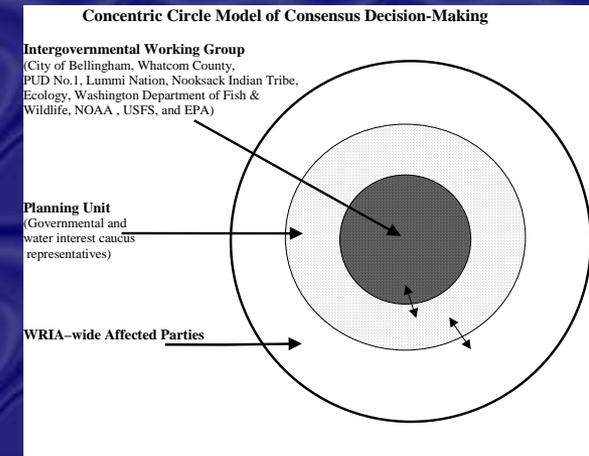
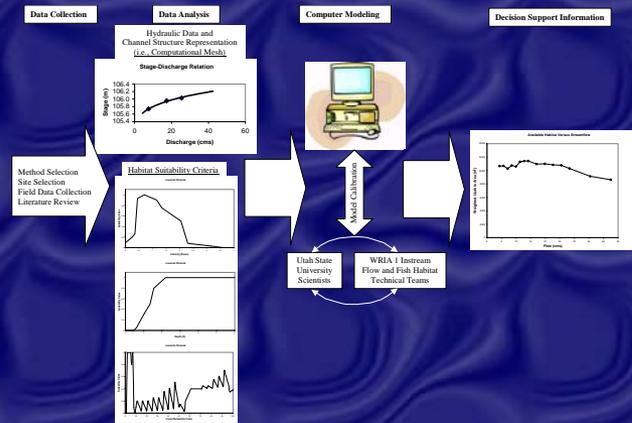


# What Have We Done to Date



Lummi Natural Resources Department  
 Jeremy Freimund P.H., Water Resources Manager  
 Water Supply: Searching for Certainty in Uncertain Times  
 May 31, 2013



# Presentation Purpose

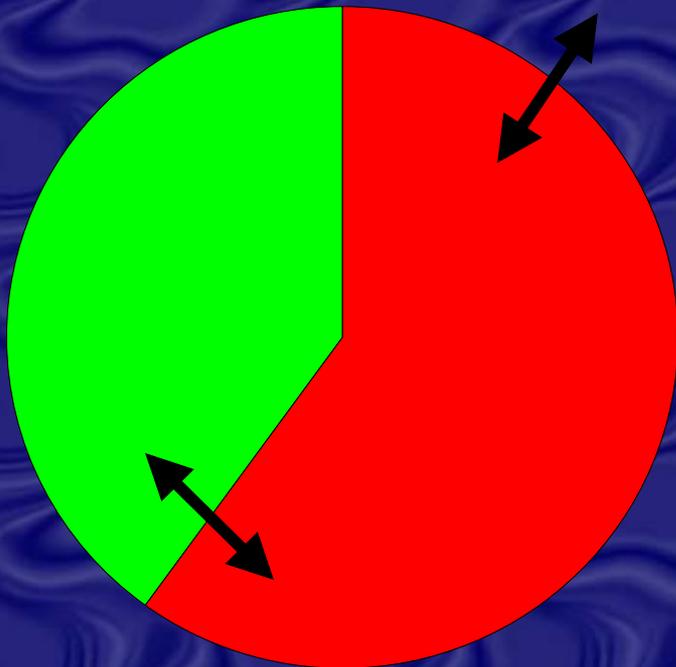
- The purpose of this presentation is to:
  - Review **what** we are trying to accomplish;
  - Summarize **why** we are doing it;
  - Identify **where** the work is focused;
  - Identify **when** the work was/is being conducted;
  - Identify **who** has been doing it;
  - Summarize **how** the work is being conducted;
  - Summarize accomplishments to date;
  - Answer questions.



# What Are We Trying to Accomplish



# Solve the Prior Appropriation Equation



- $X - Y = Z$
- How big is the pie (X)?
- How big is the Tribal slice of pie (Y)?
- How much pie is left over for the State to divide up among the more junior water right holders (Z)?

# Other Goals

- Efficiently Use Limited Resources
  - Combine and coordinate data collection
- Ensure achievement of water quality standards for designated uses of each water body
- Consistent with ESA recovery actions
- Do not conflict with existing state statutes, federal laws, tribal laws, and tribal treaty rights
- Achieve Certainty and Finality



# Why Are We Doing It



# Why We Are Doing It

- Water is a limited natural resource that is decreasing in quantity and quality while the demand for water is increasing.
- Securing/protecting quality water resources for future generations is both time consuming and expensive.
- Because of the increasing competition for the limited resource, the sooner water rights can be quantified and protected, the easier and cheaper it can be accomplished for everyone.
- We are also doing it because...



# Sustainable Harvestable Surplus of Salmon



# Shellfish that are Safe to Eat



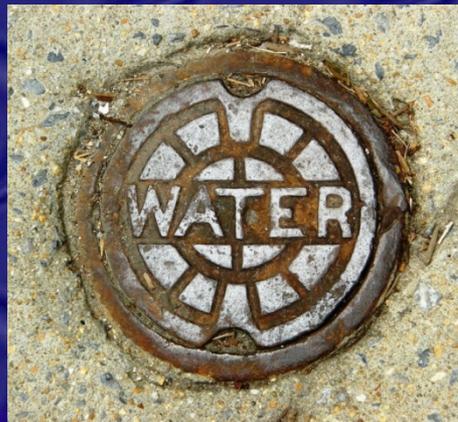
# Viability Agricultural Economy



# Job Producing Industries



# Livable Cities, Towns, and Rural Areas

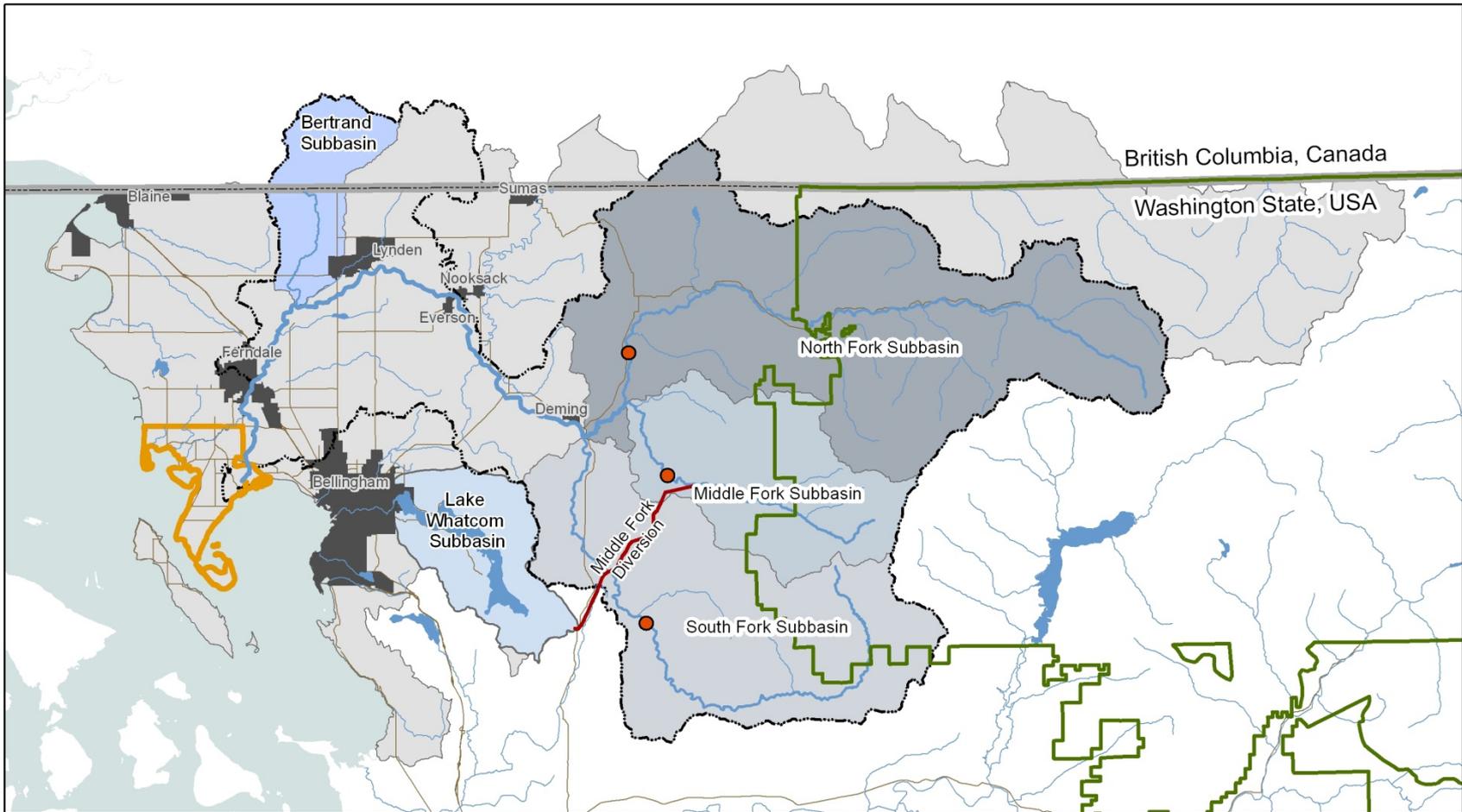


# Aesthetics, Recreation, Natural Beauty



# Where Is the Work Focused





## WRIA 1 Major Subbasins

June-24-2009



Lummi Nation GIS Department makes no claim as to the accuracy, completeness, or content of any data contained herein. This map is not intended to reflect the extent of land boundaries of the Lummi Reservation. All warranties of fitness for a particular purpose and of merchantability are hereby disclaimed. No part of this document may be reproduced without prior consent of the Lummi Nation. Any user of this data assumes all responsibility for use thereof and further agrees to hold the Lummi Nation harmless from and against any damage loss of liability arising from any use of these data.

- Nooksack Basin
- WRIA1 Boundary
- Lummi Reservation
- Federal Lands
- City Limits
- Middle Fork Diversion
- USA-Canadian Border
- Primary Roads
- Gauge Stations



Cartography: Gerry Gabrfsch gerald@lummi-nsn.gov  
Datum, Projection, Coordinate System: NAD83 UTM 10 N



# When Was/Is the Work Conducted



# Brief History

- Indians relied on abundant, cold and clean water to support their way of life since time immemorial
- 1855 Treaty between the United States and local Indian governments
- 1889 Washington Statehood
- 1900 to 1925 logging of lower Nooksack Valley
- Washington State Surface Water Code in 1917
- Washington State Ground Water Code in 1945



# Brief History

- 1949 Washington legislation allowed denials of water right applications when further appropriations would harm fish populations
- 1969 Washington Minimum Flows and Levels Act
- 1970 Department of Ecology created
- 1971 Washington Water Resources Act
- 1972 Federal Water Pollution Control Act
- 1985 Instream Flow Rule for the Nooksack River
- 1990 Chelan Agreement



# Brief History

- 1991 Growth Management Act
- 1993 Sinking Creek Decision
- 1994 Nooksack River Initiative
- 1995 Lummi On-Reservation Negotiations Start
- 1998 Washington Watershed Planning Act
- 1998 to present WRIA 1 Watershed Management Project
- 2001 to 2009 Lummi Peninsula Ground Water Lawsuit



# Brief History

- 2005 WRIA 1 Watershed Management Plan Version 1 Adopted
- 2005 Pilot Instream Flow Negotiations begin
- 2010 Pilot Instream Flow Negotiations Suspended
- 2011 Nooksack Tribe and Lummi Nation submit separate requests to the Department of Interior seeking litigation over tribal instream flow water rights
- 2012 Lower Nooksack River Water Budget Refinement Project



# Who Is Doing It



# Who Is Doing It

- The Lummi Nation and the Nooksack Indian Tribe are separate distinct sovereigns and state law does not apply to them.
- The Lummi Nation chose to accept an invitation to participate in the WRIA 1 Watershed Management Project if the other local governments accepted the terms of a Memorandum of Agreement (MOA) between the “Initiating Governments”.
- The other Initiating Governments agreed that the relationship with the tribal governments must be government-to-government.



# Who Is Doing It

- Reasons that the Lummi Nation chose to participate in the WRIA 1 Watershed Management Project included:
  - Promotes conducting a single set of studies/analyses rather than at least three separate efforts as would likely occur under a litigation scenario;
  - More likely to efficiently solve water resource management problems if governments work together;
  - Working together promotes understanding and good relationships - litigation can result in bad relationships;
  - Obtain funding for needed technical studies.



# Who Is Doing It

- “Initiating Governments” were defined pursuant to the Washington State legislation as:
  - Lummi Nation
  - Nooksack Indian Tribe
  - Whatcom County
  - City of Bellingham
  - PUD No. 1 of Whatcom County
- “Initiating Governments” representatives, which later became the “Joint Board”, created the “Planning Unit” and defined its role and responsibilities.



# Who Is Doing It

- Planning Unit based on a caucus structure and has the following 16 caucuses:

- ▲ City of Bellingham

- ▲ PUD No. 1

- ▲ United States

- ▲ Small Cities

- ▲ Diking/Drainage

- ▲ Fishers

- ▲ Forestry

- ▲ Environmental

- Whatcom County

- Washington State

- Port of Bellingham

- Water Districts

- Agriculture

- Non-Municipal Water Sys.

- Private Well Owners

- Land Development



# Who Is Doing It

- The role of the Planning Unit is to:
  - Facilitate the contribution of knowledge, interests, technical expertise, funding, equipment, and other resources towards the development and production of the Watershed Plan.
  - Recommend plan approval.
- Planning Unit met monthly from 1999 to 2005
- Staff Team supported the Joint Board and Planning Unit and met weekly from 1998 to 2005
- Joint Board met as needed



# How Was/Is The Work Conducted



# How Is The Work Conducted

- Decisions based on best available science
- Best available science defined as objective and repeatable analyses based on adequate empirical data collected with appropriate quality assurance/quality control procedures in place
- Decisions made by unanimous vote with each initiating government having one vote



# How Is The Work Conducted

- Termination at any time with written notice of intent to terminate followed by a formal termination letter
- No estimate of Tribal treaty rights binding on tribes unless the affected tribe expressly so agrees in writing and such Tribal agreement is approved in writing by the United States



# How Is The Work Conducted

- The WRIA 1 Watershed Management Project created technical teams for each of the primary project components:
  - Water Quantity
  - Water Quality
  - Instream Flow
  - Fish Habitat
- Teams were also created for Public Involvement and Education and the Decision Support System



# Example: Instream Flow and Fish Habitat Technical Teams

- Instream Flow Technical Team Lead:
  - Jeremy Freimund (LIBC)
- Fish Habitat Technical Team Co-Leads:
  - Chris Fairbanks (PUD No. 1)
  - John Thompson (Whatcom County)
- Important other contributors/participants include:
  - Lummi Nation, Nooksack Tribe, WDFW, Ecology, Whatcom County, Utah State University, PUD No. 1, Bellingham, Diking and Drainage Caucus, Environmental Caucus
  - Water Quality Technical Team (Co-Leads: Sue Blake and Becky Peterson)
  - Water Quantity Technical Team (Lead: Llyn Doremus)



# How Is The Work Conducted

- Overall approach was to agree on what work needed to be done and who would do the work.
- In some instances, particularly for the instream flow technical team, workshops or symposiums were held to bring in international, national, regional, and local experts to provide guidance on methodologies and approaches.



# Accomplishments So Far



# Accomplishments

## ■ Technical Accomplishments

- Focused on solving the prior appropriation challenge of defining the size of the pie and the relative sizes of each slice of the pie.

## ■ Political/Policy Direction

- Focused on defining how the governments should work together to solve the prior appropriation challenge.

## ■ Legal

- Focused on how to take the results from the technical and policy work and make it binding and enforceable.



# Technical Accomplishments

- Technical Accomplishments include:
  - Defining the watershed boundaries
  - Defining the spatial scale of the work (drainage level)
  - Defining the temporal scale of the work (monthly)
  - Developing a preliminary water budget (USGS - 1998)
  - Developing a database and geographic information system (GIS) of state water rights certificates, permits, claims, and applications and parcel boundaries
  - Collecting 10 years of stream flow data at six additional sites
  - Developing correlations between gaging sites
  - Developing a refined water budget (USU - 2007)



# Technical Accomplishments

- Technical Accomplishments (continued):
  - Developing a library and a database of existing literature regarding water resources management, fish, water quality, land use, etc
  - Developing a water quality database and evaluation tools
  - Agreeing to the methodology that would be used to quantify the relationship between stream flow and fish habitat quantity and quality
  - Agreeing on where the instream flow field data collection efforts would be conducted
  - Prioritizing fish species and life stages throughout the watershed



# Technical Accomplishments

## ■ Technical Accomplishments (continued):

- Mapping when and where fish species occur
- Agreeing to temperature and dissolved oxygen thresholds for fish habitat quality
- Characterizing the ground water flow system
- Agreeing to historic land cover for the watershed
- Developing economic impact analyses
- Identifying the instream flow levels that maximize fish habitat and the flow levels that provide 99%, 95%, 90%, and 85% of the maximum fish habitat
- Developing a more refined water budget (2013)



# Policy Direction

## ■ Policy Direction includes:

- Agreeing to the initial Memorandum of Agreement.
- Agreeing to the Structure and Function of the WRIA 1 Watershed Management Project components.
- Agreeing to the scopes of work that would be performed, who would conduct the work, how it would be evaluated, and who would pay for the work.
- Jointly seeking re-activation of the federal team assigned by the Department of Interior.
- Approving the WRIA 1 Watershed Management Plan – Version 1, including the Instream Flow Selection and Adoption Action Plan.



# Policy Direction

## Concentric Circle Model of Consensus Decision-Making

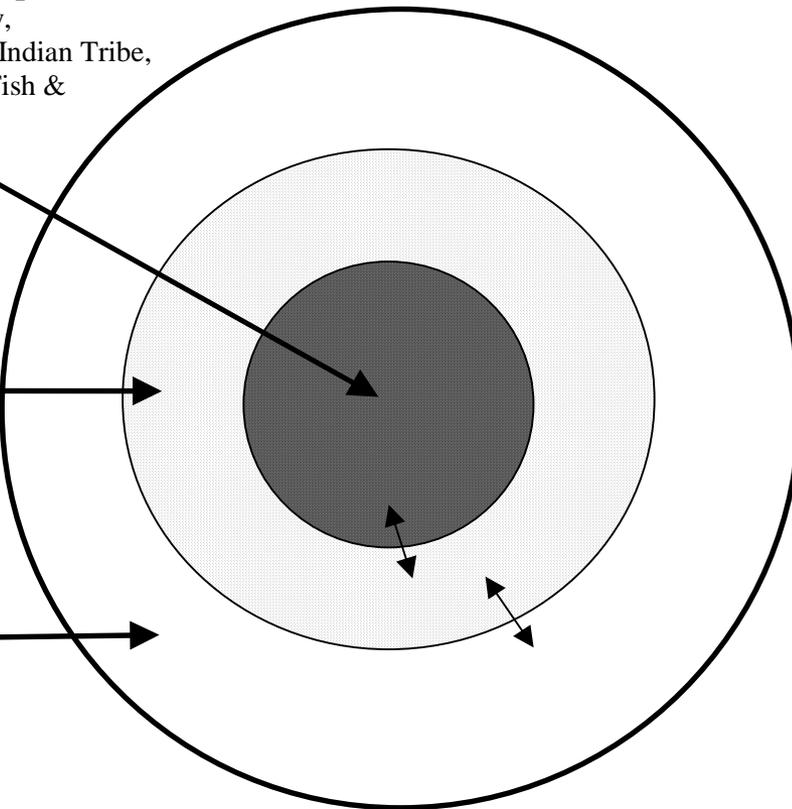
### Intergovernmental Working Group

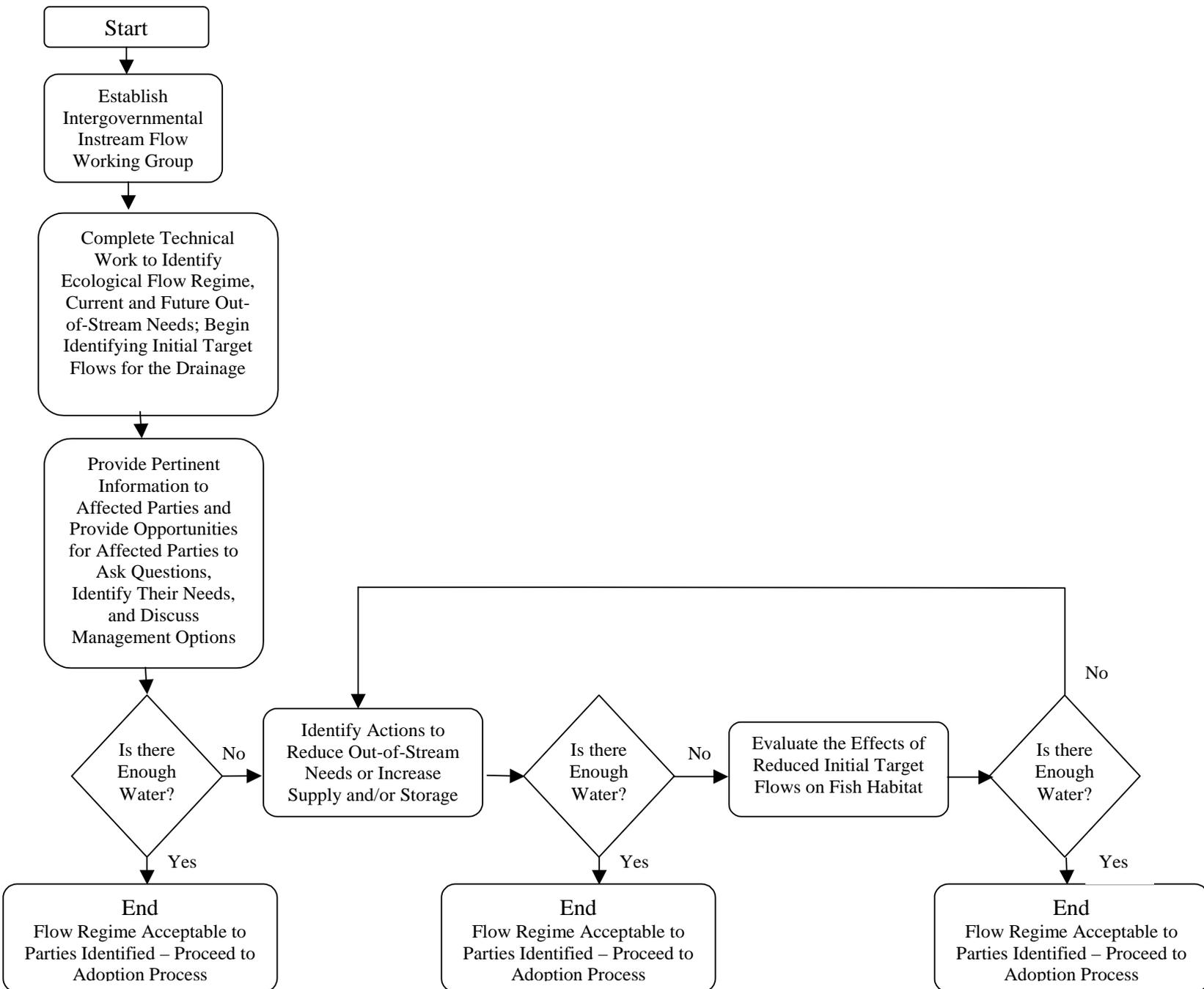
(City of Bellingham, Whatcom County, PUD No.1, Lummi Nation, Nooksack Indian Tribe, Ecology, Washington Department of Fish & Wildlife, NOAA , USFS, and EPA)

### Planning Unit

(Governmental and water interest caucus representatives)

### WRIA-wide Affected Parties





# Overview of How Instream Flow Work Was Conducted

## ■ Technical Phase

- Identify the method(s)/best available science to estimate the relationship between stream flow and fish habitat quantity and quality
- Apply selected methods
- Recommend an initial ecological flow regime

## ■ Selection and Adoption Phase

- Agree to Instream Flow Selection and Adoption Action Plan
- Apply the selection and adoption action plan
- Adopt an instream flow regime.

## ■ Consensus Decision Making Process



# Legal Accomplishments

- Developed a public information/education piece about federal reserved water rights and the negotiated settlement option.
- Developed confidentiality agreements for the pilot instream flow negotiations.
- Legal participation and review of settlement proposals during the pilot negotiations.
- Evaluation of options for achieving certainty and finality for any adopted stream flows.



# Summary and Conclusions



# Summary and Conclusions

- Water is critical to life on earth.
- The demand for water is increasing with increasing population while the supply is decreasing due to the effects of increasing population on water quality and quantity.
- In the western United States, water is allocated based on priority – “first in time is first in right”.
- Tribal rights to water do not expire with non-use or the fact that some of their water rights are non-consumptive (instream flow).



# Summary and Conclusions

- The Lummi Nation and the Nooksack Indian Tribe have a right to an adequate quantity and quality of water sufficient to support the purposes of their reservations as permanent, economically viable homelands.
- The Lummi Nation and the Nooksack Indian Tribe also have a right to an adequate quantity and quality of water necessary to support a sustainable, harvestable surplus of salmon and shellfish sufficient to support their “way of life”.



# Summary and Conclusions

- Tribal uses of water pre-date those of other community members which means they have the “senior” or highest priority water rights.
- Tribal water rights in Washington State are generally not quantified which makes management and protection of water difficult for everyone.
- The two tribal governments are actively seeking to quantify and protect their water supply (i.e., water rights) and water quality both on- and off-Reservation through negotiation if possible and through litigation if necessary.



# Summary and Conclusions

- The overall goal of the WRIA 1 Watershed Management Project is to have water of sufficient quantity and quality to meet the needs of current and future human generations.
- This goal includes the restoration of salmon, steelhead, and trout populations to healthy and harvestable levels, and the improvement of the habitats upon which fish rely.
- An essential step in achieving this goal is to develop the technical information necessary to evaluate instream and out-of-stream needs.



# Summary and Conclusions

- Substantial progress has been made to develop the technical information needed to support knowledge-based decision making.
- Work to further refine this technical information continues.
- The technical information must be evaluated in light of legal and policy considerations to determine how to meet the overall goal of the WRIA 1 Watershed Management Project.



# Summary and Conclusions

- Efforts to reach agreement in two pilot areas were not successful for various reasons.
- Even if they were successful, a legal proceeding or state, tribal, and federal legislation would be needed to make the settlement agreement binding on the parties and enforceable.
- A framework to force decision-making and compromise and achieve finality and certainty is needed.



# Summary and Conclusions

- Based on previous experience, both the Lummi Nation and the Nooksack Indian Tribe have concluded that a federal lawsuit provides the necessary framework to resolve the longstanding conflicts over water allocation in the Nooksack River watershed.
- A litigation framework does not preclude a negotiated settlement – in fact, experience has shown that it promotes resolution of long-standing conflicts.
- A decision by the United States on the litigation requests is pending.



# Questions?

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