or more specialized facilities. The ports of Port Angeles, Port Townsend, Bellingham, Everett, and Olympia all do over one-half their tonnage in logs or lumber. Some others, such as Friday Harbor, cater primarily to recreational boaters and fishermen.

Although the port districts are major entrepreneurs, like other governments, they are involved in a network of relationships with other agencies. The port districts themselves maintain the Washington Public Ports Association, and since 1975 their cooperative development committee has reviewed all proposals for new port facilities. This review process, which is still so new that no proposals have been rejected, has the potential of preventing overinvestment in competing facilities as long as the Department of Ecology and the Corps of Engineers use the committee's recommendations in permit approval decisions. Port activities, like those of all other local governments, require permits from relevant agencies such as DOE for discharges into waters, or from the Corps of Engineers for dredging. Each port also works closely with the business community and city or local government within which it operates—and the port districts provide most of the industrial development activities for local government in Washington that would be assumed by city or county agencies in other states. By any measure of economic impact, and most other measures as well, local public port

districts are the most important developers and enhancers of Puget Sound's resources.

General Purpose Local Governments

Counties and cities are the units of general local government in Washington State. Provision for organization and operation of each is found in the state constitution. All 12 counties in the Puget Sound region possess extensive shorelands, but only 28 of the 100 cities in the region front directly on Puget Sound. All of the incorporated cities in Island, Jefferson, Kitsap, Mason, and San Juan counties are on the Sound, however.

Counties

County governments are both political subdivisions of the state and municipal corporations. As municipal corporations, they may transact business necessary for their operation, but as political subdivisions of the state, counties have only those powers directly specified or necessarily implied in state statutes. Counties have always possessed sufficient authority to govern rural areas, but the organization of county government was specified in considerable detail until 1948. At that time the 21st Amendment to the Washington State Constitution provided for home rule for counties, under which county citizens can reorganize the structure of their government, and this has been done by Clallam, King, Whatcom, and Snohomish counties. Expansion of statutory authority in the late 1960s and early 1970s has also permitted governments to engage in most of the activities undertaken by city governments. Those activities most important to the use of Puget Sound are constructing bridges, providing for public health and storm water control, planning and zoning, providing park and recreation facilities, and planning and operating water and sewer systems.

Cities

Citizens of cities in Washington may organize their governments in several ways. They may adopt the charter appropriate to their size, or since 1969 they have been able to design their own governmental structure under the optional municipal code (RCW Title 35A). The optional municipal code provides cities with "Home Rule," that is, instead of having only those powers enumerated by the state, they possess all the powers consistent with the constitution and not specifically denied by state law. Thus cities may engage in any number of activities to promote the welfare of their citizens.

As with counties, however, the city activities with the greatest relationship to Puget Sound are related to providing for public health and storm water control, planning and zoning, providing park and recre-

ation facilities, and planning and operating water and sewer systems. It should be noted that cities, and county governments in unincorporated areas, may undertake most of the activities undertaken by special districts—but that only cities and counties, and to some extent port districts within their industrial development areas, possess a broad range of authority that includes planning and zoning. It is also through planning and zoning that counties and cities exercise considerable regulatory authority over the use of land surrounding Puget Sound.

Land Use Planning and Zoning

Under state constitutional and statutory provisions, counties and cities can regulate the use of land in the best interest of a community. This regulation, usually exercised through zoning, is the major way that local governments can influence or regulate the use of Puget Sound's resources. Two approaches to zoning are common. One is to designate in advance which activities are to be permitted in different areas. This requires careful land use forecasting and strong resistance to rezoning. The other is to zone all vacant land very restrictively and then process rezoning applications for each major proposed use. In the extreme, every significant development becomes a negotiated one. With either approach, the basic processes used for zoning in both counties and cities are:

Preparation of a master plan. The master plan is prepared by either a consulting firm or the local government planning commission staff. It shows the general patterns of existing and desired future land uses in the area. The planning commission must hold public hearings before the master plan is recommended to the local government governing body (city council, county commissioners, or county council).

Adoption of the master plan. The governing body must also hold a hearing prior to adopting the master plan.

Preparation of zoning ordinances. Following adoption of the master plan, zoning ordinances consistent with the master plan are prepared by the planning commission. The planning commission must hold hearings prior to recommending the zoning ordinances to the governing body.

Adoption of zoning ordinances. The governing body may adopt the zoning ordinances at a public hearing. An additional hearing is required prior to adoption if the planning commission recommendations are changed by the governing body.

After zoning has been adopted, changes must be considered by the planning commission, hearings held, and recommendations made to the governing body. The governing body must hold hearings on the planning commission recommendations before they can be adopted. If the planning commission recommendations are altered, additional public hearings by the governing body are necessary. Final decisions on a particular zoning case rest with the elected bodies of city or county governments.

If there is a conflict between the master plan and zoning ordinance, it is the zoning ordinance that is legally binding, and zoning or zoning changes are not invalidated by the lack of a properly enacted and consistent master plan. Even so, most jurisdictions attempt to use a master plan as a guide for zoning decisions.

Coordination and Constraints

With more than 750 local governments in the Puget Sound region, it is not surprising that a network of systematic relationships has arisen. All of the specific kinds of special districts (port, water, waste disposal, etc.) as well as counties and cities maintain statewide associations. These associations provide for information exhange and lobbying the state legislature for legislation they desire. To supplement general organizations, county officials also have statewide associations for particular functions, including emergency service directors, county engineers, park and recreation boards, planning directors, and local health officials.

Local governments may also enter into specific joint servicing or purchasing agreements with other governments. The Interlocal Cooperation Act authorizes public agencies, including local governments, to contract with each other to perform jointly what they have the power to do individually. An example of this kind of agreement is the purchase of water from the City of Seattle by most of the water districts and cities on the east side of Lake Washington.

Another kind of local coordination has been the formation of regional organizations such as the Puget Sound Governmental Conference, which is made up of Snohomish, King, Pierce, and Kitsap counties. All Puget Sound counties are part of a regional conference, as are many cities, special districts, and Indian tribes. These regional organizations are important for considering questions of growth and land use over multicounty areas and are often involved directly in transportation or major facility planning.

While local governments, especially cities and home-rule counties, possess considerable independent authority, they also interact regularly with state agencies. State legislation limits sources and rates of taxation for local governments. It is common for the state legislature to mandate particular activities, such as the processing of environmental impact statements under the State Environmental Policy Act or local planning for shoreline management. The state government, through the Department of Community Affairs, also attempts to assist local governments resolve problems—such as providing funds to help pay for shoreline management planning.

All local governments, cities, and counties as well as special districts, are subject to the same permit requirements for state and federal

agencies as are private developers. Activities relating to water may require permits from the Corps of Engineers and the state's Departments of Game, Fisheries, and Ecology. Local governments are also subject to supervision by the Department of Health and Social Services whenever public health is involved.

Finally, local governments are subject to one further major constraint: the state legislature can, within the limits of the constitution, change the legislation under which local governments operate. These changes can restrict local authority or mandate that local governments undertake specific actions.

Summary

With the major exceptions of city and county land use control and implementation of the Shoreline Management Act, local governments are primarily users or developers of Puget Sound's resources instead of regulators. Port districts are the major developers of port facilities; and special districts, cities, and counties are the major developers of water supply systems, sewage disposal, parks, diking and drainage. These activities are often undertaken cooperatively, and there is an active network of relationships among the 750 local governments in the Puget Sound region.

Overseeing major aspects of this system and the activities of local governments are state and federal agencies, which require permits whenever there is potential for significant effects on the land or water environment—which includes potential effects on Puget Sound resources. Thus, local governments, like other governments, operate in an open but constrained environment.

Notes

Information on the activities of local governments in Washington has never been systematically compiled. The most complete single source is the Washington State Research Council's *Handbook*, but information on specific activities must be obtained from individual local governments or associations' annual reports and phone calls. A description of local government planning and zoning authority is provided in *Municipal and Regional Planning in Washington State* (1978).

CHAPTER 7

Indian Reservations And Tribal Governments

Little attention was paid to tribal governments in the Puget Sound region until 1974 when conflicts over salmon fisheries resulted in judicial confirmation and specification of treaty rights in Judge Boldt's landmark decision—a decision subsequently upheld by the U.S. Court of Appeals and the U.S. Supreme Court (*United States v. Washington* 1974; 1975; *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.* 1979). These decisions, plus Judge Orrick's 1980 decision (*United States v. Washington* 1980) affirming Indian rights to 50 percent of hatchery runs as well as natural runs and the right to protect salmon and steelhead runs from adverse environmental impacts, have made Pacific Northwest residents well aware of the importance of Indian treaty rights. To understand the implications of these rights and the role of Indian reservations and tribal governments in coastal resource governance, however, it is necessary to look at these institutions and their unique status in the American federal system.

Origins of Tribal Governments

Early American colonies and the original thirteen states dealt with the Indians who occupied territories desired for settlement with a combination of military conquest, the forcing of Indians westward, and treaties. When the Articles of Confederation were signed, responsibility for dealing with Indians was transferred to the national government, where it remained when the U.S. Constitution was drafted. The Constitution is quite explicit that:

> The President shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . (Art. II, Sec.2)
>
> Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes . . . (Art. I, Sec. 8)

Thus when treaties were negotiated and signed, they were enforceable within the federal court system. One would expect this to result in a reasonably coherent and well understood body of law and precedent within the American legal system. Despite many court decisions, however, Indian law has not yet evolved to such a state. One scholar has observed: "The content of Indian law depends upon society's defini-

tion at any point in time of the so-called Indian problem" (Strickland 1979, p. 475). This observation is supported by documented changes in federal policy, and judicial reinterpretation of old decisions from a "new" perspective.

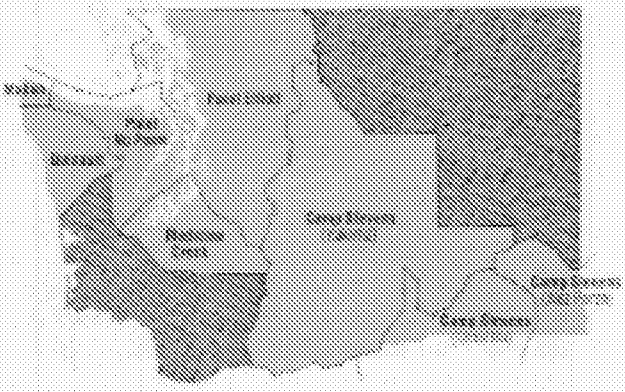
Initially, federal jurisdiction over Indian matters was the responsibility of the Secretary of War. In 1925 the Bureau of Indian Affairs (BIA) was created in the War Department to administer these matters. In those early years, court decisions made it evident that state laws did not apply on Indian reservations (*Worcester v. Georgia* 1832) and further that such reservations and their governments were "domestic dependent nations in the care of the U.S. Government." During this period federal policies were oriented toward separation of Indians from the rest of American society.

In 1849 the Bureau of Indian Affairs was transferred from the War Department to the Department of Interior, and federal policy began a shift from separation to assimilation. Assimilation was fostered primarily by the allotment of reservation lands to individual Indians. This process began on eastern reservations in 1854, prior to the more general Dawes Act of 1887, in anticipation that Indian land holders would become farmers like western homesteaders. It was during this period that Isaac Stevens was appointed Governor and Superintendent of Indian Affairs for the newly created Washington Territory.

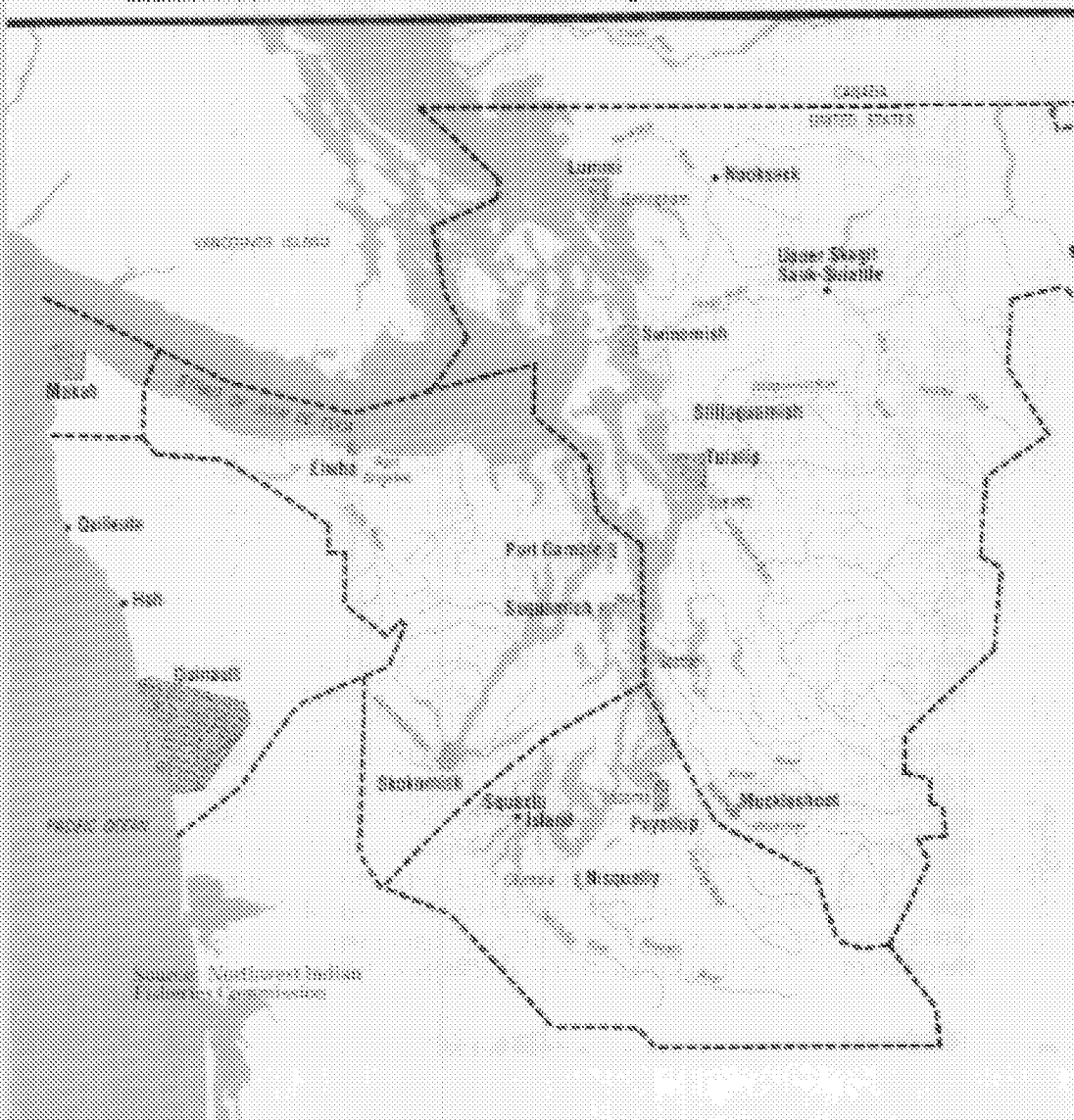
The Puget Sound region did not have a history of Indian war, but now that the boundary disputes with Britain over the Canadian-U.S. boundary had been resolved in 1846, Governor Stevens was concerned that the growing population of settlers would lead to bloodshed unless agreements could be reached quickly with local Indian tribes. Toward this end he negotiated five major treaties with "leaders" of numerous tribes of Indians in Western Washington and with the Yakima, Umatilla, and Nez Perce tribes in Eastern Washington. Three of the Western Washington treaties covered lands adjacent to Puget Sound (Medicine Creek, Point Elliott, and Point No Point). The Makah Treaty covered land on the northwest tip of the Olympic Peninsula, fronting on both the Strait of Juan de Fuca and the Pacific Ocean, and the Quinault River Treaty covered a western portion of the Olympic Peninsula.

The tribes of Puget Sound were divided into three treaty groups by Governor Stevens and each group included tribes that were historically unfriendly. In addition, it appears that the "leaders" of these three groups were often arbitrarily designated by the Governor and were not necessarily the leaders recognized by the Indians. To further complicate the problem, treaty negotiations were conducted in Chinook jargon—a trade "language" of approximately 300 words that was inadequate to convey precise terms of the agreements. The treaties themselves were written in English, a language unfamiliar to nearly all

In mid-nineteenth century treaties were negotiated by the territorial governor of Washington and local Indian tribes. In these treaties, the tribes ceded most of their lands to the U.S. Government but retained certain hunting and fishing rights.



Indian Reservations in Western Washington



of the Indian signers. It was problems of these kinds which eventually led to the U.S. Supreme Court doctrine that:

> . . . in the interpretation of agreements and treaties with Indians, ambiguities should be resolved from the standpoint of the Indians. (*Winters v. U.S.* 1908.)

The provisions of all five of the Stevens treaties were similar. Indians were to cede their rights to most of the land in exchange for which the U.S. Government would protect them from white settlers if the Indians clustered together on reservations designated by the government. In addition, all of the Puget Sound treaties included articles similar to Article III of the Medicine Creek Treaty of 1854:

> The right of taking fish at all usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* that they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter. (Reprinted in American Friends Service Committee 1970, p. 25.)

Through these articles, Indians reserved their rights to fish at their traditional fishing sites and to hunt on unclaimed land throughout the region, while granting to non-Indians the privilege of fishing and hunting in common with the Indians on non-reservation fishing sites and lands.

These treaties also provided that the U.S. Government could unilaterally alter reservations in the future by compensating Indians only for improvements that would have to be abandoned by such changes (see Article VI, Medicine Creek Treaty as an example). In recognition of the assimilation philosophy held by the BIA, the Stevens treaties also provided for the allotment of reservations lands in small parcels to individual Indians who wished to settle permanently on them.

Not all lands originally selected for reservations were suitable for habitation or for agricultural purposes, so some reservattions were later moved. Other reservations were resited for the convenience and well being of non-Indians. For example, when land was needed for an army base near Tacoma during World War I, the portion of the Nisqually Reservation on the north side of the Nisqually River was vacated for the establishment of Fort Lewis.

While the Stevens treaties established reservations, the subsequent attempts to locate reservations where Indians might become farmers was consistent with the emerging BIA thrust toward Indian assimilation as an alternative to separation.

The assimilation philosophy of BIA was given major impetus with the passage of the General Allotment Act of 1887 (Dawes Act). Under

this Act, many Indians not only received individual allotments of reservation land, but also the right after 25 years to sell individually owned land to non-Indians. Where Indian land assigned in this manner had particular value to non-Indians, supplementary laws were often passed to speed up the transfer process. Such a special law, for example, was passed in 1893 to enable non-Indians to purchase Puyallup Indian Reservation lands from Indian owners after only 10 years. This law was passed because of the importance of Puyallup Reservation lands which encompassed nearly all of what is today the Port of Tacoma on Commencement Bay (American Friends Service Committee 1970, p. 54). In this instance, only 200 to 300 acres of the original 23,000-acre reservation remain under Indian ownership.

By 1932, the policy established by the Dawes Act and the direct sale to non-Indians of reservation lands judged by BIA not to be needed by Indians had resulted in the transfer of approximately two-thirds of all Indian reservation lands in the United States to non-Indian ownership.

Where non-Indians inhabited reservation land, such as on the Puyallup Reservation, state and local governments extended their control despite the "legal" status of these lands as reservations under tribal jurisdiction regardless of whether Indians or non-Indians held title to individual lots. Ideally, at least from some perspectives, Indians were being merged into the larger society. If these policies and precedents had continued unabated, there might not have been a "Boldt decision" in 1974.

Indian Reorganization

Major studies of the conditions of Indians during the 1920s presented a depressing picture. Indians were being submerged into the lowest economic strata. Their natural resource-based culture was just not being assimilated into the American society and economy (Meriam 1928).

The federal remedy was to reverse the assimilationist philosophy with the enactment of the Indian Reorganization Act in 1934. Under this act, transfer of reservation lands to non-Indians was halted, tribal rolls were updated, and tribal governments were reorganized. Tribal governments were again to be "domestic dependent nations," in keeping with original treaties. In 1946 the Indian Claims Commission was established to hear and adjudicate claims that arose during the assimilationist period against the government over mismanagement of Indian lands and reservations. This commission is just now finishing its work.

In 1952, federal Indian policy shifted once again. At that time there was a return to an assimilation philosophy (apparently with the aim of simply reducing federal expenditures) through the early termination of

reservations (although no reservations were terminated in Washington State during this period as was the Klamath in Oregon) and through the transfer of civil and criminal jurisdiction over Indians and reservation lands to state governments.

However, Public Law 280 — which embodied this shift in philosophy—recognized the importance of natural resources to Indian culture and included specific language protecting trust land, and hunting and fishing rights in accordance with prior treaties:

> Nothing in this section shall authorize alienation, encumbrance, or taxation of any real or personal property rights, belonging to any Indian tribe, band or community that is held in Trust by the United States or is subject to a restriction against alienation imposed by the United States; . . . or shall deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under Federal treaty, agreement or statute with respect to hunting, trapping, fishing or the control, licensing or regulation thereof.

The preliminary purpose of PL-280, however, was to transfer civil and criminal jurisdiction over Indians and Indian reservations to state governments. The law, passed in 1953, provided three ways for states to assume such jurisdiction:

> Section 2 granted immediate jurisdiction to five states (California, Minnesota, Nebraska, Oregon, and Wisconsin), but in these states exempted several specific reservations that had well-organized tribal governments.
>
> Section 6 permitted states with state constitutional clauses limiting jurisdiction over Indians to assume civil and criminal jurisdiction as soon as those clauses were repealed.
>
> Section 7 permitted states without such constitutional disclaimers to assume jurisdiction over Indians and reservations.

Washington is a Section 6 state, and Article XXVI of the Washington State Constitution still reads:

> That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

One attempt was made to change the Washington State Constitution to enable assumption of civil and criminal jurisdiction over reservations, but that attempt failed — at least partially because of lobbying by Indians. Nevertheless, the legislature did pass a law in 1957 permitting assumption of state jurisdiction by request of tribal governments,

and then in 1963 the legislature passed a law unilaterally assuming civil jurisdiction on reservations over specific civil issues.

The consensus of legal scholars is that this legislative action did not meet the terms of the federal PL-280; however, the Washington State Supreme Court upheld the state's action—and since the U.S. Supreme Court has recognized the Washington State Supreme Court as the ultimate interpreter of the Washington State Constitution, this legislation has been allowed to stand (Baris 1978; Bamberger 1979). Thus under the present law, Washington State governs in such reservation matters as compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles over public roads.

It must be noted that many Indians, especially those with well-organized tribal governments, were and still are strongly opposed to the imposition of state law on reservations. It is also clear that if Washington had been one of the mandatory states under Section 2 of PL-280, some reservations would have been excluded from state jurisdiction because of federal recognition of the adequacy of their tribal governance (Bamberger 1979, p. 149). Thus, Washington State's unilateral extension of authority through what many consider doubtful legal processes did not reassure Indians that they could "trust" state government.

The 1960s Philosophy

The 1960s brought another change in federal policy toward Indians. The reservation termination policy was abandoned and PL-280 was amended in 1968 so that any further assumptions of state authority over reservations required consent of the Indians.

More importantly, however, Indian tribes began using legal channels to challenge violations of treaty rights, with their own lawyers in addition to those of the federal government. These challenges, including those on fisheries rights in Washington state treaties, in turn forced federal lawyers to join the Indian suits or risk suit themselves for failing to represent Indian rights. This interest in protecting treaty rights became a North American movement, paralleling in time the nation's civil rights movement. The results for Indians, from Maine to Alaska, were dramatic. A large number of challenges, including challenges to Washington State government, were upheld by the U.S. Supreme Court and now are recognized as the law through which future conflicts must be resolved. On Puget Sound the most significant of these challenges on Puget Sound has focused on fisheries.

Fisheries Cases

In the Stevens treaties, Indians granted rights to non-Indians to fish in common at off-reservation locations. In the 1850s Indian salmon fisheries relied primarily on fixed site traps and nets, and very few salmon were taken from boats.

There are three major advantages to fixed site trap and net fisheries. First, location of fishing gear at river mouths means taking salmon at peak weight—just after they have reached full growth in the ocean but before upstream migration when they do not feed and when the flesh deteriorates. Second, fixed traps and nets are the most efficient method of taking anadromous fish. Fewer resources and less labor are needed for this kind of fishery, especially in comparison to the resources and labor needed for seiners and trollers. And third, trap and fixed site net fisheries are biologically the most effective for maintaining maximum fish runs. This is because at this point individual runs are sorted out, and escapement on each run can be controlled.

At the time the treaties were negotiated, Indian fisheries management was very much decentralized and was focused on individual rivers and streams. Many of the best trap and net sites were owned through inheritance by the same families generation after generation. Thus there was considerable self-interest in maintaining future runs since the beneficiaries were the families doing the fishing as well as other members of the tribe fishing the same river. In some cases Indians were known to go so far as to regulate escapement between males and females, recognizing that fewer males than females are needed for spawning processes. With these advantages, Indians developed both an effective fishery and a fisheries management strategy prior to White settlement.

When settlers arrived in the Puget Sound region, many of the better fishing sites were already occupied by Indians; however, over time non-Indians joined Indians in the trap and fixed net salmon fishery. By common agreement, proprietary rights over trap and net sites were recognized and often sold by the current occupier to someone else—just as reef net sites off Lummi Island are today recognized by tradition as belonging to particular fishermen who can "sell" the site along with the gear to fish it. This trap and fixed net fishery, however, was a limited one, in that to obtain a highly productive site one had to purchase it from the current holder, and this practice was opposed by others who wished to become fishermen.

In the late 1800s, when the value of salmon increased as a result of the introduction of canneries, many Northwest immigrants, familiar with European net and troll fishing, obtained boats and equipment and began fishing for salmon before they entered the rivers. The result was that the number of fish available to traditional trap and net fishermen was reduced.

When salt-water gill-netting or seining became crowded, the next step was to sail farther from shore in order to intercept fish sooner. Eventually the point was reached where fishermen were trolling for fish in the North Pacific Ocean.

These offshore fisheries for anadromous fish were and are inefficient, and they greatly increase the difficulty of managing the resource. The management problem arises because it is not possible to limit offshore fishing to a single identifiable run indigenous to a specific stream or river; instead fish are caught from several runs mixed together. Even if the number (or proportion of fish) from different runs once caught could be identified, it is still impossible to take different proportions of fish from different runs to achieve optimal escapement to maintain stocks. Instead a crude average is attempted, which means that too few fish escape to maintain some runs while surplus fish escape in others.

The dilemma is especially acute when hatchery fish are mixed with native salmon. Far fewer (from one-half to one-tenth as many) hatchery fish need escape to perpetuate a run since hatchery smolt have a higher survival rate in infancy in the hatchery than do native smolt in the natural environment. Thus managers are frequently faced with the possibility of risking the virtual elimination of natural runs or an unnecessary surplus of hatchery fish if natural runs are protected.

Puget Sound Indians did not move into offshore boat fishing on the scale that non-Indian fishermen did. One reason was they lacked resources to purchase boats and equipment. While traps can be constructed with very little dollar outlay, or small nets used in rivers with or without small boats, offshore boats and equipment usually require outside financing from fish companies or banks. Neither has a history of extending such credit to Indian fishermen, partially because reservation Indians may have very little property that could be used for collateral. (Allotments of land cannot be used as security for loans because they cannot be passed to non-Indian owners.)

Because Indians could not engage in boat fishing on the same scale as non-Indians and because of regulations that ignored Indian rights to fish anywhere except on reservations, Indians were virtually excluded from the commercial salmon fishery on Puget Sound (*United States* v. *Washington* Phase II 1980, p. 4). From 1960-1974, Indians averaged 6 percent of the statewide salmon harvest (Barsh 1979, p. 91), and in 1974 the Indian share was 2.4 percent of the commercial catch.

During the 1960s and 1970s, while the proportion of fish taken by Indians—as well as the total catch—was declining, the two state management agencies Fisheries and Game became increasingly involved in allocating fish among commercial and sports fishermen, as well as trying to control fishing pressure on declining fish stocks. Other

salmon management agencies—the Pacific Fisheries Management Council and international treaty organizations—also become involved in allocating salmon among fishermen with different gear types. In these management systems Indians were neither represented nor their treaty rights recognized, so it was not surprising that few fish were left by the time the runs reached traditional Indian fishing sites or waters. It was also not surprising that state agencies declared that those few escaping fish were needed to perpetuate the stocks and that Indian catches on the rivers could therefore destroy the runs. This was the situation that Indians began fighting both through legal means and through illegal "fish-ins" in the 1950s and 1960s.

Individual fisheries disputes and court cases were numerous during the 1950s and 1960s and in these cases Indians defended their own rights without federal assistance. At the same time many enforcement practices of state agencies, especially those of the Department of Game, violated individual Indian rights to due process and involved illegal confiscation of Indian property. In one 1967 dispute, a Tacoma judge went so far as to resolve a fisheries problem on the Puyallup by simply declaring that the Puyallup Reservation ceased to exist—all law to the contrary (*The Department of Game* v. *The Puyallup Indian Tribe* 1967). Although this decision was later overturned, such decisions did not contribute to Indian faith in the state court system. Finally in 1974, on behalf of treaty Indians, the United States initiated *United States* v. *Washington* in the federal District Court in Tacoma. It was this case over which Judge Boldt presided.

Judge Boldt's decision combined segments of anthropology, history, law and fisheries science (*United States* v. *Washington* 1974). Its most important rulings, however, were (1) that treaty Indians are entitled to the opportunity to catch up to 50 percent of the treaty area harvestable salmon under Washington State jurisdiction and (2) that when Indian tribal governments are organized to regulate tribal fisheries and fishermen they, rather than the state, will undertake that regulation within all usual and accustomed places and grounds. In addition, Judge Boldt ruled that the salmon catch on reservations for ceremonial purposes and subsistence was not to be counted in the Indian's share. Postponed for a later ruling were questions concerning whether Indians were to be permitted to catch one-half of the hatchery fish (which in the interim they were permitted to do) and whether Indians had a legal right to protect fish runs from destruction by governmentally sanctioned activities such as dams, logging, or streambed alteration. While Judge Boldt's decision would force major changes in fisheries management, it should not have been unexpected as it simply followed the more recent legal precedents of recognizing and protecting Indian treaty rights by the federal court system (*Sohappy* v. *Smith* 1969).

Reactions to the Boldt decision took three directions: state fishery management agencies and fishermen's organizations appealed; some non-Indian fishermen continued fishing in open defiance of new restrictions; and Indians began to develop and expand their fisheries management systems, both within individual treaty areas and jointly through the Northwest Indian Fisheries Commission, an organization established by the nineteen case area tribes.

Under appeal the federal Circuit Court upheld Judge Boldt's decision --noting that

> . . . the record in this case, and the history set forth . . . make it crystal clear that it has been the recalcitrance of Washington State officials [and their vocal non-Indian commercial and sports fishing allies] which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten. [p. 693]

The U.S. Supreme Court denied hearing further appeal of this decision.

When Judge Boldt's decision was upheld, non-Indian fishermen's organizations brought suit in state court to enjoin the state directors of Fisheries and Game from implementing the Judge's ordered division of the fishery between Indians and non-Indians. State courts, ultimately upheld by the Washington State Supreme Court, ruled that the state departments could not divide the fishery between Indians and non-Indians because that would involve violation of equal protection (the 14th Amendment) for all citizens. This series of state court decisions was contrary to all previous case law involving Indian treaty rights—and was simply wrong according to both legal scholars, and the U.S. Supreme Court (Johnson and Crystal 1979; and McConaughy 1978; *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.* 1979). The state court restriction of state fisheries management, however, forced Judge Boldt to transfer fisheries management from the state agencies to a federal court-appointed master in cooperation with the federal fisheries agencies (National Marine Fisheries Service and U.S. Fish and Wildlife Service), the Northwest Indian Fisheries Commission, and the treaty tribal organizations.

Another complication was introduced when the Canadian members of the Canadian-U.S. International Pacific Salmon Fisheries Joint Commission (IJC), which regulates Fraser River salmon runs, refused to permit the Commission to adjust its regulations to permit an increase in the Indian catch relative to the non-Indian catch within the U.S. share of the fishery. In response, the U.S. district court also assumed management over some IJC fishing regulations as well. According to a U.S. member of the Commission, "Canadian reluctance to cooperate in making Commission regulations that specifically recognize United States Indian treaty rights apparently stems from fear that their native Indians will demand similar rights" (Petty 1979 p. 454).

In 1979 the U.S. Supreme Court ruled on the Washington State equal protection cases, and affirmed the decisions of Judge Boldt and the 9th Circuit Court with minor changes: fish taken on reservations and subsistence and ceremonial fish are to be counted as part of the Indians' 50 percent share, instead of counted separately.

The Supreme Court also introduced language indicating that sufficient salmon to maintain a moderate life-style could substitute for the 50 percent rule, but it is not yet clear what effect, if any, this qualification will have.

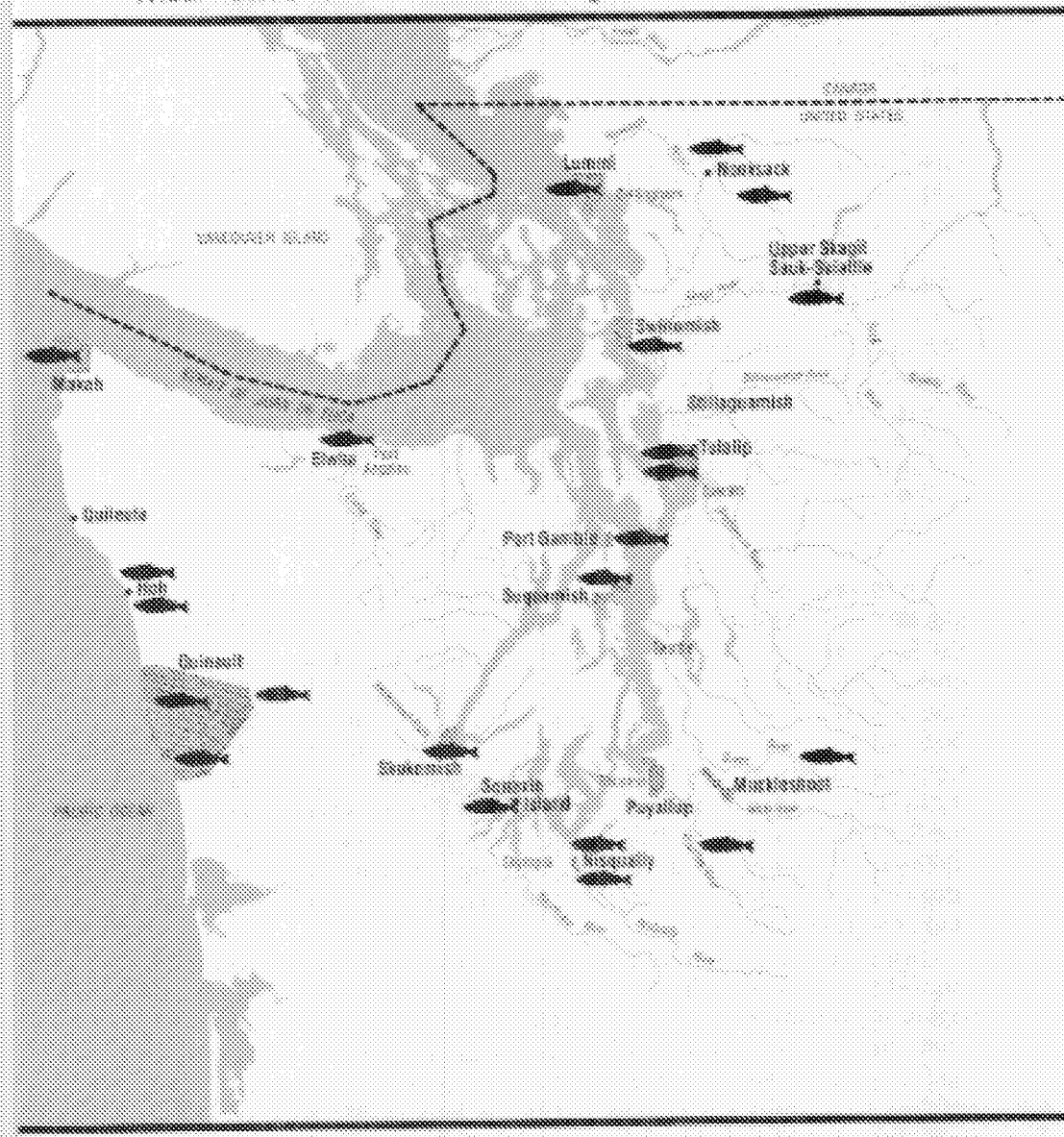
The Supreme Court rejected totally the arguments of Washington State on equal protection as completely without precedent and contrary to previous decisions. The U.S. Supreme Court also had sharp words for the attitudes and policies of Washington's State agencies. At the end of its decision the Court observed:

> The State's extraordinary machinations in resisting the (1974) decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases (citations omitted), the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.

Between the 1974 and 1980 decisions, tribal governments put considerable effort into improving their own fisheries management capacity. Each treaty area elected a fisheries manager, and professional fisheries biologists were hired. The Northwest Indian Fisheries Commission was created by the treaty tribes to serve as a coordinating body. While this commission is governed by elected representatives from each treaty area, it also has developed its own professional staff for fisheries research and management. The Fisheries Commission also led the way to encourage tribal fisheries enhancement projects, and by 1978 approximately 25 percent of hatchery salmon releases in treaty area rivers were from tribal hatcheries (Hearings on Northwest Salmon and Steelhead 1979, p. 145).

Judge Boldt's original decision left two issues for future resolution—the division of the catch from state salmon hatcheries and the rights of Indians to protect the fisheries environment. In September 1980, Judge Orrick of the federal District Court in San Francisco ruled on these issues. His ruling (subsequently appealed) is that treaty Indians do have the right to one-half of all harvestable fish, including hatchery fish. This is consistent with the view that hatchery fish are replacements for native stocks eliminated by government-approved activities such as logging, stream bed alteration, or overfishing. Judge Orrick, however, also ruled that the Stevens treaties bar the state from taking or approving actions that could in future harm the fishery environment. After all, what good does it do to guarantee the right to

Tribal Hatcheries in Western Washington



Source: Northwest Indian Fisheries Commission

fish if the fish are destroyed? It is this latter ruling, if upheld, that has the potential to alter radically the role of tribal governments in decisions on the use of Puget Sound's resources.

The Boldt decisions returned to Indians a voice in managing the fishery resource, and Judge Orrick's decision gave tribes the right to protect that resource from any government approved activity—which, given current permit systems, includes any significant activity—that would harm fish runs. Furthermore, the Orrick decision indicated that as trustee for Indians, the federal government is obligated to share the duty to protect the environment to preserve fish runs.

As a result of these decisions tribal governments are becoming involved in decisions on real estate projects, logging practices, highway construction, port developments (such as Northern Tier Pipeline) or pesticide use—within the treaty area—which includes all of the Puget Sound region and most of Western Washington. Although not all legal battles are concluded, tribal governments have acquired legal status to play a major role in future decisions on the use of Puget Sound and its resources.

Future Directions

Responses to the Indian fisheries decisions have been what one would expect from traditional fisheries management agencies: Obtain federal funds to buy out some non-Indian fishermen, make it easier for Indians to obtain boats, and increase hatchery production. Serious questions can be raised, however, as to whether these approaches will provide net benefits for either Indians or non-Indians.

Studies of salmon fisheries have concluded that open entry permits too many fishermen, and that each fisherman spends almost as much on his boat and equipment as he gets from selling the fish he catches. Since government also spends large sums on fisheries enhancement, it is quite likely that the total cost of running the fishery (hatcheries and enhancement costs plus boat and equipment costs) exceeds the total value of the salmon caught—and hence a valuable fishery results in net losses for society instead of net gains (e.g. Crutchfield and Pontecorvo 1969, ch. 9).

It is difficult to find a rationale why Indians should replicate the errors of the non-Indian fishery by investing large sums in boats to chase salmon around the North Pacific when they could wait for them to return to the mouths of nearby rivers and streams to be caught in traps or fixed site nets. Fisheries could be managed so that non-Indians would no longer intercept the fish offshore before they reach the Indians' fishing facilities. This approach becomes even more appropriate if Judge Orrick's ruling—that Indians can prevent destruction of the fishery environment from other government-sanctioned activities—is upheld.

If Indians adopted such an approach, however, could non-Indian fisheries continue to be fished and managed as they currently are and still meet the 50 percent catch limit—while Indians manage on a stream-by-stream basis? Probably not unless a way can be devised to manage mixed stock offshore fisheries that include runs destined for many streams to assure proper escapement for each individual run. Until that way can be found, Indians probably will rely relatively more on native fish and insist on taking their share from these stocks, and excessive escapement of hatchery fish will be required until hatchery and native runs separate—which occurs in the river system rather than offshore.

It would appear sensible for state agencies to manage salmon on a stream-by-stream basis and eliminate open water fisheries. While in the past this may not have been possible because of offshore foreign fishing on Puget Sound stocks, emerging international agreements, recognizing that anadromous fish are the resource and responsibility of the country within which they spawn, could make a radical return to the Indians' method of fishing feasible. It is clearly not the approach that non-Indian fishermen would prefer—but some people believe that if the results of past fisheries management in Washington are an indication, perhaps salmon management is too important to be left to fishermen, especially if the result is a net economic loss for everyone.

Tribal Governments and Coastal Resource Use

Tribal governments hold a unique place in the American federal system. Within their reservations, they may exercise authority similar to that exercised by local governments. Tribal governments may also incorporate to undertake profit-making businesses—a power that local governments in Washington State lack. Thus tribal governments may engage in resource use enhancement by constructing and operating facilities such as marinas, sewage disposal plants, parks, docks, and fish hatcheries. They may also develop facilities such as resorts or canneries, or combine local government activities with business activities.

In addition to the authority to use and enhance shoreline resources, tribal governments also have the authority to undertake taxing, general land use planning, and zoning within their reservation boundaries. When one remembers that many tribal reservations are occupied by non-Indian landowners (such as the Puyallup Reservation), this can pose a real dilemma because non-Indian owners cannot participate in tribal governance. This area of law, however, is somewhat like fisheries law of the 1960s, and it is not clear whether judges in subsequent litigation will follow Judge Boldt by enforcing Indian treaty rights, or find some way around the implementation of tribal authority in reservation areas such as the Port of Tacoma (Slagle 1979). Tribal authority, com-

bined with the shoreline location of most reservations, has the potential of being an important factor in the future.

Summary

Indians and Indian reservations occupy a unique situation in the American federal system. Historically they have been subject to extreme changes in federal policy, and Indian treaty rights have not always been respected by federal and state governments.

Since the 1970s, however, Puget Sound tribes have won major court victories, assuring respect for their treaties not only in terms of the right to fish, but also assuring them of the right to participate in fisheries management decisions and decisions on any other activity requiring government approval that could have a negative impact upon the fishery environment. Recent decisions go far beyond fisheries and provide the basis for tribal governments to play a major role in deciding future uses of Puget Sound's resources.

Notes

Two major pre-Boldt sources of information on Indian issues are Price's (1973) collection of readings, notes and cases (*Law and the American Indian*), and the American Friends Service Committee, *Uncommon Controversy* (1970). The Boldt decision itself (*United States v. Washington* 1974) provides a comprehensive history of Indian treaties and Indian fishing on Puget Sound. Barsh (1979) also provides a useful analysis of the economics of Indian fishing, and Latourell and Latourell (1975) provide a good description of the different reservations in Washington's coastal zone.

Disputes over state jurisdiction on Indian reservations are well covered in articles by Goldberg (1975), Baris (1978), and Bamberger (1979), and attempts to apply 14th Amendment equal protection rights to treaty issues are analyzed in Johnson and Crystal (1979) and McConaughy (1978). Additional references are cited in the text and listed in the bibliography.

CHAPTER 8

Shoreline Management

The protected shorelines and wetlands of ocean waters are unique for combining a diverse and productive ecology with intense and varied human use. These wetlands and estuaries are an important interface between land and sea and they are exceptionally productive in a biological sense. The biological productivity is sensitive to disruption from human activities, but it is precisely in protected harbors and estuaries where rivers provide access to hinterlands that the shorelines become a location for human settlement. Moreover, it is here that the most complex legal and jurisdictional environment in the United States exists because of federal concern for navigation and maritime affairs, state and local government concern for property and land use, the location of Indian reservations and fishing sites, and the special resource user concerns of many federal, state, and local government agencies. It is not at all surprising that a concentrated effort has been made to examine the natural processes, uses, and governance of this critical area, of which Puget Sound is a classic example.

Shorelines became a significant concern as part of two movements in the 1960s. The environmental movement elevated concern for interdependencies among biological uses and human impacts on natural processes to a national level and generated a series of pollution control and estuarine studies. Most of these studies exhibited a strong interest in minimizing human impacts and preserving the natural environment. Another, but much smaller, movement has been associated with greater use of ocean resources—regarding the ocean as the frontier of the future. Much of this effort has been toward scientific research and technological development to increase human uses of the marine environment. This latter thrust has not been as visible in the mass media as the environmental movement, but its views have clearly been heard in Congress and other policy-making forums.

Preservation of the natural shoreline ecology and exploitation of shoreline resources are often in conflict. However, both movements seem to agree that shorelines and coastal resources can be "managed" through a relatively simple institutional structure, and that only with a simplified management structure can appropriate resource use decisions, including decisions on preservation, be made. The cumulative

result of these movements, plus the concerns of others regularly making use of shoreline resources, has created a popular and political focus on shorelines per se—under the designation of shoreline or coastal zone management.

Chapter 3 examined the constitutional framework for resource use decisions in the United States, and Chapters 4, 5, 6, and 7 described the ways in which different governments have implemented their authority on Puget Sound. These chapters revealed that there are a multiplicity of uses, users, laws, and jurisdictions governing the use of Puget Sound's resources. This, however, is precisely the governance system that advocates of coastal "management" have suggested replacing. Before examining the operation of this complex system, however, it will be useful to examine attempts to impose management on coastal resources. These attempts are exemplified by the movements that resulted in the Shoreline Management Act of 1971 in Washington State and the federal Coastal Zone Management Act of 1972. This examination will reveal how demands are articulated and processed, and compromises made to take into account a new concern in the American system. It will also provide an assessment of the management laws to illustrate their value despite their failure to produce a coastal management system.

Shoreline Management in Washington State

During the 1960s, there was an increasing amount of environmental concern in Washington State and Washington's open political system provided many opportunities for this concern to be expressed. First came a series of *ad hoc* disputes, in which environmentalists were able to disrupt and have reversed through court, administrative, and legislative processes major development proposals.

These projects included an aluminum reduction plant proposed for Guemes Island in Skagit County (1966), an oil refinery proposed for Kayak Point in Snohomish County (1967), a port development proposed at Nisqually Delta in Pierce County (1969), and a new recreational community and marina proposed for Anderson Cove on Hood Canal in Kitsap and Mason counties (1970). In the Guemes Island and Kayak Point conflicts, the environmentalists were in dispute not only with the private firms proposing the developments, but also with the local governments that had approved them. In Nisqually Delta the dispute was directly with a local government—the Port of Tacoma. These disputes and the success of the environmentalists against developers and development-oriented local governments indicated that environmental organizations had the capacity to halt or delay, and hence increase the costs, of future developments on Puget Sound's shoreline (Bish et al. 1975).

In addition, environmentally oriented legislation was introduced into the state legislature in 1967, 1969, and 1970. In 1967 a scenic rivers act was introduced and after its failure, environmental organizations formed a coalition—the Washington Environmental Council (WEC). The Council then promoted ocean beaches and shoreline bills in 1969, again without success. In 1970, despite an alliance with the governor, the WEC again failed to get shoreline management legislation through, although with WEC support, the Department of Ecology was established to coordinate water management and water and air pollution control.

Because of the failure to get a shoreline management bill through in 1970, the WEC developed Initiative 43 (I-43). Initiative 43 was a single interest bill that reflected the preservationist values of the Environmental Council and their distrust of local governments, which they viewed as ineffective, lacking in environmental expertise, and as too pro-development. The basic values of the initiative are expressed in section 2, which stipulated that a comprehensive shoreline plan and regulation of development should give preference to regional interests over local interests; to natural environments over man-made environments; and to location of industrial or commercial facilities in already developed industrial or commercial areas over location in underdeveloped, rural, or residential areas of the shoreline. Responsibility for preparing and administering the plan was placed with the Department of Ecology, and preparation was to proceed through the use of regional citizens' councils instead of in cooperation with local governments. This procedure, plus direct state administration of all substantial development permits, was designed to minimize the influence of local governments and provide a strong environmentally oriented state-administered system.

The indirect initiative process used by the WEC for I-43 provided the state legislature with the opportunity to pass I-43 into law, develop an alternative, or do nothing, prior to the popular vote on I-43 in the 1972 general election. Given the strong anti-local and single-interest focus of I-43, it is doubtful that it would have passed in a statewide election, but shoreline regulation matters had been complicated by a state Supreme Court decision in 1969. This decision requiring abatement of a fill in Lake Chelan called into question the authority to permit fills in any navigable waters without some kind of public planning (*Wilbour* v. *Gallagher* 1969). This court decision clearly strengthened the position of environmentalists in conflicts over development, to the point where some analysts were arguing that shoreline development would be at a stalemate until further public action was taken (Corker 1970). Thus when the 1971 session of the legislature convened, it was known that the WEC initiative would be submitted to voters in 1972

and that some kind of shoreline decision-making process was needed to end the uncertainty surrounding future shoreline use in the state.

Shoreline Management Act of 1971

When the 1971 legislative session began, there was major concern by the Legislative Council, interest groups, local government officials, and individual legislators that some legislative alternative to I-43 be passed for inclusion on the ballot. The only major proposal put to the legislature early in the session was one from the governor's office (HB-548). This proposal contained a provision to separate out "shorelines of statewide significance" for Department of Ecology administration and leave the remainder for local government administration under DOE guidelines. Even this approach, however, was disliked by local officials and most of the same interests opposed to I-43.

Shortly after considering the governor's bill, the chairman of the Natural Resources Committee in the House appointed an *ad hoc* committee of legislators and citizens, which included a law professor, the assistant attorney-general who drafted the governor's bill, and representatives of the Washington Association of Counties and the Washington Environmental Council. This committee developed a bill without publicity, and the Natural Resources Committee reached agreement that only this substitute bill would be reported out. With some amendments and one item veto by the governor, this bill became the Shoreline Management Act of 1971. The most significant differences between I-43 and the SMA of 1971 were that the SMA of 1971 was much less preservationist-oriented and local governments retained major control over shoreline planning and permit administration. The act did retain the concept of shorelines of statewide significance and gave the Department of Ecology the authority to regulate these areas if local government efforts were inadequate.

The most important components of the SMA were quite straightforward. While it retained statements concerning the environment, at the same time it recognized protecting property rights and development consistent with the public interest. The focus was on striking a balance between the use of shorelines and minimizing adverse environmental effects. For shorelines of statewide significance, however, there were general statements of a more preservationist nature. In addition, rather than designation of such shorelines being left to DOE or other administrators, they were specified in the act itself, and any additions to the list required legislative action. In the Puget Sound region, these designated lands included the tidelands and wetlands of the Nisqually Delta, Birch Bay, Hood Canal, Skagit Bay, and Padilla Bay, and all submerged lands of Puget Sound and the straits to the Canadian border. Thus preservationist guidelines would influence permission for any

development requiring fill beyond the low-tide line or any activity on submerged lands.

Administration of the SMA was to be by general local governments under the guidance of DOE, which was to specify general implementing procedures. Then each county or city was supposed to develop its own plan and a permit system for substantial developments within its area. The area for which plans were to be developed was a relatively narrow one 200 feet of shoreline along the Sound, rivers, or lakes plus submerged lands. The definition of substantial developments excluded improvements costing $1,000 or less, normal maintenance or repair of existing buildings, protective bulkheads for single-family residences, noncommercial docks worth $2,500 or less, navigational aids, agricultural structures, diking or drainage structures, or power plants certified by the Energy Facility Site Evaluation Council. Thus the act would apply to most, but not all, nonresidential uses within 200 feet of a shoreline.

The legislature specified that implementation of the SMA begin June 1, 1971, even though the popular vote on the SMA and I-43 would not take place until 1972. Thus, before the popular vote, the SMA was already in process of implementation. The results of the 1972 election are not surprising. Citizens had the opportunity to vote on two issues: 1) "for either" or "against either" alternative; and 2) a preference for I-43 or the SMA. Only if "for either," received a majority on the first vote would the second preference vote have any meaning.

Given the diversity within the Puget Sound region and across Washington State, it is not surprising that different preferences were exhibited in different areas. Six of the twelve counties on Puget Sound preferred neither act: Island, Jefferson, Kitsap, Mason, Pierce, and Skagit. These counties contain only one-third of the population in the Puget Sound region and, with the exception of Pierce County, have limited shoreline development. However, without the King County ninety-two thousand majority for some action, the vote of the remaining eleven counties would have rejected any shoreline legislation by a slight margin (this would have also been true for the state as a whole without the King County vote). As with the rest of the state, which cast 68 percent of its vote for the SMA over I-43, Puget Sound counties decisively favored the law that explicitly left more flexibility for shoreline development and retained basic authority at the local level.

Quite clearly the SMA, which was developed by multiple interests and the legislature, was a more accurate reflection of citizen preferences than was the WEC single-interest bill. At the same time, however, without the forced consideration of I-43 by the WEC and the uncertainty resulting from the Lake Chelan decision, it does not appear likely that the legislature would have come up with a bill as strong as the Shoreline Management Act, if it came up with any bill at all.

Implementing the Shoreline Management Act

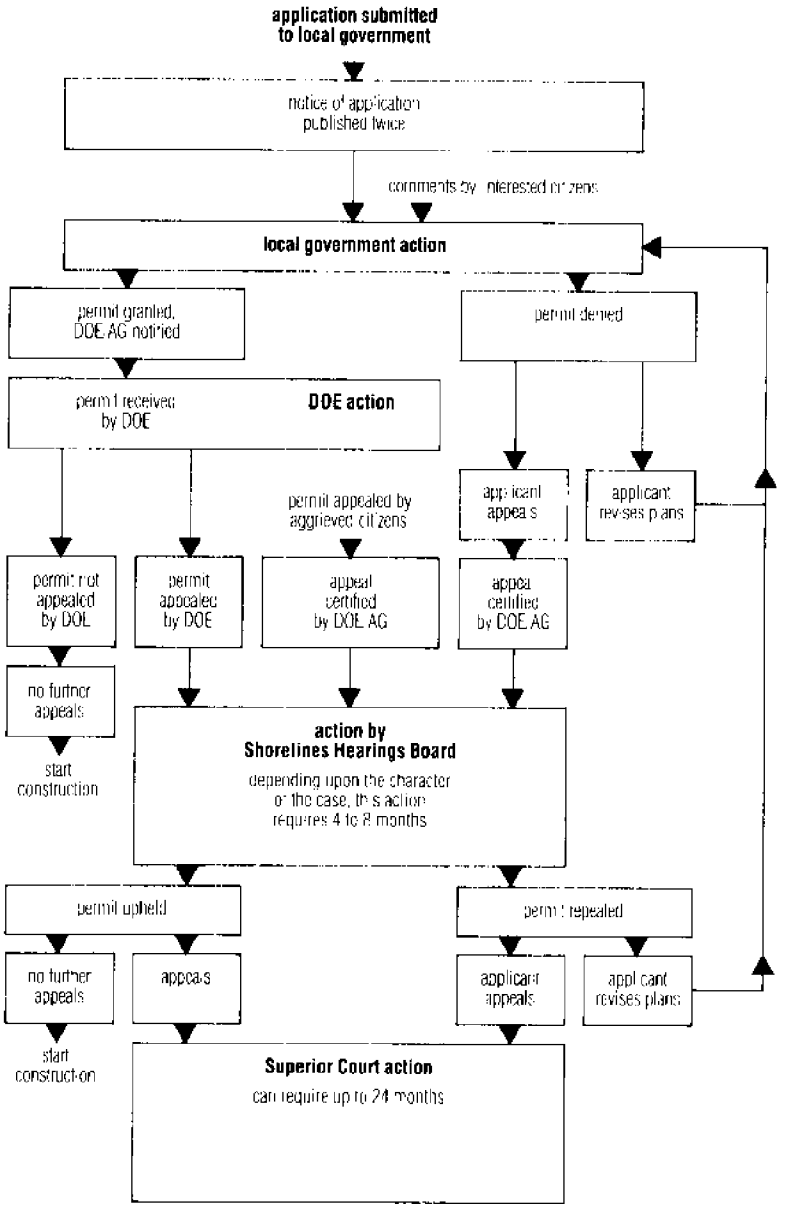
The SMA provided a time schedule for implementation, and the Department of Ecology published its final guidelines in June of 1972. The guidelines provided for each local government to prepare a detailed shoreline inventory and a master program for anticipated future development. The guidelines suggest the use of a citizens' advisory committee to assist with the development of the master program, especially for the development of its statement of goals and general policy. The guidelines specify that the policy statements must take into account economic development, public access, circulation (e.g. transportation), recreation, shoreline use, conservation, and historical and cultural aspects of the shoreline area. The plan itself must take into account natural systems and existing uses to classify shorelines as natural environments for preservation, conservancy areas for careful use, rural areas for agriculture or other low-density use, and urban areas. A set of specific policy guidelines is provided for shorelines of statewide significance as designated in the act itself.

When a master program—which is like a comprehensive plan—is complete, the local government submits it to DOE for approval. The department then distributes the program to state and federal agencies for their comments. If DOE rejects a program, it may prepare its own alternative for shorelines of statewide significance—but no sanction except the withholding of Coastal Zone Management Act (CZMA) funds exists for nonapproval. Upon approval of the original or a revised submission, the master program becomes a state regulation under the Washington Administrative Code. By February 1980, master programs had been approved for all Puget Sound counties and all cities adjacent to the Sound except Steilacoom in Pierce County.

Following approval of its master program, a city or county must develop a procedure to process substantial development permits. These permits are required for substantial developments and for any development in shorelines of statewide significance. After a permit application is filed, adequate public notice must be given and 30 days allowed for citizen comment. Upon reaching a decision, the local government then notifies DOE, the attorney general, and the applicant; and they or any affected party may appeal the issuance or nonissuance to the Shorelines Hearings Board.

The Shorelines Hearings Board is composed of three members from the Pollution Control Board, a representative of the Commissioner of Public Lands, and representatives from the Association of Washington Cities and Washington Association of Counties. Only after this appeal process has been exhausted may dissatisfied parties appeal to the court system. Through 1975 only 7 percent of all certified appeals to the Hearings Board were further appealed to the courts (Washington

Shoreline Permit Procedure



DOE—Washington Department of Ecology
AG—Washington State Attorney General

Source: *Washington State Coastal Zone Management Program*, June 1976, p. 43.

State Coastal Zone Management Plan 1976), and even this small percent should decline as precedents are established.

The implementation of the SMA has gone relatively well, but slower than specified in the legislation. There have been difficulties with inventory compilation because basic data did not exist and local government staffs were too small or lacked the necessary technical skills to undertake such an effort. One must remember that while King County, with more than 3,600 full-time employees, and Pierce County, with approximately 1,500 full-time employees, have large planning staffs, some of the smaller counties with the most shoreline have many fewer full-time employees (under 200 in the four smaller counties) and very small planning staffs, often of only one to three persons. The inventories that were developed also turned out to be too general so that site visits were still necessary to evaluate permits for major projects. The state government has passed through financial aid from HUD 701 planning grants and the federal Coastal Zone Management Program—but the financial burden was still significant for the smaller units. Even so, by 1980 every local government except one on Puget Sound was operating a system under an approved master program.

It is too soon and very difficult to evaluate the impact of the SMA on shorelines, but some decisions are notable. San Juan County has used its permit authority to reject proposals for recreational facilities on state-owned land by both the Department of Natural Resources and the State Parks and Recreation Commission. In contrast, the city of Seattle has used its authority to encourage more public access to shorelines as a condition of permit issuance. It also appears that fills for non-water-dependent uses have been virtually eliminated.

One provision of the SMA, that submerged lands as shorelands of statewide significance be regulated in a preservationist manner, has also led to an intense conflict among the state departments of Fisheries, Natural Resources, and Ecology, and local governments. The departments of Natural Resources and Fisheries are actively promoting clam and geoduck harvesting on state-leased submerged lands, but local governments are opposing these developments because of their unsightliness for local shoreline residents and the potential environmental disruption. They are backing up their opposition by refusing SMA permits in their offshore waters. This use of the SMA by local governments to prevent development is in keeping with the preservationist nature of regulations for submerged lands, although the intensity of the conflict and support for harvesting clams and geoducks by state agencies have already led to recommendations to remove this control from the SMA both to clarify the role of DOE relative to local governments in the permit process for shorelines of statewide significance and to reduce (or eliminate) local government constraints on this particular development activity (Oceanographic Commission of Washington 1981).

While the overall magnitude of the impact of the SMA is hard to evaluate, it is clear that the act has provided for an analysis of Washington shorelines and their uses, identified shorelines of statewide significance, including submerged lands, for more preservationist regulation, and made users conscious of the impacts of significant development decisions.

Federal Coastal Management

The evolution of the federal Coastal Zone Management Act of 1972 was similar to the evolution of the Washington Shoreline Management Act. The federal antecedents include an interest in greater public access to beaches for recreation, an environmentalist attempt to preserve estuarine areas, the marine resources development thrust, and a brief consideration of a national land use planning bill. The concept of national land use planning was rejected in Congressional debate as beyond constitutional authority or political acceptability, just as strong state shoreline planning was rejected by the voters of Washington State. The federal act, like Initiative 43 however, does emphasize state government rather than local government control of coastal land use.

During the 1960s there were a series of commissions, studies, and bills in Congress focusing on estuarine protection and marine resources development. Estuarine protection activities included a bill to establish a Long Island National Wetlands. This bill generated considerable controversy and resistance from New York State and local governments. It was eventually abandoned in favor of "a national system of estuarine areas." Opposition on both constitutional and political grounds again appeared, and eventually only a study of estuarine areas was approved. This study was administered by the Federal Water Pollution Control Board and included preparation of a volume on Puget Sound (Crutchfield et al. 1969). Most of the studies on individual estuaries and the summary report concluded that the problems of estuaries are inseparably related to other resources and that any management system had to deal with the coastal zone in its entirety.

Simultaneously with the estuarine studies, the Commission on Marine Science, Engineering, and Resources (1969, often called the Stratton Commission) was studying marine resources development. The legislation creating the commission and the commission report itself were clearly development-oriented. The report, like earlier estuarine studies however, concluded that the key to effective use of the coastline is the introduction of an effective management system. However, the commission recommended that management be directed from the state government level with federal support rather than from the national level. A second change of emphasis over the estuarine reports was the recommendation that federal assistance be through a proposed

National Oceanic and Atmospheric Administration in the Department of Commerce instead of through the Department of Interior.

During the Congressional sessions from 1969 through 1972, the most active administration proponents of a coastal management act built upon the estuarine studies instead of the Stratton Commission report, and they advocated that responsibility for administration be placed in the Department of Interior. At the same time, Secretary of Interior Walter Hickel began to advocate a national land use planning bill that would subsume estuarine and coastal areas under its jurisdiction. If anything, the recommendation by the Department of Interior for a national land use bill eroded support for an Interior-based coastal management act by congressmen opposed to federal intrusion into areas clearly beyond federal constitutional authority.

While debates over national land use planning and the role of the Department of Interior were receiving the most attention, the Subcommittee on Oceanography of the House Committee on Merchant Marine and Fisheries and the Committee on Commerce, Science, and Transportation of the Senate kept working on coastal zone management bills, and eventually bills assigning administrative responsibility to the Department of Commerce were reported out of the committees. The Senate passed its bill, but the full House added an amendment to give administration to Interior. However, because it was the House Committee on Merchant Marine and Fisheries (which supervises Department of Commerce maritime programs) that had reported the bill out, it was members of that committee who were appointed to the Senate-House conference committee. The House conference committee members then "yielded" to the Senate members by accepting the Senate assignment of administration of the Act to the Department of Commerce. Senator Magnuson, as chairman of the Senate Commerce Committee, played a major role in effecting the bill's passage. Thus, the Coastal Zone Management Act of 1972 was passed. The final bill differed significantly from the original proposals for federal estuarine protection. As with the transition from Initiative 43 to the Shoreline Management Act in Washington, efforts toward the single purpose of estuarine preservation gradually were modified to accommodate a much broader range of interests and focus on procedure as much as on substantive concerns.

Coastal Zone Management Act of 1972

The federal Coastal Zone Management Act (CZMA) is essentially a voluntary participation grant-in-aid program for states. There are no sanctions for nonparticipation, and the federal government was not provided with any additional authority in coastal areas. Such programs are constitutional under the "power to spend," even if unrelated to any enumerated federal concern.

There are two incentives for states to participate in the Coastal Zone Management Program. First, federal aid is provided to cover part of the costs (initially 66.7 percent, raised to 80 percent in 1977) of planning and administration and, second, if a state develops a federally approved management program, federal agency actions within or affecting the coastal zone shall, "to the maximum extent practicable," be consistent with the state program, and any private activities in the coastal zone licensed or permitted by a federal agency shall be consistent with the state program. These federal consistency clauses are a more important incentive for many states than grant funds for developing state programs because they give a state government some control over federal government activities in its coastal zone.

States may receive federal funds for developing their programs, but to obtain continual aid and federal consistency requires that state programs meet a list of legislatively stated conditions and become an approved program. The conditions listed in the 1972 act are procedural; none indicates either a preservationist or development bias. One requirement is that a state plan include provisions for such activities as identification of boundaries, definitions of uses, and planning the siting of energy facilities. In 1976 the act was amended with the Coastal Energy Impact Program to provide additional federal grants and loans to state or local governments whose jurisdictions were negatively affected by new energy facilities.

A second procedural requirement is that there be "full participation by relevant federal agencies, state agencies, local governments, regional organizations, port authorities, and other interested public and private parties." A state government may delegate responsibilities to local governments, but that state must have some method for controlling land and water uses or have the power to approve or disapprove local decisions. And finally, there must be a method of assuring that local control does not unreasonably restrict or exclude land and water uses of regional benefit, and that the state itself must take national concerns into account in planning and management decisions.

Implementation by Washington State

Legislation creating the State Department of Ecology, the Energy Facility Site Evaluation Council, the Shoreline Management Act, and the State Environmental Policy Act was all passed in Washington prior to passage of the CZMA. Washington's programs were easily adaptable to federal CZMA requirements. The Department of Ecology provided a single state agency for the federal agency to deal with. The Energy Facility Site Evaluation Council provided a mechanism for considering energy facilities, and the Shoreline Management Act set up procedures and guidelines for local government planning and administration of a

Coastal Zone Management Act of 1972

Excerpts from Section 305
Management Program Development Grants

(b) The management program for each coastal state shall include each of the following requirements:

(1) An identification of the boundaries of the coastal zone subject to the management program.

(2) A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.

(3) An inventory and designation of areas of particular concern within the coastal zone.

(4) An identification of the means by which the state proposes to exert control over the land uses and water uses referred to in paragraph (2), including a listing of relevant constitutional provisions, laws, regulations, and judicial decisions.

(5) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

(6) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, areawide, state, regional, and interstate agencies in the management process.

(7) A definition of the term "beach" and a planning process of the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value.

(8) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for anticipating and managing the impacts from such facilities.

(9) A planning process for (a) assessing the effects of shoreline erosion (however caused), and (b) studying and evaluating ways to control, or lessen the impact of, such erosion, and to restore areas adversely affected by such erosion.

No management program is required to meet the requirements in paragraphs (7), (8), and (9) before October 1, 1978.

Excerpts from Section 307
Coordination and Cooperation

(c) Consistency of Federal activities with state management programs; certification.

(1) Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs.

(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. . .

shoreline use permit system that could include all other procedures required for an approved program. The appeal procedures to the Shorelines Hearings Board also provided for state government review of local government decisions. The one major ingredient of federal program requirements missing from these state processes, however, was full participation of affected federal agencies in the development of both state and local government programs.

Washington's programs had been legislated and implementation begun prior to passage of the federal CZMA, and there had been no attempt to include federal agencies in the process. After all, federal agencies usually could not be bound by state laws, and even after passage of the CZMA in 1972, federal officials did not appear to recognize the potential importance of the federal consistency clause in the CZMA. The result was very little contact and virtually no federal agency input into Washington's shoreline management act processes or the development of the more comprehensive CZMA proposal. Finally, only two months before the March 1975 submission of the Washington proposal to the National Oceanic and Atmospheric Administration (NOAA) for approval, the Department of Ecology mailed packets to federal agencies to secure information on their coastal activities. This request for information did not meet the intent of the federal legislation, and when the Secretary of Commerce requested comments on Washington's program, virtually all federal agencies recommended nonapproval because of the lack of substantive federal agency input and the neglect of procedures to take into account national objectives in the development of the state program.

Ironically, and in stark contrast to the conflicts between federal agencies and DOE, and between the departments of Fisheries and Game and Indian tribes, the relationship between DOE and Indian tribal governments has been cooperative and beneficial. The legal status of reservation lands is clear: they are not subject to state regulation. However, with that understood, DOE has provided CZMA funds for tribal governments to proceed with their own shoreline inventories and shoreline management plans. Tribal governments have, in turn, engaged consultants for much of the work, and detailed inventories for reservation lands have been completed and planning is under way for both preservation and development activities. Because of Indian concern for preserving salmon fisheries, these plans also reflect a strong interest in environmental preservation and appear to be highly compatible with preservationist-oriented shoreline management. Thus, even though tribal governments and Indian reservations are not legally a part of the SMA and CZMA processes, common interests between tribal governments and DOE have led to increased capacity for tribal governments to manage their own lands consistently with SMA and CZMA

Excerpts from formal review comments on the proposed Washington State coastal management program—March 1975

Assistant Secretary of Defense
In summary, we have no substantive comments to offer on the draft environmental impact statement, but we do strongly object to the final approval of the State plan at this time. . . . We object to the approval of the plan primarily because national security interests were not adequately considered in the program development.

Secretary of the Interior
. . . we would urge that approval to permit implementation not be granted at this time, and that a revised environmental statement covering the improved submission be circulated to give reviewers an opportunity for a more meaningful review. . . . The State should modify the proposal to specifically recognize the expression of National interest and the importance of the Federal role in the natural resources activities.

Administrator, Federal Energy Administration
The Federal Energy Administration has reviewed the Washington Coastal Zone Management Program. Although the program has much to commend, its treatment of energy concerns is cursory. We recommend that it not be approved as submitted. . . . FEA's principal reservation concerning Washington's proposed program is that it does not sufficiently evidence consideration of the National interest in energy facility siting in planning for uses of the coastal zone.

Regional Administrator, Region X Federal Energy Administration
. . . the program does not appear to sufficiently protect the national interest in the use of the coastal zone.

Commandant, 13th Naval District
The program as represented by documents submitted, does not address significantly most of the Navy's concerns . . . in view of these basic shortcomings, it is recommended that the Navy recommend against Department of Commerce approval of the State of Washington's Coastal Zone Management Program until conditions of approval are fully met, a resolution of Federal and local government policy is achieved and included in the program, and the Navy's serious concerns are adequately addressed, both in the program and the environmental assessment.

Administrator, Bonneville Power Administration
We feel that the application should not be approved until the State of Washington develops a coastal zone management program in concert with all "principally affected" Federal agencies, including [Bonneville Power Administration] . . . . It is recommended that the application not be approved until the program clearly reflects the state's intentions not to interfere with the role of the Federal Government in terms of managing the Federal Columbia River Power System . .

Chief of Staff, 13th Coast Guard District
How will the term "national interest" be defined. . . .We feel that the proposed program is unacceptably general in that answers to the above questions are not apparent. Consequently, we can only recommend that the program not be approved until clarification is provided and any resulting conflicts are satisfactorily resolved.

Source: Report to Congress by the Comptroller General of the United States, 1976. *The Coastal Zone Management Program: An Uncertain Future*, pp. 97–98.

objectives. Severe conflicts remain, however, between DOE and other federal agencies over the issue of federal consistency.

Federal Consistency

A revision submitted by Washington State was approved by NOAA in 1976, and Washington's program became the first one approved under the CZMA. Although statements of national objectives have been inserted, the issue of federal consistency was postponed by excluding all federally owned or leased lands and all Indian reservations from the definition of Washington's coastal zone. This expedient decision, however, leaves unanswered a major coastal resource use question: the relationship between federal agency actions and a federally financed and sanctioned shoreline use planning process.

There are several potential questions concerning the federal consistency issue. One is legal: Under existing legislation, including the CZMA, what authority does the state have in regard to federal land use activities? The second is substantive: How could be achieved the goal of having federal agencies participate in shoreline planning processes and be subject to consistency with the resulting plan?

Following submission of its amended program exempting federally owned or leased lands, the Department of Ecology requested the U.S. Attorney General's opinion on the degree to which federal agency actions were subject to Washington's program. The opinion was essentially "not at all." Legal arguments have been advanced by state and federal officials and independent analysts. William Brewer, Jr. has argued:

> Congress has asserted its undoubted constitutional power to enact general legislation governing the activities of the executive agencies in the coastal zone, and in so doing has assimilated state law—to the extent incorporated in a coastal zone management program—directly into the body of federal law governing the missions of such agencies. (Brewer 1976)

Brewer goes on to note that although Congress may declare state law applicable where it prefers, it *cannot* declare federal lands as not in the coastal zone and thus not subject to state law if those lands are proprietary (Title IV) lands instead of lands over which the federal government has sole discretion (Title I). One could add that federal Title IV lands could also be managed for a constitutionally enumerated purpose and thus federal law would preempt state law—but any remaining Title IV lands are subject to state law with or without the CZMA federal consistency clause. Brewer's arguments are congruent with the U.S. constitutional treatment of federal lands and the intent of the CZMA.

In contrast to Brewer, B. H. Williamson (1978) has argued that the waiver of federal immunity, e.g. wording of the federal consistency provision, is not specific enough in the CZMA, and hence the state cannot

bind federal agency actions to the state program. Williamson also points out that the U.S. Attorney General's opinion may be correct because the CZMA uses the language "sole discretion" instead of "sole jurisdiction" in describing which federal lands are exempt, and only "sole jurisdiction" would unequivocally designate Title I lands only. To clarify this important issue, the state has filed a lawsuit to force federal agency compliance but the suit will not be relevant and will not come to trial if the CZMA program is discontinued as proposed for the 1982 federal budget. This suit could have provided an opportunity for some clarification of the general problem of federal agencies claiming that their proprietary lands are exempt from state control. However, the court also could have declared federal lands in Washington's coastal zone exempt because the state did not follow proper procedures in implementing the CZMA and thus have avoided the more difficult question of the status of Title IV lands.

The issue of federal consistency, however, is more than a purely legal one. The question remains how can local government-based shoreline planning take into account national objectives and obtain meaningful participation by federal agency representatives for lands within the local government's area? This question would not in itself be resolved by a court decision. What is clear, however, is that some change in procedure by local governments and DOE will be necessary, as will be a change in attitude by federal agencies, before this problem is resolved whether or not the federal CZMA program continues.

Washington State has achieved an approved CZMA program, but the combination of failure to solicit and involve federal agencies early in the planning process, the unclear wording on federal consistency in the CZMA itself, and the resistance of federal agencies to any state control over their activities leaves a potentially serious void in Washington's shoreline management process. Thus one of the two incentives for participating in the federal program has not been realized. Now if federal funds are discontinued, the incentives for federal-state cooperation will be further reduced—but Washington's system, which predated the CZMA, will remain if state and local governments are willing to provide approximately $1.5 million needed to maintain current staffing.

Change in the System: SMA and CZMA

Both the SMA and CZMA are more procedural than substantive, although the SMA provides policies for shorelines of statewide concern and 1980 amendments to the CZMA show some concern for preservation very similar to SMA policies for shorelines of statewide significance. Just what differences do these acts make in the context of other laws and jurisdictions on Puget Sound?

First, and most important, neither the SMA nor CZMA has anything to do with "management" in the sense of specifying particular shoreline uses and proceeding to bring them about. Both acts set up procedures, but the two procedures that specifically affect the direct use of shorelines are (1) zoning for a 200-foot-wide strip of shoreline and submerged lands and (2) a requirement for a permit for any substantial developments under the SMA. Ideally, this zoning is integrated into a local government's comprehensive plan so that the zoning relates to more than a 200-foot-wide strip and the adjacent waters. The requirement of a shoreline permit, however, is added to all other permit requirements such as for buildings, for discharges into navigable waters, and so on, and it is not clear that this kind of local zoning under the SMA will be any more effective in managing land use patterns in the future than other kinds of zoning have been in the past.

What appears to be more important than the permitting process itself has been the development of shoreline inventories and the attempt to zone for future uses, including uses of submerged lands, increased knowledge and raised the visibility of shoreline issues to many public officials. Thus, at least for now, the system has been sensitized to examine impacts on shorelines more closely—but if such sensitivity is lost, the permit system by itself is unlikely to generate it. The one important exception to this may be on shorelines of statewide significance (which includes all submerged lands)—where a specific list of state-legislated policies exists—and where local permits are monitored very closely by DOE. Thus just because a management system has not been created and there is no reason to expect that a shoreline permit will be any more important than any other permit do not mean that the SMA and CZMA are unimportant. They are best viewed, however, as another addition to a very complex system, and an addition whose long-run consequences are as yet unknown.

Notes

The history and development of Initiative 43 and the Shoreline Management Act are covered in Bish et al. (1975). A history of the federal Coastal Zone Management Act is provided in Zile (1974). The controversy over federal consistency is treated in the Comptroller General's 1976 report, and revealed in comments on the Washington proposal by federal agencies in their review of the program prior to its rejection, revision, and approval.

CHAPTER 9

Specialization, Cooperation, And Rivalry

The use of government to develop and regulate resource uses on Puget Sound within the framework of the U.S. and Washington State constitutions has resulted in a multiplicity of quasi-independent agencies active on Puget Sound. Most of the agencies have specific objectives and constituencies, but the interdependencies among them and the limited natural resource base result in an organizational environment in which both cooperation and rivalry result. To understand these interdependencies and the operation of the system, it is useful first to examine the relationships within major resource use areas, and then to examine the network of relationships whereby one kind of resource use is related to another.

Enhancement and Regulatory Subsystems

Ports and Navigation

Commerce and navigation are major concerns of the federal government, and harbor improvements by the Corps of Engineers were among the first programs developed by the new national government in the United States. Federal law, however, stipulates that Corps projects cannot favor one port over another and the Corps responds to requests from congressmen or other officials for harbor improvements rather than initiating its own projects independently. Congressmen and local officials, for whom their port is very important, must take the initiative to propose harbor developments and assure that sufficient wharves, warehouses, and port facilities exist to attract cargo to their area — which in turn strengthens their case for Corps projects. In Washington State, local port districts are organized to perform this latter role. The relationship between the federal Corps of Engineers and local port districts is mutually beneficial in that the better either one does, the more support is generated for the other's programs.

There is also a close relationship between port activity and the economic well-being of other business in a port area. This has led to close cooperation between port districts and other local governments, state promotional agencies such as the Department of Commerce and Economic Development, and federal agencies such as the Department of Commerce's Maritime Administration — all of which have programs to support economic growth.

Although there is cooperation among some agencies, there is rivalry among local port districts. To some extent, the more cargo one port attracts, the less other ports will receive; and this rivalry can lead to more port investment than is really necessary to handle all the cargo. These rivalries, however, such as exist between Long Beach and Los Angeles, Oakland and San Francisco, and Seattle and Tacoma, have also encouraged a rapid rate of technological innovation that probably would not have occurred under less competitive conditions. The net result is a system of highly efficient ports with some excess capacity. To deal with the problem of excess capacity, the Washington Public Ports Association has created a cooperative development committee to evaluate new port investments and make recommendations to agencies that provide the permits necessary before new facilities can be built. This committee must strike a balance between overinvestment and stagnation by permitting sufficient competition among ports to stimulate their development. Being overly restrictive could slow innovation and cause Washington's ports to lag behind others on the West Coast.

Both the Corps and local port districts are primarily resource developers in that their activities facilitate, rather than regulate, commerce and navigation. The Corps' regulatory role—approval of all projects in navigable waters and for dumping of dredge spoils—also gives it the authority to protect navigation from intrusion by other uses. The state constitutional mandate setting aside submerged lands and tidelands within harbors for trade-related uses also gives protection to local port districts in their competition for scarce shoreline space.

The other major agency concerned with trade and navigation is the U.S. Coast Guard. The Coast Guard facilitates ship movements with navigational aids and regulates ship movements and ship safety. On Puget Sound this involves cooperation with the Canadian Coast Guard to operate the vessel traffic system, and cooperation with international agencies to set standards for ship construction. Coast Guard regulations take the concerns of commercial shipping into account.

This combination of the Corps, the port districts and the Coast Guard, supported by others interested in economic development, provides comprehensive promotion and regulation of port and navigation user concerns. None of the agencies from different levels of government directly duplicates one another, and the rivalry among local port districts encourages responsiveness and higher trade volumes. Government enhancement and regulation of port and navigation concerns are well developed on Puget Sound.

Fisheries and Wildlife

One of the first acts of Washington as a state was to create a Department of Fisheries to regulate fish, game, and waterfowl; and the depart-

ment quickly began to enhance the fisheries resource through its hatchery program. There was a feeling among sportsmen, however, that Fisheries was overly concerned with commercial enhancement to the neglect of recreational interests, and the Department of Game was created to provide a voice for sports interests. Because salmon remained the responsibility of Fisheries, however, the department still has the difficulty of simultaneously representing two different constituencies—commercial and recreational salmon fishermen. The division of species between the two departments has eliminated direct competition between them, however, and they cooperate to enhance fisheries and wildlife and protect natural environments. In general, Game and Fisheries also cooperate with their federal counterparts—Interior's U.S. Fish and Wildlife Service and Commerce's National Marine Fisheries Service. For example, Game administers federal waterfowl regulations and part of the federal Marine Mammal Protection Act under contract to Fish and Wildlife. There are potentials for conflict, however, when the interests of state resource users differ from those of a federal constituency. One conflict is illustrated by the recent controversy over Indian fishing rights.

The Department of Fisheries has always taken the initiative for salmon enhancement and regulation on Puget Sound and Game has done likewise for steelhead. Neither of these agencies, however, paid attention to the special fishing rights Indians possessed under treaties with the U.S. government. When Judge Boldt ruled that Indians were entitled to one-half of the fisheries catch in their usual and accustomed fishing places, the Department of Fisheries was enjoined by the state Supreme Court from administering the federal court decision; and a court-appointed master in cooperation with the National Marine Fisheries Service and the Coast Guard took over management and policing of the fishery. Thus cooperative relationships between federal and state agencies may turn into rivalry and conflict when additional factors enter in. Now that Indian rights to fish have been clearly established, it is necessary to develop new cooperative fisheries regulations that include tribal governments and the Northwest Indian Fisheries Commission as well as state and federal agencies.

The most solid form of cooperation among fisheries and wildlife agencies occurs when they deal with other resource users or other countries. Both the Department of Fisheries and the National Marine Fisheries Service participate in international negotiations over salmon. Because both Fisheries and Game administer hydraulic permits, they have the authority to control in-water construction on rivers to protect fish migration. Both the federal and state agencies, and now Indians, must be consulted before Corps of Engineers permits for construction or spoil disposal in navigable waters can be issued, and all are con-

sulted on Department of Ecology discharge permits and on environmental impact statements under both state and national environmental policies. To reduce redundancy for applicants, Fisheries and Game also utilize Corps permit applications for issuance of hydraulic permits.

Finally, Game and Fisheries participate on the state Energy Facility Site Evaluation Council, and U.S. Fish and Wildlife and the National Marine Fisheries Service participate in federal energy facility approval processes. Thus the fisheries agencies play a major role in protecting the natural environment. As the rights of Indians to protect fisheries environments are integrated into the entire system, all of the fisheries and wildlife agencies will be in an even stronger position than in the past to protect the natural environment.

Recreation

Recreational uses of Puget Sound are too diverse to comprise a single constituency or be represented by a single agency. Recreational fishing and hunting are regulated and enhanced by those agencies that deal with fish and wildlife; recreational boating is enhanced by the Corps and local port districts and regulated by the Coast Guard. Another recreational agency on Puget Sound is the federal Heritage, Conservation and Recreation Service, which provides funds to the State Interagency Committee on Outdoor Recreation (IAC), which in turn allocates those funds among the Departments of Game, Fisheries, Natural Resources, the State Parks and Recreation Commission, and local governments. These organizations provide recreational facilitities on the Sound. Although State Parks is the largest single provider of recreational sites, recreation is an area of multiple providers in which individual projects may be operated by one agency and owned by another. Many cooperative agreements to provide recreational facilities also extend beyond the major agencies and include facilities such as the Corps of Engineers Carl F. Engbert Garden Park near the Hiram M. Chittenden Locks in Seattle and the leasing of Coast Guard lands in the San Juans by State Parks.

There appears to be cooperation among recreation agencies despite their potential duplication and their clear rivalry over IAC funds. This cooperation, however, was forced by the creation of the IAC through the initiative process, and in order to be eligible for funds the operating agencies had to define their roles and work out a state plan. Now the rivalry is less important because the tremendous demand for recreational facilities is much larger than can be accommodated.

Recreation agencies are resource use developers and not regulators. None of the agencies, except those concerned with navigation or fish and wildlife, has control over permits for other uses that would impinge on their activities. Thus despite the growing demand for recre-

ation on the Sound, the recreation provision agencies are not as cohesive or as strong as agencies involved in commerce or fisheries.

Waste Disposal and Water Quality

Most agencies that dispose of wastes in Puget Sound are local or regional governments. State government began pollution control in relation to human health in the 1890s, and the Department of Social and Health Services continues those activities. State government also created the Pollution Control Hearings Board in 1945 and began regulating industrial waste discharges in 1955. In 1970 the federal government preempted state water quality regulation on navigable waters—but the federal Environmental Protection Agency has developed its regulations in cooperation with the state, and the state Department of Ecology administers the federal regulations. These regulations apply to all waste dischargers including local governments and METRO as well as to industrial firms. The result is a relatively simple system in which local governments provide collection, treatment, and outfall facilities, and the state Department of Ecology administers the National Pollution Discharge Elimination System for EPA.

There is a clear conflict in the system between dischargers and DOE/EPA regulations. This conflict has resulted because EPA regulations call for expensive treatment and eventually for complete elimination of waste discharges into water across the United States—even in waters such as Puget Sound, where there may be sufficient dilution and mixing to eliminate potentially harmful effects from nonchemical outfalls. The major rationale for this technological approach appears to be to impose higher costs on industries discharging into salt water so that they do not obtain a competitive edge over industrial plants that pollute more fragile fresh waters. Thus local governments (and taxpayers) and local industry are paying a very high price to satisfy a federal policy—when there are not always apparent benefits. These concerns are understood by the state Department of Ecology, and it will be interesting to see if the department is able to articulate the views of state residents to obtain more reasonable federal policies toward Puget Sound than have been forthcoming so far.

Shoreline Use

Until 1971 any regulation of shoreline use was a byproduct of local government planning and zoning, port district development, and Department of Natural Resources leasing policies. With the passage and implementation of the Shoreline Management Act, however, general purpose local governments, in cooperation with the Department of Ecology, have begun to regulate the use of shorelines and submerged lands. It also appears, however, that the legal status of local government

shoreline master programs as state regulations has imposed public scrutiny on a formerly unobserved conflict between local and state government agencies. In the past, state agencies such as State Parks or the Department of Natural Resources could establish facilities on state lands as they pleased—beyond the control of local planning and zoning. Now, however, state agencies are subject to the local shoreline management plan, and local governments have rejected permit applications from state agencies—including both State Parks and DNR—for recreational facilities and geoduck and clam harvesting within their jurisdiction. The exclusions from increased public beach access were not the consequences anticipated when the SMA was adopted, but the rejection of mechanical and hydraulic shellfish harvesting on submerged lands is consistent with the preservationist thrust for shorelines of statewide significance.

Shoreline management is clearly a cooperative program between the federal Office of Coastal Zone Management, the state Department of Ecology, and usually with local governments—at least as far as obtaining agreement on procedures is concerned. However, because procedures are not biased toward either development or preservation except on shorelines of statewide significance, it is not clear if these agencies will maintain strong support over time because their constituency is very diffuse in contrast to development constituencies of other agencies such as the Corps of Engineers, the state's departments of Fisheries and Game, and local port districts. And in fact with the proposed diminution of funding for the federal CZMA in 1982, this weakness is further emphasized.

Enhancement and Regulatory System

When the major resource uses of ports and navigation, fisheries and wildlife, recreation, waste disposal and water quality, and shoreline decision-making on Puget Sound are examined separately, the organizational structures within each area are relatively simple and easy to understand. Different levels of government are also involved in different aspects of activities—and no single level dominates all areas. For example, the federal government is a major enhancer of ports and navigation and a major regulator of navigation and water quality; state agencies have played the major role in fisheries, wildlife, and recreation (with Indians now joining them in fisheries); and local governments are major developers of ports and waste disposal and regulators of shoreline use. Only rarely are agencies relatively unconstrained by others, such as with the Coast Guard's regulation of navigation and EPA's regulation of water quality. And even those activities are subject to other constraints such as environmental impact statement processes, legislation, and the courts. In all other areas, there is either duplication (e.g. in

recreation) or a potential for duplication (e.g. in fisheries) in case an agency fails to perform. The potential for duplication is a critical characteristic for the adaptability and resiliency of complex systems over time, as failure in any component organization can be easily compensated for. At the same time, a complex system with multiple veto points can produce rigidity and delay until accommodations are reached or major legal changes made.

Major Developments

There is a reasonably well-defined set of relationships within resource uses, but major projects such as a marina, new port facility, oil transshipment port, or shoreline recreational resort are likely to impact several resource uses simultaneously. For example, a marina would enhance recreation but also would be a component of harbor development, potentially would affect fish migration along shorelines, possibly would cause local water pollution, and would be a major use of a shoreline. The decision-making process itself then becomes more complex. Potential support for the marina could come from a local port district, which in turn might enlist aid from the Corps of Engineers. Both agencies have the capacity to provide funds and undertake construction of facilities. There might also be support from recreation agencies, which could provide funds for special public access—such as provision of a boat ramp. The major regulators would be the Corps of Engineers (construction in navigable waters), the Department of Social and Health Services (sewage disposal facilities), the Department of Ecology (discharges into navigable waters), and the local general government (zoning and a shoreline permit). In addition, a lease for the occupation of tidelands and submerged lands would have to be obtained from the Department of Natural Resources. These are the agencies a developer would deal with directly, but not all of the agencies that would be involved.

Before the Corps of Engineers could issue a permit for construction in navigable waters, it would have to consult with fisheries and wildlife agencies and it would have to hold hearings to permit any interested party to be heard. Because the Corps also would be issuing a permit, an environmental assessment—or more likely an environmental impact statement—would be required. This provides another opportunity for any interest to have its views taken into account. Finally the state Department of Ecology would also have to obtain comments on any discharge permit from fish and wildlife agencies, and a state declaration of significance and most likely a state environmental impact statement would be required. The net result is that some major agency representing each major user constituency has a voice in approval, modification, or disapproval of the project. A similar scenario exists for

any major use of Puget Sound's resources. A developer, even if a public agency, may choose to deal with all state agencies simultaneously through the Department of Ecology's master permit process, but local and federal agencies would still have to be dealt with separately. Finally, one must remember that if any agencies do not maintain an "appearance of fairness" in all procedures, any dissatisfied party may appeal a decision to the courts and have the decision nullified.

The costs of decision-making on major projects in such a system can be quite high—just as the impacts of a major project may be extensive. For energy facility developments, which combine national importance with major local impacts, the federal government provides financial aid to state and local governments through the Coastal Energy Impacts Program to support planning and decision-making costs (This aid may be discontinued in 1982). This aid, for example, has been provided to Clallam, Island, Snohomish, and King counties to analyze impacts from the Northern Tier Pipeline Company proposal. While financial aid to support technical studies and participation by local governments in these decisions may reduce some problems of high costs, the uncertainty surrounding major projects is still an important problem.

It is difficult to describe all of the relationships among users and agencies involved in the enhancement or regulation of Puget Sound's resources. One can portray, however, the major enhancers, supporting enhancers, major regulators of a use, minor regulators and regulators to protect a use from the impacts of other activities in a simple matrix—Table 9-1.

The most powerful agencies are those that are simultaneously major resource enhancers and regulators of both the specific use and other activities that may impinge upon it. These agencies include only the Corps of Engineers and Coast Guard at the federal level, Fisheries and Game at the state level and Indian tribes with regard to salmon and steelhead. Other regulators such as EPA, DOE, DNR and general local governments may exhibit considerable authority, but these agencies do not have the same kind of constituency support as do enhancing agencies—and are thus more subject to erosion of their strength over time. For example, the Corps of Engineers, the Coast Guard, and the departments of Game and Fisheries have powerful constituencies that benefit from the agencies' activities to a much greater extent than EPA, DOE, DNR, or general local governments in their administration of the Shoreline Management Act.

Table 9-1 shows that no federal or state agency is a major enhancer in more than one area, except when provision for one use, e.g., ports for shipping, also provides for another, e.g., facilities for recreational boating and Indian tribes within their own reservations. Only the U.S. Coast

Table 9.1 Agency missions in the Puget Sound region

	Ports			Navigation			Commercial fishing			Sport salmon fishing			Waste disposal			Water quality			Shoreline use			Non-salmon sport fishing and wildlife			Recreational boating			Parks		
	ENHANCEMENT	REGULATION	PROTECTION	ENHANCEMENT	REGULATION	PROTECTION	ENHANCEMENT	REGULATION	PROTECTION	ENHANCEMENT	REGULATION	PROTECTION	ENHANCEMENT	REGULATION	PROTECTION	ENHANCEMENT	REGULATION	PROTECTION	ENHANCEMENT	REGULATION	PROTECTION	ENHANCEMENT	REGULATION	PROTECTION	ENHANCEMENT	REGULATION	PROTECTION	ENHANCEMENT	REGULATION	PROTECTION
Federal agencies																														
Coast Guard	●	◆	■								◇														●	◆	■			
Corps of Engineers	●	◆	■																						●					
Environmental Protection Agency											◆																			
Fish & Wildlife Service																						●	▲	■						
National Marine Fisheries Service				●	▲	■																								
Washington State agencies																														
Department of Ecology											◆									▲										
Department of Fisheries				●	◆	■																								
Department of Game																						●	◆	■				●		
Department of Natural Resources				○																◆		●			●			●		
Department of Transportation	●																													
Interagency Committee for Outdoor Recreation																						●			●			●		
Parks & Recreation Commission																						●			●			●		
Local governments																														
Counties/Cities									●											◆								●		
Port districts	●																								●					
Special districts									●																					
Puget Sound tribal jurisdictions																														
Within reservations				●	◆	■			●											◆		●	◆	■						
Outside reservations				●	◆	■																●	▲	□						

● Major enhancement and development of use
• Supportive enhancement
○ Promotion of aquaculture

◆ Major regulation of use
◇ Major regulation of oil pollution and waste discharge from boats
▲ Minor regulation of use

■ Major protection of use from impacts of other activities
□ Protection of steelhead only
▪ Supportive protection of use

Guard, which regulates navigation and oil pollution, is a major regulator of more than one use. *Thus all federal and state agencies are primarily single-purpose organizations.* In addition, except for recreation and fisheries, there are few major resource-use enhancers and very little day-to-day duplication—but all areas possess potential redundancy. This is complex perhaps, but not unreasonably so for the magnitude of the problems involved.

Constitutionalism

The U.S. federal system was designed to provide multiple points of access and to prevent any single component from abusing its authority. Constraints were to be imposed by public officials with different responsibilities constraining one another. In addition, the time and debate in multiple forums were supposed to assure that all sides of an issue were well explored before major decisions were actually made. The system that has evolved on Puget Sound clearly meets the conditions considered so important by the founding fathers. Just meeting these conditions—multiplicity, redundancy, multiple decision points, and so on—however, may best be viewed as a necessary, but not necessarily a sufficient, criterion for effective governance of Puget Sound's resources.

CHAPTER 10

Evaluating the Governance System

There is no perfect method for evaluating the performance of complex systems—and different analysts may reach different conclusions. Two major sources of different conclusions are: 1) whether the analyst "knows" what the results of a system's operation should be or, instead, accepts the values and judgments of affected persons as a guide; and 2) whether an analyst compares the existing situation with a vision of Utopia (in which case no system works) or with the magnitude of the problems. The approach taken in this evaluation is not to postulate a Utopia, the author's or anyone else's, but to focus on a series of issues that relate to both decision processes and to outcomes. These issues, listed below as the questions first posed in Chapter 2, involve knowledge and access, consideration of trade-offs, decision-making costs, certainty, adaptive capacity, fairness, and the maintenance of essential characteristics of the natural environment. By focusing on these issues, individuals can draw their own conclusions as well as become aware of the magnitude of the problems involved. One should note that these issues and questions focus on the entire system, and not on particular organizations or single uses where indicators in terms of effectiveness, efficiency or responsiveness to a single clientele would be more appropriate. One should also note that the observations on each criterion are very much the impressions of the author.

Evaluative Criteria

Does the institutional structure provide relevant information for all concerned individuals and groups to make their preferences for the use of Puget Sound's resources known and considered?

Washington's state and local governments are very accessible to citizens. The existence of many elected state officials, commissions to supervise state departments, and the potential for initiative, referenda, or recall petitions all contribute to this openness. Local governments are equally open. Entry into local politics is not controlled by political parties, and it is relatively easy to form a new local government if existing ones are unresponsive or do not possess appropriate boundaries. Of equal or even greater importance, however, is the multiplicity of single-purpose agencies that often make citizen politics unnecessary because

some government official has the specific job of looking out for a group of citizens' interests. For example, if there is a threat to fisheries, a citizen can anticipate that officials from the departments of Fisheries and Game will look out for his interests. In cases where no existing governmental agency provides sufficient advocacy on behalf of a constituency, citizens have found it possible to create new agencies (Game was created by initiative to provide better representation for sportsmen; the Inter-Agency Committee was created by initiative to force cooperation among state recreation agencies) or to have new laws passed (the Shoreline Management Act). In general, one must conclude that Washington's system is an open system.

Knowledge of access is also important. The extensive use of citizen access indicates that well-organized interest groups know how to work the system. The openness of the system also makes conflicts visible and increases the general level of information available in newspapers and other news media, and the federal and state requirements for environmental impact statements increase information about significant projects. The institutional arrangement of subsystems illustrated in Table 9-1, with major agencies clearly identifiable in each area, does not appear too complex for any seriously affected person to understand, and if individuals pay attention to the subsystems they are concerned with, knowledge is generally available. Only if one is completely new to the system or if one is trying to comprehend everything (as comprehensive planners would like to do) is the multiplicity of agencies confusing and complex. A simpler appearing structure might make it easier for a newcomer or comprehensive planner to "understand," but the transformation of the visible cooperation and rivalry among separate agencies into internal bureaucratic decision-making would greatly reduce the overall level of knowledge available to citizens and members of other organizations.

It is much more difficult to determine the openness of federal agencies to citizen influence because of the sheer size of the federal government. There are many layers of bureaucracy and many procedural steps between a citizen and his congressman and a federal agency operating on Puget Sound. It is also clear that federal agencies may choose to operate with considerable independence—even if large numbers of local citizens are opposed to their actions. The decision by former Secretary of the Interior Cecil Andrus to expedite the consideration of the Northern Tier Pipeline is an example. However, when compared with parliamentary systems (Canada, Great Britain), the U.S. system provides exceptional citizen access.

Does the institutional structure provide the means to take into account a wide range of alternative courses of action in response to these preferences and to compare and choose among the trade-offs inherent in each?

The institutional structure governing Puget Sound's resources is comprised primarily of single or limited purpose agencies. Such agencies are often criticized for not taking all potential trade-offs into account in their decision-making (with the implication that one grand management agency would). However, one must focus on the entire system to determine if trade-offs are considered in interagency relations. Table 9-1 illustrates that at least one major agency in each major subsystem could regulate effects of other resource users on its own resource. This authority has permitted Fisheries to require contributions to fish hatcheries from agencies wanting to use rivers in ways that reduce salmon runs, and even federal agencies cooperate. For example, the Corps of Engineers has installed a salmon fish ladder at the Hiram M. Chittenden Locks in Seattle to facilitate salmon migration into Lake Washington.

There is no way to assure that all possible trade-offs are always considered or that all problems are resolved smoothly, but with agencies holding veto positions over one another, it is in the interest of agency personnel to consult with one another informally, to compromise, to seek new solutions, and to avoid conflicts that could lead to stalemates. The regular, but unofficial, meetings of government officials (such as the Musk Ox group—named after the way threatened musk oxen form a circle, horns pointing outward, to protect their vulnerable hind ends) play a major role in facilitating these deliberations. To the extent that such groups help agency personnel resolve conflicts, they also reduce publicly visible conflicts and make agency jobs easier. Finally, the development of the environmental impact statement review process provides opportunities to suggest modification in projects to accommodate affected parties, and the creation of the master permit process at the state level was designed to facilitate trade-offs by bringing representatives of all agencies together simultaneously.

While trade-offs occur regularly, one can also identify many resulting problems, some of which are caused by government policies. For example, pricing vehicle rides on ferries below the cost of providing them encourages vehicular overuse instead of greater walk-on ridership, fewer trips, or alternative destinations. It also appears that federally legislated standards for discharges into Puget Sound may preclude more efficient discharge strategies to preserve clean water. In general, whenever users can benefit without incurring cost, or whenever a fixed standard is set, there is no incentive to seek more efficient trade-offs. On Puget Sound it is precisely the system of multiple agency vetos that

forces a resource user to take into account the costs imposed on others and negotiate with them so that net costs are minimized. Thus, the institutional structure on Puget Sound is one that does provide incentives for agencies to search for a wide range of trade-offs.

Are the time and costs of decision-making reasonable in relation to the magnitude of the issues?

A major problem in any complex open system is the time and costs incurred in reaching a major decision. After a decision is made, one always wonders why it took so long.

Each access point where citizens or other organizations may influence a decision increases the time, cost, and uncertainty of making that decision. For example, the Fish and Wildlife Coordination Act of 1958, which required the Corps of Engineers to consult with fish and wildlife agencies before issuing a permit, increased the time, cost, and uncertainty for Corps permit applicants; and requirements for environmental impact statements have clearly increased the time, cost, and uncertainty for shoreline developers. Furthermore, when one agency's decisions are contingent on the actions of another agency, which has its own constituency, decision costs will be higher and outcomes less certain. These high costs have been obvious with the Skagit nuclear power plant, Port of Tacoma harbor improvements, Weyerhaeuser's proposed log export facility at DuPont, and expansion of clam and geoduck harvesting on submerged lands.

Unfortunately, relatively high decision costs cannot be avoided if project reviews and permit processes, including citizen access, are to be meaningful. Most recommendations for coastal or shoreline "management" schemes are directed toward reducing decision costs in the system. Because decision costs are clearly high on proposed changes on uses of Puget Sound, the potential for such an achievement will be reconsidered after all evaluative questions have been dealt with.

Do the decision processes produce an awareness of the consequences from a multiplicity of perspectives?

One way to reduce decision-making costs is to reduce citizen access. However, if access is restricted, knowledge about the consequences of a project is likely to decrease because representatives of fewer perspectives participate. For example, the geological instability of Puget Power's Skagit River site (which up to May 1, 1979, included 73 days of hearings, 15,916 pages of transcript—not including prefiled material—and 174 exhibits spread over 6 years) or the lack of demand for the capacity provided for in Northern Tier's proposed pipeline are the kinds of information that are more likely to be brought out and are best explored from a variety of perspectives instead of in a closed, sin-

gle perspective, decision process. Thus, the problem is to strike a balance between decision costs and knowledge about needs and consequences. One should anticipate high decision costs and long processing times occurring in an open system precisely where the stakes are high and uncertainty of consequences exists. Decision-making on Puget Sound clearly fits this category.

Do individuals participating in the system develop compatible mutual expectations on which to base their decisions and thus reduce conflicts?

In an open-access and highly participatory decision-making system, the preferences of affected individuals and organizations become widely known. This knowledge makes it possible to predict the responses of different interest groups to proposals, and thus time and effort can be devoted to accommodating these groups instead of entering into long and costly disputes. Knowledge of their preferences and concern for accommodating them can lead to expectations about future developments that are widely shared and accepted by most as a compromise scenario. To the extent that mutually compatible expectations exist, conflicts and decision-making costs will be reduced without diminishing access to the system.

In the Puget Sound region, a reasonably high consensus on use practices has emerged from past disputes. Because of this consensus it is unlikely that anyone would propose a major industrial facility in an undeveloped area—as was the case with proposals for siting an oil refinery and aluminum reduction plant in the 1960s—yet similar projects are likely to be acceptable in developed areas. At the same time, however, new issues lacking consensus continually arise to be debated, legislated, and adjudicated, such as concern for toxic wastes, salmon ranching, coal exports, and the uses of submerged lands. As long as there is a changing world, the emergence of new issues is a continual process in which the legal system may never anticipate every issue to provide predictability. It is likely, however, that one may still predict the attitudes of different agencies and groups in any open system such as that on Puget Sound—even if one cannot always predict precise outcomes.

Is the institutional structure flexible enough to compensate for failures and to avoid damaging irreversible actions? Can new knowledge be introduced and used and can new problems be resolved?

The open governance system on Puget Sound is clearly an adaptive one. Adaption occurs in many ways. Old laws have been reinterpreted as when the Rivers and Harbors Act of 1899 was applied to liquid pollution in the 1960s. Agency responsibilities are changed, as when re-

sponsibility for regulating discharges into navigable waters was transferred to the Environmental Protection Agency from the Corps of Engineers and when the fish and wildlife agencies were authorized to comment on Corps of Engineers permit applications. Also, new agencies with new constituencies are created, as with EPA, the Washington State departments of Ecology and Fisheries, and METRO. In Washington State the greatest flurry of recent activity was in 1970-71 when fourteen environmental protection bills, including the Shoreline Management Act, were considered in the legislature, and similar activity continued.

Previous discussions of the evolution of constitutional law, federal, state, and local governments, and shoreline management all illustrate adaptive capacity—with a minimum of major failures—of the system on Puget Sound. And the overlapping capacities of agencies provide some assurance that even if a single agency makes a major error or fails to carry out its responsibilities, there will be other agencies to correct those errors or assume those responsibilities.

Are the institutional structure, its processes and outcomes, regarded as fair and ones that promote a high level of agreement on the decisions that result?

This is a question that individual citizens must answer for themselves—and not all would answer yes. Two aspects of fairness need to be considered. One is whether the constitutional structure is itself biased so that some users or uses consistently win over other uses or users. The examination of the governance system presented in this volume does not reveal permanent coalitions of either winners or losers and there are no obvious pro-development, pro-environmentalist, or other pro-con biases over time. Puget Sound continues to be used for multiple purposes by a variety of users.

A second component of fairness is a stable legal system so that if one plans and works within that system one's expectations are generally realized, or at least not frustrated by an apparently arbitrary decision. This kind of fairness is what is meant by a government of laws, rather than a government of men. It reduces uncertainty in decision-making, not by guaranteeing outcomes, but by not changing the basic rules in the middle of the game.

Most decisions on Puget Sound are made within a stable legal system, but there are examples in which the rules of the game have been changed to frustrate individual expectations in ways that appear unfair. Many of these changes have been attributable to the courts, either directly or indirectly by their not curtailing other governmental officials to act within the bounds of the Constitution. The U.S. Supreme Court decision *United States* v. *California* (1946) giving submerged lands up

to three miles offshore to federal instead of state governments was clearly a change in the rules of the game. Another example was the Washington State Supreme Court expansion of State Environmental Policy Act power to allow an official to refuse a permit on aesthetic grounds for a building meeting all code and zoning regulations. These decisions are judge-made retroactive law—which is the antithesis of the rule of law envisaged in the American system. Fortunately, such decisions are exceptions among the great number of cases the courts are called upon to decide.

Reconciling overall constitutional fairness with a stable legal system is difficult when systemic inequities have existed for a long time. For example, fairness has been lacking for a long time in the treatment of Indians and their treaty rights. According to the U.S. Supreme Court, the government of Washington systematically discriminated against Indians—depriving them of their rights to due process, violating the 14th amendment applying "no taking of property" to state governments, and ignoring their violated Indian treaty rights.

The federal system of multiple jurisdictions did eventually work out a solution to the Indians' problem. The dilemma is, however, that while the solution may be fair to Indians in redressing systemic bias, it is now difficult to consider it fair to non-Indian fishermen who invested in boats and fishing equipment under the assumption that state regulation of fisheries was legal. Now, one must ask, is it fair to ask taxpayers to bear the costs of bailing out the non-Indian fishermen by purchasing their boats and making expensive investments to expand hatchery production?

Fairness is an elusive objective—but an objective no less worthy of being sought just because of that elusiveness.

Does the institutional structure produce decisions that balance human uses of Puget Sound with the maintenance of essential characteristics of the natural environment?

This volume has focused on institutional arrangements for governing Puget Sound—not on the impact of man's activities on natural environments. Hence any detailed answer to this last, but important, question is not contained in this text.

It is obvious to any observer that human activities have clearly altered particular physical and biological environments on Puget Sound, especially in urbanized areas such as Commencement and Elliott bays. It is also clear that dams, logging, and land development have altered the physical characteristics of many of the Sound's tributary rivers. Three unsettling effects of these activities include the virtual disappearance of the native Olympia oyster, major declines in anadromous fish runs, and the discovery of diseased flatfish that appear to be associ-

ated with harmful pollutants, including PCB's, chlorinated pesticides, and heavy metals in the bottom sediments in several harbors.

In contrast to these problems, the imported Pacific oyster is doing well, new land management practices and hatcheries are partially restoring anadromous fish runs, and the recently discovered problem of bottom sediments contamination is under serious examination. Furthermore, most of Puget Sound's shorelines remain commercially undeveloped and most Puget Sound waters sustain healthy natural biological communities. Thus far, at least, essential characteristics of the natural environment appear to be maintained. It would also appear that the institutional structure is open enough to continue this preservation as long as there are some citizens who consider natural preservation a major objective and who use the openness of the institutional system to pursue their objectives. Without such individuals, preservation is much less likely.

The Quest for Certainty

Access, adaptive capacity, fairness, knowledge of consequences from diverse perspectives, and the incentive to seek efficient and innovative trade-offs in complex environments are more likely to be achieved in an open system characterized by multiplicity, redundancy, and interdependency as found on Puget Sound than in simpler systems, especially single organization systems attempting to operate as if their problem were management instead of governance. At the same time, however, the very characteristics that facilitate access, knowledge of consequences from diverse perspectives, the incentive to seek efficient and innovative trade-offs, and systemic fairness raise decision-making costs and contribute to uncertainty for single decisions, single organizations, or single users. This, in turn, leads to recommendations for management or planning schemes such as those found in the Stratton Commission, early estuarine studies, and many academic papers. Such proposals would sacrifice access, knowledge of consequences obtained from diverse perspectives, incentives to seek efficient and innovative trade-offs, and both systemic and individual fairness in a quest for more certainty. Can management and planning approaches to coastal resource use decision-making really provide benefits that outweigh the costs of these sacrifices?

The belief that a single organization can outperform a governance system comprised of a multiplicity of limited-purpose, redundant, and interdependent organizations depends on extreme assumptions about the ability to collect and use knowledge in hierarchically ordered systems. At least two kinds of knowledge are important: knowledge of people's preferences and knowledge of the future, i.e. the ability to predict. This knowledge is necessary before one can even consider the feasibil-

ity of using it to determine goals and to design, implement, and monitor programs.

It is extremely difficult to determine the value that people place on different things, and even more difficult to compare the values of different people unless we observe them making choices. However, one cannot observe the making of decisions unless institutional arrangements facilitate choice-making processes as well as the production of information upon which choices can be based. Arrangements such as Washington State's very open system provide a multiplicity of information, choice, and decision-making processes—and it is precisely the outcomes from these processes that provide some indication as to citizens' preferences for the use of Puget Sound's resources.

Even more important, in a system where people make gains through trade-offs and accommodation, there need be no agreement on goals for mutually beneficial decisions. Each party needs only to be satisfied that its goals are fostered. For example, there is no reason to expect agreement on goals by power companies and the Department of Fisheries, but they were still able to come to a mutually beneficial accommodation with the power company financing fish hatcheries to replace natural runs lost from the construction of power-producing dams.

There is no way that a single organization, where choices and trade-offs are made internally, can replicate production of knowledge about Puget Sound resources and people's preferences for their use. Thus from the very beginning, management and planning organizations that depend on knowledge of individual values to formulate goals face a serious problem.

Even if planners and managers knew people's preferences perfectly, they still are faced with the problem of predicting the consequences of particular programs. Without predictive capacity, they cannot evaluate alternative policies in terms of their contribution to objectives.

This prerequisite poses a dilemma for planners and managers because humans learn and adapt their choices and behavior to new knowledge and changing conditions. This learning and adapting creates what may be termed the "planner's paradox:" The more people know, in the sense of new possibilities and better ability to predict the consequences of different policies, the greater the range of potential human action. And, the greater the range of potential human action, the more difficult it is for planners and managers to predict the outcomes of their policies. Planners and managers are always on a treadmill. There would appear to be no reason to anticipate that planners and managers of a central coastal resource use agency would make net gains in their ability to predict the future as the range of human choice widens and the environment becomes increasingly complex and diverse.

If one cannot be sure that a centralized coastal management organization could obtain and process knowledge of what people want or that such an organization could predict the future, how would such an organization itself be predicted to behave? Would one be surprised if goals of planners and managers or of a single faction displaced diverse values of citizens? Would one be surprised if the organization became unresponsive to a changing environment? Would one be surprised if errors were hidden from public view by monopolizing information or claiming to be the only real source of scientific knowledge? Would one be surprised if decisions affected individuals in an arbitrary and capricious manner? Would one anticipate net benefits from such an organization to exceed those from the current governance system on Puget Sound, especially in regard to knowledge and access, incentives for innovative trade-offs, adaptive capacity, fairness and certainty?

The impossibility of achieving certainty, or the difficulty of even making net progress in the ability to predict the future in a complex and changing environment populated by thinking and learning human beings should not, however, lead one to give up trying to make the governance system work better. It is not a laissez-faire system that runs by itself; it is a human artifact designed and run by human beings (not a single human being) and capable of being improved by them.

Conclusions

In 1972, Robert Warren, in concluding a study of coastal resource decision-making on Puget Sound at the University of Washington, wrote:

> It is common for studies of environmental policy to end with either a plea for radically reformed governing structure—usually organized on a hierarchical basis—or a new morality. In contrast, the conclusions here must be that humans, whatever their values and preferences, have done a reasonable job in creating an institutional structure for the governance of Puget Sound's resources that matches the diversity and complexity of the Sound's resource system and the uses people make of it. This does not mean that the system is perfect or that it can or should stabilize in a static form. Citizen access is extensive but participating is becoming more costly. Various sub-systems have become more sophisticated in resource management and in recognizing their interpendencies but there is certainly more to be done. State and local governments tend to underinvest in relation to the Sound in management and regulatory functions in contrast to directly consumable public goods and services. Even so, the system has demonstrated a capacity for learning and continued evolution as new resource use preferences and conflicts have emerged. [Bish et al. 1975, p. 198]

Today, nearly ten years later, two modifications of Warren's conclusion are warranted. First, state and local governments no longer underinvest in management and regulatory functions in contrast to resource devel-

opment activities. The development of programs associated with the creation of the Department of Ecology—shoreline management, environmental impact statements, the assumption of administration of water discharge permits, the master permit process, as well as local government activity implementing shoreline management—has redressed the previous imbalance—and according to some perhaps gone too far. Even with a reduction in federal regulatory presence, however, the system is fundamentally different from that of 1970. Second, the creation of these formal regulatory processes with their open hearings has again reduced the cost of citizen participation in the system because recourse to costly court suits—as were so important in the 1960s—is less necessary. These changes provide even further evidence of the adaptiveness of Puget Sound's governance system.

Puget Sound remains a productive natural resource with a diversity of environments and human uses. Its natural carrying capacity is great, but with increasing population in the region, increasing pressure on resources must be anticipated. One must conclude that the governance system that has evolved from English common law, the federal principles of the U.S. Constitution and the organization and operation of state and local governments within Washington has served its citizens well and is likely to provide an adaptive governance system for the future. It is a system, however, that depends on the continued energy of citizens and officials who care about the future and who utilize the open political system to its fullest extent.

Notes

The observations in this chapter are the author's impressions following work on institutional analysis and Puget Sound. The heading, "The Quest for Certainty," parallels Shirley Robin Letwin's *The Pursuit of Certainty* tracing this phenomenon through several major political philosophers. The implications of institutional design for information production and use are developed in "The Assumption of Knowledge in Policy Analysis" (Bish 1973).

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