REPORT TO THE

71ST OREGON LEGISLATIVE ASSEMBLY

HOUSE BILL 2102

FISH PASSAGE TASK FORCE
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FISH PASSAGE TASK FORCE

Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Summary</td>
<td>1</td>
</tr>
<tr>
<td>Background</td>
<td>2</td>
</tr>
<tr>
<td>Task Force Membership and Operation</td>
<td>3</td>
</tr>
<tr>
<td>Discussion of the Recommendations and Related Issues</td>
<td>5</td>
</tr>
<tr>
<td>1. Integration and Policy</td>
<td>5</td>
</tr>
<tr>
<td>2. Installation and Triggers</td>
<td>5</td>
</tr>
<tr>
<td>3. Determination of Presence of Migratory Fish</td>
<td>6</td>
</tr>
<tr>
<td>4. Inventory and Priority</td>
<td>7</td>
</tr>
<tr>
<td>5. Waivers, alternatives to passage</td>
<td>8</td>
</tr>
<tr>
<td>6. Emergency</td>
<td>9</td>
</tr>
<tr>
<td>7. Cost share for legally constructed, existing</td>
<td>9</td>
</tr>
<tr>
<td>8. All others (illegally constructed)</td>
<td>10</td>
</tr>
<tr>
<td>9. Hydroelectric Projects</td>
<td>10</td>
</tr>
<tr>
<td>10. Fish Passage Task Force</td>
<td>11</td>
</tr>
</tbody>
</table>

Appendices

I. Recommended Draft Legislation as Proposed by the Task Force
II. Working Agreements of the Task Force
III. Summaries of Task Force Meetings
IV. Memo on Fish Passage History
REPORT TO THE 71ST OREGON LEGISLATIVE ASSEMBLY

HOUSE BILL 2102
FISH PASSAGE TASK FORCE

EXECUTIVE SUMMARY

The 70th Legislative Assembly enacted House Bill 2102 directing the Oregon Department of Fish and Wildlife (Department or ODFW) to convene a Fish Passage Task Force to “develop recommendations, including suggested legislative changes, necessary to improve the benefits to fish resulting from fish passage, fishway and alternative mitigation requirements.” The statute specified 12 groups to be represented on the Task Force, and required an invitation to federal agencies affected by the fishway or fish passage requirements. This is the second Task Force to attempt such recommendations. The 69th Legislative Assembly enacted House Bill 2607, which required a similar task force. That Task Force was unable to complete all of its work, but did submit a report and some recommendations to the 70th Legislative Assembly. The new Task Force was reconstituted following the 1999 legislative session pursuant to House Bill 2102.

This report summarizes the latest Fish Passage Task Force’s work from its first meeting on June 13, 2000, through development of this report and recommendation. The Task Force’s consensus recommendations are in the form of draft legislation, attached as Appendix I to this report, and were subsequently drafted by legislative counsel into an amendment to House Bill 2540. The recommendations as drafted by the Task Force generally provide for:

- Integrating and making consistent provisions of the two former statutes (one for food or commercially caught fish and one for game or sport caught fish) relating to fish passage;

- Requiring installation of fish passage or alternatives at the owner/operator’s expense at all artificial obstructions (in bodies of water in which migratory native fish are currently or have historically been present) at the time of:
  - construction (which includes major replacement or structural modifications at existing structures),
  - abandonment, or
  - “fundamental” changes in permit status

- Requiring installation of fish passage or alternatives at the owner/operator’s expense at any existing artificial obstruction when the Oregon Fish and Wildlife Commission (Commission) determines that an emergency exists, which because of adverse impacts to a fish population, calls for immediate action;
- Requiring installation of fish passage at the owner/operator’s expense at any existing obstruction constructed illegally;

- ODFW to inventory and maintain a list of existing artificial obstructions and to prioritize enforcement action based on the needs of migrating fish populations;

- ODFW working with owners/operators to find cost share funding for installation of fish passage or alternatives at other existing obstructions. Those that are not otherwise required to install passage under one of the above requirements and have a legal water right, but do not have an existing exemption from passage requirements, may be required to install passage if non-owner/non-operator funding of 60% or more can be provided;

- Waivers or alternatives to fish passage on a showing of a net benefit to the habitat quality or quantity which would lead to an increase in the production of migratory native fish;

- Opportunities for exemptions that are reviewed every five years in cases where the Commission finds there is no appreciable benefit to providing passage;

- Establishing a permanent Fish Passage Task Force to advise the Department and Commission on matters related to fish passage;

- Encouraging collaboration between ODFW and owners/operators of artificial obstructions to achieve maximum fish passage throughout the state;

- Coordination of fish passage requirements through the State’s Hydroelectric Application Review Team (HART) process for federally licensed hydroelectric projects.

BACKGROUND

In Oregon, the issue of providing fish passage over man-made dams and diversions pre-dates its 1859 statehood. Oregonians have long sought to strike a balance between survival of species and the developments of humans. For a discussion of the history of the Fish Passage statutes please refer to the memo in Appendix IV.

Information regarding the current number of dams and diversions throughout the state that lack fish passage facilities, and the extent of the fish habitat problems that this situation creates, is limited. The Oregon Water Resources Department has a database of over 3,500 dam structures in the state that meet minimum state dam safety review requirements (includes all dams 10 feet or more in height, or that impound 9.2 acre-feet of water or more). This database, however, is not designed to reference or include fish or fish passage information.

ODFW estimates that there are currently at least 750 dams and diversions that impact fish habitat in Oregon, with less than half of these facilities providing adequate fish passage. Many of these
diversions are under the minimum state dam safety review requirements. There is also information to suggest that many of the existing fish passage facilities are in disrepair.

Most recently, the continual decline and eventual federal ESA listings of a number of salmonid species (steelhead, salmon and trout) has brought new emphasis to the fish passage issue. A 1996 Oregon Department of Justice letter of advice interpreted current state fish passage statutes as providing no agency discretion to grant a waiver of fish passage requirements. This analysis pushed the 1997 and 1999 Oregon Legislatures and the Governor’s Office to craft House Bill 2607 and House Bill 2102, respectively. (Appendix F). These temporary statutes (scheduled to sunset on June 30, 2001) gave the Oregon Fish and Wildlife Commission authority to grant a waiver of fish passage requirements for new, or for the modification of existing, projects in return for alternative mitigation measures that would “provide a net benefit to wild anadromous and other migratory native fish.” Both statutes provided for a Fish Passage Task Force to develop recommendations for a permanent fish passage statute.

**TASK FORCE MEMBERSHIP AND OPERATION**
The 2000-2001 Task Force membership initially included the following representatives of organizations and agencies:

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<th>Interest/Group/Government</th>
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<tr>
<td>Oregon Dept. of Fish &amp; Wildlife</td>
<td>Roy Elicker, Deputy Director, Fish Div.</td>
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<td>Stephanie Burchfield, HD/Hydro</td>
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<tr>
<td>Office of the Governor</td>
<td>Roy Hemmingway, GNRO</td>
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<td>Water Resources Dept.</td>
<td>Bev Hayes, Hydro Task Force</td>
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<td>Oregon Counties</td>
<td>Ron Yockim, Douglas County</td>
</tr>
<tr>
<td>Oregon Cities</td>
<td>Willie Tiffany, League of OR Cities</td>
</tr>
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<td>Steve Kucas, Portland Water Bureau</td>
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<tr>
<td>Special Districts</td>
<td>Kevin Hanway, Assoc. of Special Districts</td>
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<td>Water Utilities</td>
<td>Jason Green, OR Assoc. Water Utilities</td>
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<td>Dave Anderson, OR Water Utility Council</td>
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<td>Rob Schab, Coos Bay-N. Bend Water Board</td>
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<td>Water User Organizations</td>
<td>Pete Test, Oregon Farm Bureau</td>
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<td>John Youngquist, Small Water Users</td>
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<td>Water Suppliers</td>
<td>Jan Lee, OR Water Resources Congress</td>
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Environmental Organizations  Mark Riskedahl, NW Environmental Defense Center

Hydroelectric Project Operators  Cliff Bentz, Idaho Power
  Todd Olson, PacifiCorp

Angling & Fish Conservation  Jim Myron, Oregon Trout
  Phil Donovan, NW Sport Fishing Assoc.
  Glen Spain, Pacific Coast Federation of Fishermen’s Associations

Indian Tribal Governments  Bobby Brunoe or Patty O’Toole,
  Confederated Tribes of the Warm Springs
  Carl Merkle, Confederated Tribes of the Umatilla Indian Reservation

Tribal representatives were invited and encouraged to participate. They were kept informed of all meetings, meeting summaries and drafts developed during the work of the Task Force. However, no Tribal representatives actually participated in the Task Force deliberations nor in the resulting consensus. Mark Riskedahl of the Northwest Environmental Defense Center was able to participate only occasionally. He therefore, did not take part in the consensus recommendation, neither opposing nor supporting it.

Representatives of Federal agencies and staff from ODFW and the Attorney General’s office also participated as resource advisors. Advisors participated in discussions, but were not considered official members for purposes of consensus.

To accomplish its tasks, the Task Force developed a set of Working Agreements (attached as Appendix II) which set out the protocols for its work. Through the working agreements the Task Force committed to reach consensus on any recommendations submitted to the legislature. If no consensus were reached, the group would simply report the differing views without making a Task Force recommendation to the legislature. Consensus was agreed to mean “the willingness to go along with the recommendation either in active support of it or in not opposing it.”

Each meeting of the task force was professionally facilitated. The facilitators drafted summaries of each meeting to capture the major areas of discussion, tentative agreements and the range of views on issues discussed. Draft meeting summaries were corrected by the members and revised into final summaries. These final meeting summaries are attached in Appendix III. Meeting summaries represent the views and the discussions at the particular time of that meeting. They may reflect tentative agreements that were not reflected in the actual agreement on the final recommendations, as all agreements were treated as tentative until the full package was put together.
DISCUSSION OF THE RECOMMENDATIONS AND RELATED ISSUES

The following discussion follows the general outline of the proposed statute, but does not attempt to summarize each and every provision. It is intended to highlight the major elements of the legislation and point out the Task Force’s view of their application.

1. Integration of two former statutes and Policy Statement

As noted above, the two Oregon laws that dealt with fish passage had inconsistencies that lead to both confusion and a lack of enforcement of either law. In 1996 the Attorney General determined that the current statute did not give the Commission authority to waive fish passage, even though some owners and operators believed they had been given a waiver by the agency. The Legislature subsequently gave short term authorization for the Commission to grant waivers to fish passage requirements.

One of the main objectives of the task force was to craft legislation that combined the existing statutes into one meaningful piece of legislation, was reasonable for owners/operators, benefited fish that migrate for their lifecycle and had enough flexibility for the Commission to waive passage requirements under appropriate circumstances. At its early meetings, the group agreed that finding a way to protect Oregon’s native migratory fish populations is very important. Doing this in a way that encouraged cooperation and minimized the burden to owners and operators of artificial obstructions, while maintaining the authority of the Fish and Wildlife Commission to enforce its laws, proved to require a great deal of creativity and flexibility from the Task Force. This proposed legislation is intended to complement, not to abrogate, any related authority under other state and federal laws.

As a state policy, the Task Force members agreed that upstream and downstream passage should be required at all artificial obstructions in those Oregon waters in which migratory native fish are currently or have historically been present, except under certain clearly defined circumstances (laid out below). The Task Force agreed that the primary method for implementing this policy should be through active collaboration and cooperation between the Department of Fish and Wildlife and owners or operators of artificial obstructions. Collaboration is important because increased compliance and efficiency with an overall goal of more and safer passage is first and foremost, not an increase in enforcement orders from the Department.

2. Installation of fish passage or alternatives at the time of construction, abandonment or fundamental change in permit status

The Task Force recommendation contains the basic premise that fish passage would be required for both new and existing artificial obstructions, which include dams, diversions and culverts. Under certain limited circumstances described below (Section 4) the passage requirement may be waived or exempted. The Task Force believed that for any new obstruction, the cost of fish passage or alternatives would be built in to the cost of the project from the outset and included in
whatever financing arrangements were made. The most difficult area for the Task Force was to
determine how to find a practicable way to get fish passage in existing obstructions that do not
have a legal waiver of the passage requirement. To this end, the group set out to establish certain
events or opportunities that would both logically and financially be best suited for the
requirement of fish passage to apply. After much discussion and exploration, the Task Force
determined events that would “trigger” the requirement for fish passage. These events include:
“construction”, “abandonment”, or a fundamental change in permit status of any artificial
obstruction.

“Construction” was purposefully defined to include original construction, major replacement, or
structural modifications that increase storage or diversion capacity. For culverts it means culvert
or roadbed installation or replacement. Major replacement was used to refer to a true
replacement of a large portion of the original diversion structure, such as would occur following
a catastrophic failure of the original facility. Construction was not intended to refer to upgrades
of an existing facility undertaken solely for the purposes of increasing dam safety, for example
seismic upgrades or spillway enhancements or enlargements. Structural modifications, to
become a trigger for fish passage, must increase the storage or diversion capacity of a given
obstruction, not simply be a maintenance repair or a modification for public safety requirements.

The Task Force chose these triggers because it assumed an owner or operator could most easily
build the costs of fish passage into the costs of a major structural upgrade, original or
replacement construction, or a request for a significant change to the obstruction’s permit (such
as seeking a license, re-license, reauthorization or new water rights). When these events occur,
fish passage is to be constructed at the owner/operator’s expense. Costs would have to be built in
before an owner or operator could abandon an obstruction.

3. Determination of presence of migratory native fish

Prior to the occurrence of any of these “triggers”, the owner or operator must obtain a
determination from the Department as to whether migratory native fish are or historically have
been present in the body of water affected by the obstruction. If they are, the owner or operator
must submit a proposal for fish passage or alternatives to passage to ODFW. Approval of the
plans for passage must be obtained prior to proceeding with the action. It is anticipated that at
this stage negotiations between the Department and the owner/operator will take place. Indeed,
the Task Force recommendation requires the Department to seek cooperative partnerships, and
encourages negotiation of the terms and conditions of passage or alternative requirements.
Equitable factors are to be considered in this negotiation. The Task Force had considerable
discussion about the equity of requiring owners or operators of older existing structures that
thought they had been given permission to build without fish passage to now install passage.
Since the circumstances existing at the time such projects were built vary considerably, and the
documentation of approvals may or may not be clear, consideration should be given on a case by
case basis. If no legal waiver exists, the equities of the situation, in the context of the purpose of
the project, the difficulties and costs of retrofitting will all have to be considered in determining the required passage or alternatives.

The Task Force expects that, as a matter of practical application, the Department will develop a simple action plan with each existing artificial obstruction for which it is seeking fish passage or alternatives to passage. A specific time line for compliance should be within the action plan. To the extent feasible, the State should coordinate its review and requirements with those of the Federal agencies reviewing for compliance with Endangered Species Act.

4. **ODFW inventory of existing artificial obstructions and prioritization of enforcement actions**

The Task Force recommends that, as a first step, the Oregon Department of Fish and Wildlife complete and maintain a statewide inventory of artificial obstructions. The group agreed that information is needed regarding the number and extent of fish passage problems in the state in order to prioritize enforcement action based on the needs of migrating fish populations. This information should include: the proposed statewide inventory and an evaluation of existing barriers to fish passage, the fish species impacted, the extent of lost fish habitat, opportunities to restore fish passage, and other important biological and economic factors.

Once the inventory and evaluation have been completed, the Task Force recommends that the Department prioritize its enforcement actions and funding efforts based on the degree of impact of the artificial obstruction on the migrating fish, the biological status of the stocks in question and other factors established by rule. This prioritization will not only help guide the agency’s efforts, but also will provide a level of certainty to owners and operators of artificial obstructions as to when and where such efforts will be focused. The Task Force recommends this focused guide to ODFW efforts as a practical solution to making real progress on priority obstructions. Prioritization will serve as a guide for directing available funding, as well as a guide to well-meaning owner/operators in their efforts to come into voluntary compliance with the overall policy of fish passage. It will not affect owners’ or operators’ responsibility to address fish passage when a “trigger” event occurs.

The Task Force noted that a survey a few years ago listed a number of state hatcheries that block passage to native migratory fish. The Task Force believes that ODFW should set an example for other project owners/operators by resolving existing passage problems at state hatcheries or providing mitigation that provides a net benefit to native migratory fish within a reasonable period of time. These state owned obstructions should be included in the prioritization process.

The Task Force also acknowledged the historical waiver or non-enforcement of fish passage requirements that resulted in numerous dams and diversions without fish passage. These dams and diversions need to be reviewed to ascertain which have truly been granted a waiver and/or have provided the required alternatives so that no future requirements should apply, and those
which may have been “overlooked” or predate the types of requirements necessitated by current conditions.

The Task Force anticipates that the department will maintain a list of dams and diversions that have been approved as having adequate fish passage. Those so listed will not have to be reviewed or subject to any other requirements beyond the monitoring, evaluation and maintenance requirements in current law.

5. Waivers, Exemptions and Alternatives to Fish Passage

The Task Force recommends that the requirement for fish passage should be waived if alternatives to passage provide a net benefit to fish. The proposed legislation spells out the way the net benefit comparison is made, and that it is based upon conditions as they exist at the time of the comparison. It is expected that this determination would be made at the time of the original permitting for any new obstruction. The determination for an existing obstruction would be made at the time of one of the triggers requiring fish passage, or if the obstruction was on the priority list and a cost share became available. However, the owner or operator of an existing obstruction may petition for a waiver in exchange for agreed upon alternatives at any time. It is expected that the Commission would allow a waiver or alternative mitigation on a showing of net benefit to the habitat quality or quantity within the same watershed or basin (“in-proximity”), which would lead to an increase in the production of migratory native fish. It is intended that the term “basin” used in the definition of “in-proximity” refers to the planning basins as identified by the Water Resources Department.

The Task Force clarified that artificial obstructions without fish passage are exempt from any further fish passage requirements (and therefore not in violation of the law) if the lack of passage has been effectively mitigated (alternatives provided), if the Commission has granted a legal waiver of the requirement, or if the Commission finds there is no benefit to providing fish passage. The recommended statute provides that the Commission may further define by rule what no benefit means, but it is expected to include such things as obstructions that are upstream of other obstructions not permitting passage, or obstructions that have no usable habitat upstream of them. Exemptions other than a permanent legal waiver are to be reviewed every seven years unless they have an established exemption expiration date. Exemptions that are not legal waivers may be amended or revoked on review. This is to take into consideration such situations as an obstruction upstream of another obstruction (whether natural or man-made). If the downstream obstruction is removed or passage provided, then the upstream obstruction may need to provide passage as well.

The department and the owner/operators are encouraged to negotiate the fish passage requirements, including appropriate cost sharing and other equitable factors. The word “equitable” was deliberately used and is intended to be somewhat vague. This vagueness would allow consideration of cost-benefit, logistics, technology, past history of approval without
passage and other factors in light of the overall project purpose, when negotiating the conditions or alternatives to passage.

The owner or operator is responsible for maintaining, monitoring and evaluating the effectiveness of passage or alternatives to passage. The Task Force expects that the requirements will make the applicant accountable to the goals of mitigation, and they will be expected to use adaptive management to achieve and maintain the net benefit standard in quantifiable goals such as habitat units.

6. **Installation of fish passage or alternatives at any existing artificial obstruction when the Commission determines that an emergency exists, which because of adverse impacts to a fish population, calls for immediate action**

The Task Force recommends that the Fish and Wildlife Commission be given authority to require installation of fish passage at the owner/operator's expense if a population of native migratory fish is adversely impacted, the impact is materially related to or affected by the artificial obstruction, and immediate action is necessary. This emergency authority would apply at any artificial obstruction whether or not it has met one of the above triggers or would otherwise qualify under the cost share provisions described below.

The Task Force acknowledged that an “emergency” declaration is to be limited to situations that are posing a critical danger to a migratory native fish population because of the lack of passage. These rules apply to “passage emergencies” related to the structure. Task Force members felt that under certain unforeseen circumstances directly related to or affected by an artificial obstruction, the Commission should have the authority to require fish passage at the owner/operator’s expense if a population of migratory fish were believed to be adversely impacted. Task Force members also felt strongly that this authority should not be used as a method for avoiding the cost share provisions of the proposed statute that are noted below. It is not intended to make a project ineligible for cost share or outside funding, but rather to provide a means of action when biologically needed and when cost share funding may not be readily available. The Association of Oregon Counties remains concerned that funding issues related to an emergency declaration will raise Measure 30 concerns (unfunded mandates).

7. **Cost Sharing Opportunities for Existing Priority Obstructions if Passage is Deemed Necessary and no “Trigger” has been Met**

As a practical approach for achieving the policy of fish passage, the Task Force recommends that the Fish and Wildlife Commission be allowed to require fish passage at existing priority obstructions if it can find funds (from any source other than the owner/operator) to help share 60% or more of the cost of providing fish passage facilities or alternatives to fish passage. This required cost sharing provision in the proposed statute applies only to those artificial obstructions that are on the Department’s priority list, and have a water right or were lawfully constructed pursuant to whatever land use or other regulatory measures that applied at the time of
construction, and are not subject to the triggering events or emergency declaration noted above. Lack of cooperation will cause forfeiture of the cost share opportunity. An owner or operator of a legally constructed artificial obstruction may voluntarily opt into the cost share provisions even if his/her obstruction is not on the priority list.

This cost share portion of the proposed statute is intended to provide an incentive to owners and operators for building fish passage facilities at their obstructions. It is also intended to foster the cooperation and collaboration that the Task Force suggests is necessary to achieve the overall goal of fish passage on a statewide basis. The cost share aspects of the proposed statute are intended to create a balance between the importance of the state’s outright enforcement of its laws with the need for voluntary compliance with those same laws. It is anticipated that obstructions listed on the priority list would be eligible for funding sources (such as OWEB grants) prior to any enforcement action.

After much discussion and debate, the Task Force recommends the cost sharing approach as the only viable means of achieving success of any statewide fish passage program. Members noted the reality that some older obstructions are not going to be retrofitted for fish passage until there is financial assistance available and the equitable argument that some may have pre-dated the types of requirements necessitated by current conditions. Fortunately, the Department expects to access such funding through federal and other programs, with proper budget limitation granted by the legislature. The Association of Counties remains concerned that funding issues may raise Measure 30 (unfunded mandates) concerns, and is not completely comfortable with the language regarding the cost share (lower than is typical for culvert construction).

8. Installation of fish passage or alternatives required at owner/operator expense at all other existing artificial obstructions

Any artificial obstructions that are not covered in any of the above categories may be ordered to install fish passage or alternatives at the owner or operator’s expense. The direction to the Department to focus its enforcement efforts at obstructions on its priority list still applies. This overall provision is intended to catch any obstructions that were constructed without fish passage in a clearly unlawful manner. This would include those that did not get water rights, did not obtain appropriate permits, etc. It reiterates the basic policy that fish passage is required at all artificial obstructions.

9. Hydroelectric projects

The Fish Passage Task Force had members who also serve on the Task Force on Hydroelectric Issues established under section 39, chapter 449, Oregon Laws 1997. These members formed a sub-committee to address issues affecting hydroelectric projects, and discussed fish passage issues with the Hydro Task Force. The Fish Passage Task Force incorporated recommendations of the sub-committee into the proposed statute that would allow integration of fish passage review with the current state and federal re-licensing processes. The Task Force
recommendation is not intended to weaken the state's Hydroelectric Application Review Team (HART) process. A unified state position is still the goal of the state's involvement in Federal Energy Regulatory Commission (FERC) licensing. Furthermore, the Task Force recognizes the importance of the timing of the Commission decision to grant a waiver for fish passage on FERC licensed projects. ODFW staff involved with the HART processes are encouraged to work with the FERC applicant to get Commission action on a waiver early enough in the development of a unified state position that other issues important to the state are given maximum opportunity to be resolved in the conditions requested by the state in the new FERC license.

The recommended statute recognizes that federally licensed hydroelectric projects are exempt from this statute “to the extent preempted under federal law by the Federal Power Act or by the laws governing projects located on bi-state waters.” Task Force members disagree over the extent of federal preemption in the area of federally licensed hydroelectric projects, recognizing that the extent of federal preemption is presently uncertain and may be subject to court interpretation. The Task Force does agree that the exemption acknowledged in the proposed statute is intended to apply only to the extent that federal law actually does preempt the state’s regulatory authority over such projects. The Task Force encourages the mutual resolution of the issues surrounding fish passage rather than engaging in disputes regarding preemption.

Idaho Power Company believes that the area of regulation covered by this authority is subordinate to the Federal Power Act and that such preemption should be clearly reflected in the statute itself. Specifically, Idaho Power believes that the authority given the Federal Energy Regulatory Commission (FERC) under the Federal Power Act with respect to navigable streams, as discussed in First Iowa Hydroelectric Coop vs. Federal Power Commission, 328 US 152, 66 S.Ct. 906 (1946) fully occupies this area of regulation. There is not consensus on this issue. Therefore, Idaho Power has asked that this Legislative Report reflect its position concerning preemption. Subject to this position, and retaining the right to challenge, on a constitutional basis, this bill or any part hereof should it become law, Idaho Power Company does not object to this proposed legislation as currently drafted.

10. **Fish Passage Task Force**

Finally, the Task Force recommends that a standing advisory “Fish Passage Task Force”, similar to the existing task force for the ODFW fish screening program (ORS 496.085), be established to advise the Department and Commission in rule-making, funding, and other program matters related to fish passage. It is anticipated that there will be a wide range of issues on which the input of an outside group familiar with the practical application and competing interests would be of considerable assistance to the department in achieving the goals of actually expanding and improving fish passage in the state.

The Task Force discussed the possibility of combining this fish passage task force with the current fish screening task force, but decided to recommend a separate task force with the idea that the two could be combined later if the department and the task forces feel it would save
resources to do so. It was recognized that both task forces have considerable issues to cover and, even though there is some overlap, adding fish passage to the duties of the fish screening task force would considerably expand its workload.

CONCLUSION

Protecting Oregon's migratory native fish continues to be an important issue for Oregonians just as it was prior to statehood. The diversity of interests represented on this 2000-2001 Fish Passage Task Force made it clear that finding a practical way to protect these fish is a necessary step in the state's evolution. Members of the Task Force, while not agreeing on all issues all the time, were dedicated to the notion of finding a common sense and common ground solution that meets the challenge of protecting species, while making advances in the 21st Century.

With that in mind, the members of the 2000-2001 Fish Passage Task Force respectfully submit this report and its recommendations to the 71st Oregon Legislature as a consensus of its members.
APPENDIX I.

RECOMMENDED DRAFT LEGISLATION
AS PROPOSED BY THE TASK FORCE
Proposed Fish Passage ORS Revisions

Policy: The policy of the State of Oregon is to provide for upstream and downstream passage for migratory native fish. Except as herein provided, fish passage is required in all bodies of water in which these fish are currently or have historically been present. The legislative assembly finds that cooperation and collaboration are necessary to accomplish the goals of this act.

Definitions: As used in ORS 509.xxx to 509.xxx:

(1) “Artificial obstruction” means any man made device placed in a body of water that precludes migration of fish, including but not limited to: dams, diversions, culverts, push up dams.

(2) “Construction” means original construction, major replacement, or structural modifications that increase storage or diversion capacity, except for culverts for which “construction” means culvert or roadbed installation or replacement.

(3) “Emergency” means an unforeseen combination of circumstances materially related to or affected by the artificial obstruction that, because of adverse impacts to a fish population calls for immediate action. The Fish and Wildlife Commission may further define emergency conditions by rule.

(4) “Fundamental change in permit status” means changes in regulatory approval for the operation of the obstruction where the regulatory agency has discretion to impose additional conditions on the applicant. Examples include, but are not limited to, licensing, re-licensing, reauthorization or the granting of new water rights, but do not include water right transfers or routine maintenance permits.
(5) "In-proximity" means within the same watershed or basin, having the highest likelihood of benefiting the fish populations directly affected by the obstruction.

(6) "Migratory native fish" means those native fish that migrate for their life cycle needs, as listed in the Fish and Wildlife Commission rules.

(7) "Net Benefit" means an increase in the overall in-proximity habitat quality or quantity, which is biologically likely to lead to an increased number of migratory native fish, after a development action and any subsequent mitigation measures have been completed.

509.600. Destroying, injuring or taking fish near fishway; permits to take fish.

(1) It is unlawful to willfully or knowingly destroy, injure or take fish within 600 feet of any fishway, except as authorized under subsection (2) of this section. Actions that violate this section include, but are not limited to:

(a) Hindering, annoying or disturbing fish entering, passing through, resting in or leaving such fishway, or obstructing the passage of fish through the fishway at any time or in any manner.

(b) Placing anything in the fishway.

(c) Using any fishing gear within 600 feet of the fishway.

(d) Taking fish at any time anywhere within 600 feet of the fishway.

(e) Doing any injury to the fishway.

(2) The State Fish and Wildlife Commission may authorize the taking of fish within 600 feet of any fishway by rule or permit.

509.605. Fish passage required over artificial obstructions; approval by department; failure to complete fish passage.
(1) Except as otherwise provided in 509.645 or subsections (6), (7) or (8) of this section, it is unlawful for any owner or operator to construct or maintain any artificial obstruction across any body of water in this state inhabited, or historically inhabited, by migratory native fish without providing passage for such fish.

(2) The department shall complete and maintain a statewide inventory of artificial obstructions in order to prioritize enforcement action based on the needs of migrating fish populations. This prioritization shall include, but not be limited to, the degree of impact of the artificial obstruction on the migrating fish, the biological status of the stocks in question, and other factors as established by rule. The department shall establish a list of priority projects for enforcement purposes. Priority obstructions are subject to the commission's authority as set out in ORS 509.625(2). Unless requested by owners and operators, the department shall primarily direct its enforcement authority towards priority projects, emergencies and projects subject to subsection (3). The fish passage priority list shall be subject to periodic review and amendment by the Department and to formal review and amendment by the Commission no less frequently than once every five years after adoption.

(3) Any owner or operator shall, prior to construction, fundamental change in permit status, or abandonment of any artificial obstruction in any waters of this state, obtain a determination from the department as to whether migratory native fish are or historically have been present in the body of water. If the department determines that such fish are or historically have been present in the body of water, the owner or operator shall submit a proposal for fish passage to the department or for a waiver pursuant to subsection (6) to the Commission. Approval of the proposed fish passage facility or the alternatives to passage
must be obtained from the department prior to construction, permit modification or
abandonment of the artificial obstruction.

(4) The department shall seek cooperative partnerships to remediate passage problems
and assure they are corrected as soon as possible. The department and owner or operator are
encouraged to negotiate the terms and conditions of fish passage or alternatives to passage,
including appropriate cost sharing. This negotiation may include, but is not limited to,
consideration of equitable factors.

(5) The department will submit a proposed determination of the required fish passage
or alternatives to passage to the Commission for approval. This determination could be the
result of negotiation as described in (4) or, if no agreement was reached, it will be a
determination proposed by the department. If no protest is filed within the required time
pursuant to ORS 509.645 (2), the proposed order will automatically become a final order.

(6) The State Fish and Wildlife Commission shall waive the requirement for
adequate fish passage if the Commission determines that alternatives to fish passage
proposed by the owner or operator provide a net benefit to fish.

(a) Net benefit to fish is derived by comparing the benefit to fish which would occur
if the artificial obstruction had fish passage to the benefit to fish which would occur
using the proposed alternatives to fish passage.

(b) Alternatives to fish passage, to be allowed, must result in a benefit to fish greater
than that which would be provided by the artificial obstruction with fish passage.

(c) The net benefit comparisons shall be based upon conditions as they exist at the
time of the comparison.
(d) The Commission shall develop rules establishing general criteria for determining the adequacy of fish passage and of alternatives to fish passage. The general criteria shall include, but not be limited to:

(i) The geographic scope in which alternatives must be conducted

(ii) The type and quality of habitat

(iii) The species affected

(iv) The status of the runs

(v) Standards for monitoring, evaluation and changes (adaptive management)

(vi) The feasibility of passage and alternatives

(vii) Quantified baseline conditions

(viii) Historic conditions

(ix) Existing fish management plans

(x) Whether there are financial or other incentives and how they are applied

(xi) Data collection and evaluation

(e) To the extent feasible, the State shall coordinate its review and requirements with those of the Federal agencies reviewing for compliance with Endangered Species Act.

(7) Any owner or operator of an artificial obstruction may at any time petition the Commission to waive the requirement for fish passage in exchange for agreed upon alternatives to passage that meet the net benefit test in subsection (6) of this section.

(8) Artificial obstructions without fish passage are exempt from the requirement of subsection (1) if:

(a) The Commission finds that lack of passage has been effectively mitigated;

(b) The Commission has granted a legal waiver for the obstruction; or
(c) The Commission finds there is no appreciable benefit to providing passage, as
defined by rule.

With respect to (a) and (c) of this section, the Commission shall review, at least every seven
years, those exempt obstructions that do not have an exemption expiration date to determine
whether such exemption should still apply, and may amend or revoke an exemption if it finds
that circumstances have changed such that the relevant requirements for qualification for that
exemption are no longer met or no longer apply. Any such finding shall be subject to ORS
509.645 rights to appeal and other procedural rights.

(9) Where the fundamental change in permit status is the expiration of the license of a
federally licensed hydroelectric project, the Commission’s determination shall be submitted
to the Federal Energy Relicensing Commission solely through and as required by ORS
543A.060 et. seq.

(10) To the extent preempted under federal law by the Federal Power Act or by laws
governing projects located on bi-state waters, federally licensed hydroelectric projects are
exempt from this 2001 Act.

509.610. Maintenance, monitoring and evaluation of fish passage required.

(1) Subject to ORS 509.645, when the State Department of Fish and Wildlife requires
fish passage to be provided pursuant to ORS 509.605, the owner or operator of an artificial
obstruction shall keep the fish passage in such repair as to provide adequate passage of fish at
all times.

(2) Each day of neglect or refusal to comply with subsection (1) of this section, after
notification in writing by the department, constitutes a separate offense.
(3) The owner or operator is responsible for maintaining, monitoring and evaluating
the effectiveness of passage and/or alternatives to passage.

ORS 509.615 Fish Screening Section is not being amended.

509.620. Condemning inadequate and ordering new fish passage.

Where in the judgment of the State Department of Fish and Wildlife, any fish passage
is not functioning as intended or is inadequate, as constructed under ORS 509.605 or
otherwise, the State Fish and Wildlife Commission may condemn the fish passage and order
new fish passage in accordance with plans and specifications determined by the department.

509.625. Power of department to inspect artificial obstructions and have fish passage
constructed.

(1) The State Department of Fish and Wildlife may determine or ascertain by
inspection of any artificial obstruction or by review of a proposed artificial obstruction
whether it would be advisable to construct, or order the construction pursuant to ORS
509.605 by the owners thereof, of fish passage over the obstruction. Without affecting other
remedies to enforce the requirement to install fish passage, if the commission determines an
emergency exists, the State Fish and Wildlife Commission may order the construction,
pursuant to ORS 509.605, of such fish passage in any body of water inhabited by migratory
native fish as is deemed to provide adequate passage for such fish.

(2) The Commission may order the owners or operators of priority obstructions which
have been issued a water right and owners of lawfully installed culverts or other lawfully
installed obstructions to install fish passage or provide alternative mitigation if the
Commission can arrange for non-owner or non-operator funding of at least 60% of the cost,
unless the owner or operator is already subject to an obligation to install fish passage or
provide alternative mitigation under 509.605(3) or if the Commission declares an emergency
under 509.625(1). The Commission may order owners or operators of all other priority
obstructions to install fish passage or alternative mitigation at the expense of the
owner/operator.

(3) Where fish passage has been constructed with or without the approval of the
commission and has proved useless or inadequate for the purposes for which it is intended,
the commission may improve or rebuild such fish passage. However, such construction or
reconstruction shall not interfere with the prime purpose of the artificial obstruction. This
subsection shall not be construed to require the improvement or rebuilding of fish passage by
the commission.

(4) Where an owner or operator required under ORS 509.605 to provide adequate
passage for fish, fails to provide adequate passage in the manner and time required by the
department, the commission may remove, replace or repair the artificial obstruction or any
parts thereof at the expense of the owner or operator.

509.630. Power of commission to establish fish passages in natural stream obstructions.
The State Department of Fish and Wildlife may determine or ascertain by inspection
of any natural obstruction whether it would be advisable to construct fish passage over or
around such natural obstruction. If it is deemed advisable the commission may construct fish
passage that provides adequate passage for fish in any body of water inhabited by migratory
native fish.

509.645. Dispute Resolution; Filing protest with State Fish and Wildlife Commission;
review and determination by State Fish and Wildlife Commission.
(1) Any owner or operator may request alternative dispute resolution at any point in
the process of determining fish passage requirements.

(2) Any owner or operator of an artificial obstruction may file a protest with the State
Fish and Wildlife Commission within 30 days after receipt of the State Department of Fish
and Wildlife’s determinations under ORS 509.605(3) or (5). The owner or operator shall
identify the grounds for protesting the department’s determination.

(3) The State Fish and Wildlife Commission, after sufficient opportunity for public
review and comment, may approve, deny or modify the proposed determination.

509.910. Injunction to prevent certain violations; jurisdiction; service on corporation.

(1) The State Fish and Wildlife Commission may maintain an action for an injunction
to enjoin and restrain any person, municipal corporation, political subdivision or
governmental agency of this state from violating any of the provisions of ORS 509.130,
509.140, 509.505, 509.605, 509.610, 509.615 and 509.625.

(2) Any action authorized by this section shall be tried in either the circuit court of the
county in which the alleged violation occurs, Marion County or Multnomah County.

(3) If the defendant is a corporation with its principal office and place of business in a
county other than in which the waters flow or are situated, such action shall be deemed an
action of local nature and service of summons made on a corporation in any county where the
corporation has its principal office and place of business. If it is a foreign corporation, service
may be made on the statutory agent but if there is no such statutory agent then upon the
Secretary of State as in other cases provided by law.

509.915 Standing Fish Passage Task Force.
(1) The Commission shall establish by rule the membership and specific duties of a
standing Fish Passage Task Force. The Fish Passage Task Force will be established
primarily to advise the department and Commission on matters related to fish passage in
Oregon, including but not limited to funding, cost share and prioritization of efforts.

(2) A member of the task force shall receive no compensation for services as a
member. However, subject to any applicable law regulating travel and other expenses of
state officers and employees, a member shall be reimbursed for actual and necessary travel
and other expenses incurred in the performance of official duties from such monies as may
be available therefor in the state wildlife fund.

President of the Senate  Speaker of the House

Governor
APPENDIX II.

WORKING AGREEMENTS OF THE TASK FORCE
HB 2102 Fish Passage Task Force
Working Agreements for a Consensus Process
(Adopted 7/6/00)

I. Purpose/Scope

Pursuant to HB 2102, the State Fish and Wildlife Director has convened a Fish Passage Task Force to develop recommendations to improve the benefits to fish resulting from fish passage, fishway and alternative mitigation requirements. The recommendations may include suggested legislative changes and/or suggested administrative rules. A report will be submitted to the Seventy-first Legislative Assembly. Recommendations related to hydroelectric projects will be coordinated with the recommendations of the task force on hydroelectric issues. The Task Force will begin its work with a review of background information and of the issues identified in the April 8, 1999 Report to the 70th Oregon Legislative Assembly.

II. Task Force Members

A. The following people will be members of the Task Force representing the interest, group or government indicated:

<table>
<thead>
<tr>
<th>Interest/Group/Government</th>
<th>Representative</th>
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<tbody>
<tr>
<td>Oregon Dept. of Fish &amp; Wildlife</td>
<td>Roy Ellicker, Deputy Director, Fish Div</td>
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<tr>
<td></td>
<td>Stephanie Burchfield, HCD/Hydro</td>
</tr>
<tr>
<td>Office of the Governor</td>
<td>Roy Hemingway, GNRO</td>
</tr>
<tr>
<td>Water Resources Dept.</td>
<td>Bev Hayes, Hydro Chair</td>
</tr>
<tr>
<td>Oregon Counties</td>
<td>Ron Yockim, Douglas County</td>
</tr>
<tr>
<td>Oregon Cities</td>
<td>Willie Tiffany, League of OR Cities</td>
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<tr>
<td></td>
<td>Steve Kucas, Portland Water Bureau</td>
</tr>
<tr>
<td>Special Districts</td>
<td>Kevin Hanway, Assoc. of Special Districts</td>
</tr>
<tr>
<td>Water Utilities</td>
<td>Jason Green, OR Assoc. Water Utilities</td>
</tr>
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<td></td>
<td>Dave Anderson, OR Water Utility Council</td>
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<tr>
<td></td>
<td>Rob Schab, Coos Bay-N. Bend Water Board</td>
</tr>
<tr>
<td>Water Users</td>
<td>Pete Test, Oregon Farm Bureau</td>
</tr>
<tr>
<td></td>
<td>John Youngquist, Small Water Users</td>
</tr>
<tr>
<td>Water Suppliers</td>
<td>Jan Lee, OR Water Resources Congress</td>
</tr>
</tbody>
</table>
Environmental Organizations  
Mark Riskedahl, NW Environmental Defense Center

Hydroelectric Project Operators  
Cliff Bentz, Idaho Power  
Todd Olson, PacifiCorp

Angling & Fish Conservation  
Jim Myron, Oregon Trout  
Phil Donovan, NW Sport Fishing Assoc.  
Glen Spain, Pacific Coast Federation of Fishermen’s Associations

Indian Tribal Governments  
Bobby Brunoe or Patty O’Toole, Confederated Tribes of the Warm Springs  
Carl Merkle, Confederated Tribes of the Umatilla Indian Reservation

B. Task Force Members represent the interest, group or government for which they are listed, and are responsible for keeping that group informed and getting its support for the recommendations developed and agreed to by consensus.

C. All Task Force Members must be part of any consensus recommendation.

D. Task Force Members commit to participate in all meetings to the extent possible. Members may have one alternate, who may take the member’s place if the member is absent. It is the Member’s responsibility to keep the alternate well briefed.

III. Resource Persons and Advisors

A. The following parties and representatives will work with the Task Force as advisors and resources.

Federal Agencies:
Gary Johnson, US Corps of Engineers  
Ben Meyer, NMFS  
Ronald Garst, US Fish and Wildlife  
Chuck Korson, Bur. of Reclamation

Charlie Corrarino, ODFW  
Joe Rohleder, ODFW  
Ray Hartlerode, ODFW  
Steve Sanders, Department of Justice, ODFW
B. Advisors and resource persons will assist with information and resources, but will not be a part of the consensus decision-making process. Additional advisors/resources may be brought in as needed.

C. Advisors and resource persons commit to keep the Task Force informed of any concerns of its agency that might hinder adoption of a proposed recommendation.

IV. Commitment to Consensus

A. Decisions on recommendations will be made by consensus of all named Task Force Members in their representative capacity. They shall be empowered to represent their group, after agreed upon consultation.

B. Agreements made on parts of recommendations will be considered tentative until the full “package” is put together.

C. Tentative agreements may be made at meetings pending the opportunity for members to consult with their necessary constituencies. This will be done on a timely basis.

D. Consensus means the willingness to go along with the recommendation either in active support of it or in not opposing it.

E. The commitment to work for consensus means that members will participate in the give and take of the process in a way that seeks to understand the interests of all and will work together to find the solutions workable for all.

F. If no consensus is reached on any issue, the various views on the issue will be included in the report, but no recommendation will be made.

G. Members will have the opportunity to review and sign-off on any report that will be presented to the legislature.

V. Open Process

A. All meetings of the Task Force will be open to the public.

B. The group will decide the level of participation of the public and observers attending meetings.

C. Participants agree to maintain the respectful tone of the meetings outside the meetings. Any reporting to constituents or speaking to the press or other discussion of the meetings will focus on issues not on individuals.
VI. Procedures for Task Force

A. Participants will treat each other with respect throughout the process. They will listen to each other to seek to understand the other's perspective, even if they disagree. One person will speak at a time. Participants will participate fully in letting the group know their perspective on issues, their concerns and their differing points of view. At the same time, participants will respect time constraints and will share the time with others. Participants will follow through with assignments between meetings.

B. All participants will act in good faith in all aspects of these discussions. This includes being honest and refraining from undertaking any actions which will undermine or threaten this process.

C. Participants shall make every effort to bring all aspects of their concerns about these issues into this process to be addressed. Members shall refrain from generating controversy in the press and from publicly criticizing or misstating the positions taken by any other participants during the consensus process.

D. Any written communications, including e-mails, will be mindful of these procedural ground rules, and will maintain a respectful tone even if highlighting different perspectives.
   
   1) All members will be clear with the intent of e-mail messages: If the message is meant for the whole group it will be sent via the facilitation team. If the message is meant for an individual, it will not be forwarded without permission from the original sender.

   2) Members are reminded that all e-mail messages should be considered public documents.

E. All participation in this consensus process is voluntary and may be withdrawn. However, participants agree that before withdrawing they will discuss it with the facilitators and with the other participants and will give them the opportunity to understand the reasons for withdrawal and to encourage continued participation if appropriate.

VII. The Facilitators

A. The facilitators, R. Elaine Hallmark and Donna Silverberg are neutral facilitators funded through a grant from Oregon's Public Policy Dispute Resolution Program. They work for all the Task Force Members and will assist the members to work in a way that fosters development of consensus.

B. The facilitators will be responsible for helping to ensure that the process runs smoothly, developing meeting agendas, facilitating meetings, and any working group
or interim sessions as needed, preparing and distributing meeting summaries and consensus recommendations. They may also work with the parties to help them resolve their differences and reach consensus on the various issues to be addressed.

C. The facilitators will maintain confidentiality of any individual communications with participants, unless authorized otherwise.

D. The facilitators will not act as spokespersons for any party and will refer all media inquiries to the spokesperson for the relevant party.
APPENDIX III.

SUMMARIES OF TASK FORCE MEETINGS:

June 13, 2000 – March 7, 2001
HB 2102 FISH PASSAGE TASK FORCE
SUMMARY OF JUNE 13, 2000 MEETING

Facilitators: Elaine Hallmark, Hallmark Pacific Group, LLC
Donna Silverberg, DS Consulting

Members in attendance were:

Dave Anderson        Cliff Bentz        Phil Donovan        Roy Elicker
Jason Green           Kevin Hanway       Bev Hayes
Roy Hemmingway       David Johns (for Steve Kucas)
Chuck Korson          Jan Lee            Todd Olson
Aubrey Russell (for Jim Myron)      Glen Spain
Amy Stuart (for Stephanie Burchfield)    Willie Tiffany    Ron Yockim

Resource Persons and Advisors: Ronald Garst, US Fish & Wildlife; Gary Johnson, US Corps of Engineers; Ben Meyer, NMFS; Steve Sanders, Attorney for ODFW.

Observers: Dale Blanton, PPDRP; John Esler, Fish & Wildlife Commission

Facilitation Team: Elaine Hallmark, Donna Silverberg, Patricia McCarty

The following is a summary from the facilitators on the discussion, agreements and pending actions from the first meeting of the Fish Passage Task Force. Materials distributed at the meeting will be mailed to those not in attendance.

Working Agreements
The Task Force reviewed tips on participating in collaborative processes. Members then discussed and revised the Draft Working Agreements, which had been prepared by the facilitators. The following issues were addressed and agreements made. A revised set of Working Agreements is being distributed with this summary.

1. Purpose and Scope: The purpose and scope of the Task Force’s work was approved as drafted based on the charge from HB 2102.

2. Task Force Members: The group suggested that the interests of irrigators and small dam operators need to be represented on the Task Force and provided some names to start with. It also urged the participation of representatives from the interested Tribes. The facilitation team will work on getting these representatives by the next meeting.
Because consistent participation is important in order to represent a constituency and develop a consensus, the members agreed to try to send a consistent and well-briefed alternate when they cannot attend.

It was agreed that the Federal Agencies will participate fully, but will be "Resources" or "Advisors" and not official members who would sign off on a consensus decision or recommendation. This will avoid various bureaucratic problems. It was also suggested that other resources such as technical expertise in fish passage construction should be brought in when needed. The Independent Multidisciplinary Science Task Force (IMST) was suggested as such a resource.

3. Decision-Making: The Task Force made a commitment to working by consensus principles and trying to achieve a consensus recommendation supported by all representatives and their constituencies. There will be adequate time to review proposals. Task Force members will have the opportunity to review and sign off on any report that will be presented to the legislature.

4. Open Process and Procedures: The Task Force agreed to maintain a respectful tone in both its deliberations and any communications outside the meetings. Meetings are open to the public, but participation may be limited. All e-mail messages regarding the work of the Task Force should be considered as public documents and written with that in mind. E-mails intended for individuals won’t be copied and sent on without permission. If they are intended for the whole group, they will be sent via the facilitation team.

5. Facilitators: The facilitators work for the whole group. Their responsibilities were discussed and approved as drafted.

**ACTION:** All members should review the Working Agreements for approval at the next meeting.

**Background Information**

1. Steve Sanders, of the Oregon Department of Justice, gave a brief history of fish passage legislation. He focused on the current statutes, ORS 498, and ORS 509. ORS 498 refers to game fish and requires fish passage in all obstructions where they are present. ORS 509, refers to anadromous and food fish, and requires fish passage, but allows for hatcheries in lieu of passage if approved by the State Fish and Wildlife Commission. He noted that the current interpretation is that fish passage is required when both game and food fish are present. The previous Task Force proposed combining and simplifying the statutes, with use of consistent language. Steve proposed preparing for the next meeting a combined statutory framework for the Committee to work with. After discussion it was decided to have Steve bring a side by side comparison of the two statutes as an educational tool to show the differences.

Steve also noted that the last two legislatures have passed nearly identical short term legislation, which sunsets in June 2001, allowing the Fish and Wildlife Commission to
waive the requirements of either statute if alternative mitigation would provide a net benefit to wild anadromous and other migratory fish. Under this interim authority the Commission has considered three requests for waivers; granted 2 and denied 1. It has also delegated authority to the Oregon Board of Forestry to make determinations regarding minor interruptions of passage due to Forestry practices. He expressed the view that the Task Force could recommend a practical and enforceable statutory scheme to replace the temporary legislation.

**ACTION:** Steve Sanders will provide a side-by-side comparison of the statutes to help educate the group. He will highlight any inconsistencies for the Task Force at the next meeting.

2. Roy Elicker, of the Oregon Department of Fish and Wildlife (ODFW), gave an update on ODFW’s perspectives. He began by highlighting the agency’s policy: there should be fish passage. If this is not possible, then there should be mitigation that provides a net benefit to wild anadromous and native fish. Mitigation must include a monitoring and evaluation component. He also noted that ODFW would like to consolidate the legislation, clarify terms, and insert the Fish & Wildlife Commission as the final ruling body on passage and waiver issues (instead of the Water Resources Commission). Roy also highlighted the Rogue Basin Fish Access Team’s vision statement as a good model of where things are heading in the area of fish management; it’s collaborative, comprehensive and prioritized by biological measures. He stated that the Department believes that state and federal funding for passage issues will grow, and he hopes the group will have time at the end of this process to work together towards finding funding mechanisms. In the absence of such funds, there is no inventory or database of fish passage problems or solutions.

3. Ben Meyer, of the National Marine Fisheries Service (NMFS), presented an overview of the Endangered Species Act as it relates to fish passage. Generally blocking fish passage would be considered a take of any listed species. He briefly described criteria for critical habitat designation and barriers, definitions of harm and taking, and opportunities for exemptions to a take. He also provided a summary of upstream passage criteria. Handouts of his comprehensive overviews were made available to the group. Even though compliance with NMFS rules under the ESA are separate from compliance with Oregon statutes, he urged the group to be proactive in establishing standards for Oregon, and working with NMFS to get those standards approved as sufficient to avoid any future takes.

**Discussion of Issues**
Members identified the following issues to be addressed in future discussion:

- Combining the statutes
- What criteria should govern whether mitigation should be allowed?
- If mitigation is allowed, what is the standard? Net benefit? No loss of habitat?
- What is the size of the problem? (Need for database or inventory – recommended in last report, but not funded by legislature)
• Incentives for providing passage
• Reasonable time frame for compliance
• Focus on priority places – benefit to fish and lower cost
• Interface of state laws with the Endangered Species Act (ESA) & the Clean Water Act (CWA)

Next Steps
The agenda for the next meeting will include:
• approval of the Working Agreements
• review and refine the issues list from the previous Task Force (contained in the Executive Summary, page 6 & 7);
• presentation by Steve Sanders of the side-by-side statutory comparison.

ACTION: All members should review the issues list. New members should note any questions or concerns with those that were “resolved” last time. Repeat members should be prepared to answer any questions about the “resolved” list. All members are encouraged to prioritize the issues list for future discussions.

MEETING SCHEDULE

The following are the proposed meeting dates through September:

July 6th, July 27th, August 17th, September 7th, September 28th

All meetings will be from 10 a.m. to 3 p.m. in Salem, at the Local Government Center, 1201 Court St. NE.
HB 2102 FISH PASSAGE TASK FORCE

SUMMARY OF JULY 6, 2000 MEETING

Facilitators: Elaine Hallmark, Hallmark Pacific Group, LLC
Donna Silverberg, DS Consulting

Members present:
Dave Anderson Cliff Bentz Stephanie Burchfield Phil Donovan
Roy Ellicker Kevin Hanway Bev Hayes Steve Kucas
Allison LaPlant (for Mark Riskedahl) Jan Lee Jim Myron
Todd Olson Rob Schab Glen Spain Pete Test
Ron Yockim John Youngquist

Members not present:
Bobby Brunoe, representing the Warm Springs Tribe; Jason Green, representing water utilities;
Roy Hemmingway, Governor’s office; Carl Merkle, representing the Umatilla Tribe; Willie Tiffany, representing Oregon cities.

Resource Persons and Advisors present:
Charlie Corrarino, ODFW; Ronald Garst, US Fish & Wildlife; Gary Johnson, US Corps of Engineers; Ben Meyer, NMFS; Steve Sanders, Attorney for ODFW.

Resource Persons and Advisors not present: John Esler, F&W Commission; Chuck Korson, Bureau of Reclamation;

Observers: Dale Blanton, PPDMP

Facilitation Team: Elaine Hallmark, Patricia McCarty

The following is a summary from the facilitators on the discussion, agreements and pending actions from the second meeting of the Fish Passage Task Force. Materials distributed at the meeting will be mailed to those not in attendance.

Revised Working Agreements
The Task Force reviewed and approved the summary of the first meeting and the revised working agreements. In response to the group’s suggestion that representatives for the interests of irrigators and small dam operators were needed, the facilitation team contacted several people. John Youngquist, an engineering consultant to small water users, has joined as a representative for those interests. He, along with the agencies, will help in providing the group with technical expertise as needed. Pete Test, with the Oregon Farm Bureau, has also joined as a representative for irrigators. Representatives for tribal interests have indicated to the facilitation team that they
would be participating, however, none have yet been able to attend the meetings. The facilitators will continue to try to get participation from tribal representatives.

Charlie Corrarino has recently taken the position of Fish Passage Coordinator for the ODFW and has joined the Task Force as an advisor.

ACTION: It was agreed that involving the Natural Resources Conservation Service would be useful. Roy Elicker offered to make the contact and invite someone from the NRCS to join the Task Force.

Review of “Major Policy Issues Resolved”

The group began with a review of the 7 issues listed as “resolved”, on page 6 of the Executive Summary of the previous Task Force. The present Task Force looked at whether it needed to revisit those issues or could agree that they were acceptable as written.

First issue: fish passage as policy. With the acknowledgment that it was a policy statement for the future, there remains a need for the group to clearly define certain terms, such as the meaning of “stream”, “migratory fish”, and whether “maintain” includes the notion of “restore”. Fragmentation of populations is an issue that needs to be considered when deciding if passage should be required for resident native fish. The definitions of these terms will determine whether there is consensus on this as a general policy.

Second issue: “net benefit” standard for mitigation. A short history of the “net benefit” standard was given. After a ruling that statute did not allow ODFW to negotiate away fish passage, the “net benefit” standard was created to compensate for harm done by barriers. Several points were clarified by discussion: an obstruction to passage, and passage structures, unavoidably create harm to fish; the “net benefit” standard is a benefit as to the whole population of a fish; the starting point for measurement of “net benefit” is the population as it is, or was, with an obstruction in place. The group made note that it will be necessary to discuss whether mitigation is likely to work and what to do if it does not, and how a “net benefit” mitigation option would be implemented.

ACTION: The Fish and Wildlife Commission has made findings where net benefit is at issue. Roy Elicker agreed to get copies of these findings for review by the group.

Third issue: historical, biological and ecological factors to be considered in passage waiver determinations involving existing dam or obstruction. The group generally agreed with this policy, and agreed to review it as the work of the task force progresses.

Fourth issue: a standing advisory Fish Passage Task Force. The group also generally accepted this policy. They agreed to return to this when developing recommendations, with attention to issues of effectiveness, consolidation and proliferation.

Fifth issue: statewide inventory and evaluation of barriers to fish passage. There was consensus that this is needed. ODFW is actively pursuing money to complete an inventory. ODOT has completed an inventory of culverts on state roads that may be useful. There was a suggestion that ODFW put a request for the money in their budget, and ODFW agreed to look into that. The group expressed strong support for trying to figure out ways to get the barrier data.
Sixth issue: appeals regarding Department action should go to the F&W Commission rather than the Water Resources Commission. The group agreed in general that the F&W Commission should be the decision making body, but further discussion is needed on procedure, the meaning of “appeal”, and the interaction between issues for which Water Resources is responsible, and those for which the F&W Commission is responsible. Concern was expressed about the time delays experienced by applicants when decisions by different agencies are required for a project. Members also cautioned against setting up a process where the F&W Commission decides an appeal of a decision it initially approved.

Seventh issue: funding not to be secured through additional fees and surcharges on hunting and fishing licenses. A portion of the funds for fish screening come from license surcharges, and the group agreed that this should not be done for fish passage. Steve Sanders reminded the group that there is a presumption inherent in this policy that funding should come from some other source than the owners of existing obstructions, and that the costs for providing fish passage for new projects should be borne by the applicants or owners.

**Review of “Minor Housekeeping Issues Resolved”**

There are seven “minor” issues listed as “resolved”, on page 6 and 7 of the Executive Summary of the previous Task Force. The facilitator suggested that the group begin with a look at the last two issues, and return to the first five a little later.

Sixth issue: authorize the Department to order or conduct the repair of any fish passage facility, with Commission approval. After discussion it appeared that this may need to be shifted up to a “major issue”, out of a minor housekeeping issue. The group agreed that the Department should have, and arguably already had, the authority to order such repair. The Department’s interest is to keep its district biologists out of a difficult position by having the order to repair fish passage come from higher up in the department. It was pointed out that the biologists do not have the same authority as water masters do, and there does need to be some direct authority for the Department to issue an order. However, this may create a situation where the initial Commission approval creates a potential conflict when a decision on the order is appealed to the Commission. The group decided that this issue needs more discussion, particularly to clarify the process involved in an order and an appeal, to clarify what type of action this applies to and how to avoid the potential for a conflict with Commission approval.

Seventh issue: expressly authorize the right of property ingress and egress to the Department to examine man-made dams or diversions and/or maintain fish passage facilities as appropriate, with notice to the owner/operator. Senate bill 1010 addresses this issue, and this policy may be one that can be deleted.

**Framing of Major Unresolved Policy Issues**

The group began to develop an approach for discussing the issues unresolved by the previous Task Force. The unresolved issues were: future fish passage requirements for new dams and diversion projects, and culverts; existing obstructions where no passage exists; standards for a “net benefit” test, mitigation standards, and hatchery supplementation as an element of mitigation.
The facilitator and group agreed on a structure for the discussion. The structure will be detailed in a draft concept paper and distributed by the facilitator. A brief overview of the structure and beginning discussion will be given here.

**ACTION:** Look for the concept paper by e-mail from the facilitator.

**Discussion of First Issue**

The initial discussion of the unresolved issues was organized around categories of projects/obstructions, each of which was considered in light of the action being taken with each. Each issue was considered in turn. The categories were Dams & Diversion Projects, Hydro Projects, and Culverts. The action categories were New, Existing (no action), and Modification (such as upgrading, decommissioning, relicensing, etc.).

Starting with new dams and diversion projects, the group took the issues in turn. The first was whether passage is to be required. The term “passage” is understood by ODFW as meaning “allowing for upstream and downstream movement for all fish at all life stages”. The next issue was mitigation; would it be required, who would decide, what would be the standard, etc.

The group quickly identified needs and concerns to be addressed as discussion on these issues continues. There is a need for definition of certain terms, such as: “body of water” (e.g., does it apply to man-made and now historic ditches); “migratory fish” (does this include resident fish that roam a reach but do not “migrate” as usually understood); and the “net benefit” baseline. Regarding mitigation, several concerns and suggestions surfaced, such as: coordination of the permitting process and authorization on mitigation net benefits; putting criteria for passage waiver and evaluation of the mitigation effort (the species, the status of the runs, etc.) into the mitigation standards; requiring that mitigation plans explicitly consider the fish species in the waters affected; and requiring that mitigation plans include monitoring to create accountability to the goals of mitigation; the feasibility of the mitigation be considered somewhere.

**ACTION:** Members should review the concept paper and think about the next issues to be discussed.

**Comparison of Two Statutes**

Steve Sanders distributed a side-by-side comparison of the two fish passage statutes for review and discussion by the group. A couple of items were noted immediately. The Task Force should address the issue of exotics in both statutes, and define what fish passage applies to.

**ACTION:** It was agreed that Steve will create a consolidated draft statute under ORS 509 with the alternatives clearly delineated. He will incorporate the items the current Task Force has consensus on, and will insert placeholders for those items the Task Force is still discussing.
Next Meeting and Meeting Schedule: The group agreed that it will extend the meeting schedule into October, keeping with the plan of meeting every 3rd Thursday. The date for October is the 19th.

The next meeting of the Task Force is July 27th, 10 a.m. – 3 p.m., in Salem, at the Local Government Center, 1201 Court St. NE, room 113. Lunch will be provided. Parking passes will be available in the meeting room.

ACTION: Look for an agenda and the concept paper by e-mail.
HB 2102 FISH PASSAGE TASK FORCE

SUMMARY OF AUGUST 17, 2000 MEETING

Facilitators: Elaine Hallmark, Hallmark Pacific Group, LLC
           Donna Silverberg, DS Consulting

Members present:
Dave Anderson  Cliff Bentz  Stephanie Burchfield  Roy Elicker
Jason Green  Kevin Hanway  Bev Hayes  Roy Hemmingway
Dave Johns (for Steve Kucsa)  Jan Lee  Jim Myron
Todd Olson  Mark Risckedahl  Rob Schab  Glen Spain
Ron Yockim  John Youngquist

Members (interests) not present:
Bobby Brune, representing the Warm Springs Tribe; Phil Donovan, representing Angling and Fish Conservation; Brad Harper, representing Water Users; Carl Merkle, representing the Umatilla Tribe; Pete Test, representing Water Users, Willie Tiffany, representing Oregon Cities.

Resource Persons and Advisors present:
Charlie Corrarino, ODFW; Larry Rasmussen (for Ron Garst), US Fish & Wildlife; Gary Johnson, US Corps of Engineers; Ben Meyer, National Marine Fisheries Service; Steve Sanders, Attorney for ODFW.

Observers: Don Adams, Josh Adams, Craig Jones

Facilitation Team: Elaine Hallmark, Patricia McCarty

The following is a summary from the facilitators on the discussion, agreements and pending actions from the fourth meeting of the Fish Passage Task Force. Materials distributed at the meeting will be mailed to those not in attendance.

Review of Agenda, Meeting Summary, and Draft Concepts for Recommendations Paper

The Task Force reviewed the July 27th meeting summary and the revised Draft Concepts for Recommendations. There were no corrections suggested at that time. Members may send suggestions for changes to the facilitators before the next meeting. If there are changes, the corrected version will be distributed by e-mail; members should discard the draft version.

The facilitator had integrated the concepts and agreements on new dams and diversions developed at the July 27th meeting into the Draft Concepts for Recommendations paper. The new draft was reviewed by the group, and no corrections were suggested at that time. As with the draft meeting summary, please send suggested changes to the facilitators before the next meeting.
Existing Dams and Diversions

Existing dams and diversions (herein after described as existing “structures”) were initially divided into two groups, for ease of discussion. One group was “existing structures being modified”, and the other was “existing structures with no change or maintenance only”. The first step in discussing existing structures being modified was to define what constituted “being modified”. What would be the trigger that would qualify a structure to be classified as “being modified”? There is a need to differentiate between actions that reasonably constitute modification, and those that constitute only maintenance that should not trigger a review of the structure for fish passage purposes. Several suggestions for the type of action that should trigger review were proposed.

1. New regulatory approval; although not all approvals would qualify the dam as “being modified”.
2. Actions increasing utilization of resources. Actions on the structures that result in an increase may or may not be physical modifications.
3. Renewal of a permit such as a Forest Service special use permit for a reservoir, and federal hydropower licenses.
4. Certain administrative actions that allow consideration of fish impacts; “administrative actions” may need to be defined to avoid unintended reviews.

There were several examples discussed involving different types of structures that the group agreed should, or should not, trigger a review for fish passage or alternatives. The group is sensitive to the need for the requirement for fish passage at existing structures to be reasonably and fairly applied, at appropriate structures, and at the appropriate time.

At this point, concern was expressed about the potential impact of relying on impending modifications to apply the passage requirement. Numerous small and large structures that are not likely to be “modified” soon may need to have passage put in to provide the greatest benefit to fish. Relying on a trigger such as modification could delay getting passage at more important structures, and possibly reduce available funding. Although discussions about existing structures with no change, or maintenance only, was on the group’s agenda as the next category to take up, the concerns expressed brought up the issue of how to prioritize getting fish passage in place.

Discussion produced a slightly different way to look at how the fish passage goals should be met. Categories that blended opportunity and relative benefit to fish emerged. The first category was for those structures that had some action that the group agreed should be an automatic trigger for the passage requirement to be considered. An example is modifications undertaken for permitting or licensing where an ESA listed species is present. Another is when a federal permit up for renewal triggers a consultation requirement. The second category was those structures with the highest priority ranking. The priority designations would be assigned as a result of an ODFW assessment of all existing structures by criteria established to identify where passage would provide the greatest benefit to fish. This idea is discussed in greater detail below. The third category was owner-initiated resolution of fish passage problems.
One option might be that ODFW would categorize each facility with inadequate fish passage or alternatives in the following categories:

a. hydropower, with relicensing requirements in the next five years,
b. a structure with renovation/upgrade planned that requires regulatory approval and increases the use of the resource,
c. a recently licensed/permitted structure (recently to be defined)
d. a structure with an old license/permit – with “old” to be defined.

These categories provide information on when and how to do something about fish passage, and what funding might be available. Those in the first two categories would utilize the regulatory opportunity presented to review fish passage requirements. Those in category “c” would not need review in the near term, and those in category “d” would be prioritized according to certain criteria.

Recognizing that the goal of getting the greatest benefit to fish as soon as possible with limited funding had to be balanced with the burden on owners of structures, the group spent some time on how priority sites could be matched with available funding. To do this, ODFW would need to know:

a) the priority sites,
b) how high a priority each site was,
c) what should be required for the site that would most benefit fish, and
d) how that could be most equitably accomplished, which would include funding decisions.

The first thing needed is a complete inventory of sites that need fish passage, and if passage or alternatives were provided, would have the greatest benefit to fish. There was also a suggestion that a full inventory could identify the sites that do not have a fish passage problem. Some databases of structures do exist, although they are incomplete and do not include additional information about which species are present, the type and quality of habitat, etc. Jan Lee was able to provide copies of three listings of structures that illustrated the problem. ODFW also has a compilation of sites.

**ACTION:** Charlie Corrarino will try to find an ODFW database for distribution to the group.

The need for an inventory was clear from the previous Task Force’s efforts, but there has not been funding for ODFW to complete it. Some members expressed concern that lack of funding could again prevent the creation of an inventory and further delay getting passage or alternatives in place. There was agreement that the creation of a list prioritizing sites should not take a long time. The group discussed options for getting a list of priority sites relatively quickly, beginning with information and resources available, with the understanding that the list would be evolving and updated. A couple of initial options were:

1. ODFW would pull together existing lists and databases from various sources, including watershed councils, which could also provide information to help evaluate the sites.
2. Districts could identify their top ten sites and those could be evaluated and prioritized.
Criteria to prioritize the sites could be set by the group in statute, or could be developed by ODFW. Options for the criteria included the criteria used by ODOT for culverts [Action: Charlie Corrarino will distribute the criteria], and many of those criteria developed for determining the adequacy of passage and alternatives for new structures, with a few additional criteria:

- The type and quality of habitat
- The species affected
- The status of the runs (an ESA listing?)
- The feasibility of passage and alternatives
- Quantified baseline conditions
- Historic conditions (for existing projects)
- Existing fish management and watershed basin plans
- Whether there are financial or other incentives and how they are applied
- Data collection and evaluation
- Cumulative/regulatory effect
- Federal ESA consultation

The next issue of concern was how the priority list would be used. For instance, if a site is a high priority site, and there is no automatic trigger for review, and is it not being modified, what steps will ODFW take? If a structure is being modified, but is a low or medium priority, what steps will ODFW take? It was suggested that the legislation contain language directing ODFW to fix fish passage problems in a way that ensures the problems will be fixed. Some suggestions for language included the following: (paraphrased)

"ODFW will work with owners to identify whether passage is feasible and how passage or alternatives can be accomplished";
"ODFW shall pursue options for addressing passage problems (or restoring fish) at high priority sites in a cooperative partnership with owners";
"ODFW will remediate passage problems and ensure they are corrected as soon as possible"

There was significant concern that owners of existing structures, especially those structures where passage had not been required for whatever reason, not be required to provide passage now without the funding being provided. After discussion, a question remains as to what extent prior approval of lack of passage, particularly for old structures, will protect an owner from bearing the costs of providing for passage now. It was suggested that the opportunity to rely on an earlier permit should diminish over time.

In considering what actions ODFW should take on priority sites the group focused on high priority sites, and outlined a possible process sequence with a high priority structure with an old license/permit.
3. ODFW notifies the owner of the structure that it is a high priority site for fish passage or alternatives. The agency asks the owner to work cooperatively to resolve the problem.

4. The agency looks at the history of the structure (what has been required, what was done, and the result), what can feasibly be done now, for either passage or alternatives, and when and how that can be accomplished, which could include funding responsibilities and options.

The group generally supported ODFW seeking to work cooperatively with owners. It was agreed that when full funding was available opposition was unlikely. Uncertain or limited funds makes the requirement of passage or alternatives problematic.

The group discussed creating timeline goals for ODFW or for passage, and the pros and cons of the idea. The group did agree that restoring fish passage was a long-term effort. The suggestions for timeline goals included percentage completion goals, or a progressive tiered schedule, possibly including financial incentives, and a recommendation in the statute for a dedicated fund or trust to finance the incentive schedule. There was a reminder to avoid creating and “unfunded mandate”.

Roy Hemmingway was present for a short time, providing a chance for the group to get some information about the outlook for funding. Roy said the budget for the next biennium will likely have shortfalls. Agencies will not be increasing their budgets. Programs that are self-supporting or have some other funding, will have a better chance for support from the governor. The governor is willing to go after federal funding but there is no guarantee of success. There may be funding sources in the long term from BPA and federal general funds.

Statutory Framework

Steve Sanders distributed a draft document entitled “Proposed Fish Passage ORS Revision” that consolidates the two statutes and includes concepts developed by the Task Force so far. Currently it does not distinguish between new and existing projects. Steve will make the structured process being discussed clear so that the statute will reflect that new and existing projects are evaluated differently through separate processes, and that it does not appear to impose an immediate requirement for fish passage on all projects. The statute needs to address, in some way, the different standards needed for deriving net benefit for different fish species. It also needs to acknowledge that there are certain projects with legal exemptions from the requirement of fish passage, and the exemptions will remain in force.

Next Steps

Elaine and Steve will make the changes noted above and will work together to combine the structure and concepts developed through the Draft Concepts for Recommendations paper with the Proposed Fish Passage ORS Revision to create a single text in statutory form for the group to work with. Concepts not included in the proposed statute will be noted for inclusion in the Task Force’s Report.

The representatives of “hydro” requested that their issues be delayed until the following meeting (Sept. 28) and suggested going forward with culverts next time. The group decided it would be better to review and refine its work on New and Existing Dams and Diversions at the
next meeting. Thus, the statutory form will be used as a method of reviewing what has been developed and where the gaps are. Hydro issues and culverts will be planned for the Sept. 28 meeting.

The next meeting of the Task Force is September 7th, 10 a.m. – 3 p.m., in Salem, at the Local Government Center, 1201 Court St. NE, room 113. Lunch will be provided. Parking passes will be available in the meeting room.
HB 2102 FISH PASSAGE TASK FORCE

SUMMARY OF SEPTEMBER 7, 2000 MEETING

Facilitators: Elaine Hallmark, Hallmark Pacific Group, LLC
              Donna Silverberg, DS Consulting

Members Present:
Dave Anderson  Brian Barr  Cliff Bentz  Stephanie Burchfield
Roy Elicker    Kevin Hanway  Bev Hayes  Mike Hayes (for
Jason Green)  Steve Kucas  Jim Myron  Rob Schab
Willie Tiffany  Ron Yockim  John Youngquist

Members not present:
Bobby Brune; Phil Donovan; Brad Harper; Roy Hemmingway; Jan Lee; Carl Merkle; Todd
Olsen; Patty O’Toole; Mark Riskedahl; Glen Spain; & Pete Test.

Resource Persons and Advisors present:
Charlie Corrarino, ODFW; Ron Garst & Larry Rasmussen, USFWS; Steve Sanders, Attorney for
ODFW.

Observers: Dale Blanton, Craig Jones, Dawn Nilson.

Facilitation Team: Elaine Hallmark and Donna Silverberg

NOTE: The following are summary notes from the fifth meeting of the Oregon Fish Passage
Task Force (FPTF). These notes are meant to capture the general discussion of those attending
the meeting to both remind people of the discussion points and keep the process moving by
highlighting homework assignments. They are not meeting minutes. Any agreements noted are
not meant to suggest that a final agreement was reached. All agreements will be considered
tentative until full package is put together (FPTF Working Agreement IV.B.).

Corrections to 8/17/00 meeting summary: Members noted that the summary notes need to be
clearer regarding statements of certainty. Because the notes may be used as a legislative record
if there is any ambiguity in a possible statute, it is important that any possible actions or
commitments to act be characterized with care. In order to make certain that issues or statements
do not get mis-characterized in the notes, the facilitators encouraged members to provide any
changes or feedback to them either between meetings or at the beginning of the meeting.

CHANGE TO 8/17/00 SUMMARY: Bottom of page 2  “Thus, ODFW would categorize”
should be changed to read: “One option might be that ODFW would categorize”. It was also
noted that the “guy with Cliff Bentz” should be changed to Craig Jones.

Review Agenda and process for the day:
The group briefly discussed how it would review the proposed statute. A request was made (and
accepted) that future versions of the proposed statute show changes from the 8/28/00 draft.

Fish Passage Task Force
Summary of 9/7/00 Meeting
Concern was expressed about funding for implementation of this statute. After discussion, the group agreed to first focus on the policy that needs to go into the authorizing statute (that which gives the agency the ability to do any work that the FPTF and the legislature deem appropriate) before taking up the funding issues. Once the legislature grants authority to the agency, the agency may then request funds to support the work. The group will discuss the funding issue and draft a possible “budget note” once the proposed statute is developed, if that seems appropriate or necessary at that time.

**FPTF Member Participation:** Related to process, the group expressed concern that some of the people who had clearly articulated concerns or positions related to fish passage in Oregon have NOT been attending the meetings regularly. The group stressed the importance of hearing the concerns of absent members as soon as possible so we can avoid last minute criticism of the hard work being done by those present at the meetings.

**ACTION:** The facilitators will make every effort to discuss this concern with absentee members and get any feedback for the group from those who may not be able to attend future meetings because of schedule conflicts.

**ODFW Database:** Staff presented the agency’s database to the group noting that the data descriptions and comments need updating. There were various questions about what the codes meant. It was noted that where there is no owner listed it may be that the agency cannot ascertain who really owns it at this time.

**ACTION:** Charlie and Roy agreed to find out the date of the last update of the database, send any further updates to the group via e-mail and to send the “key” explaining the codes used in the database via e-mail prior to the next meeting.

**Review Draft of Possible Legislation:**
This portion of the notes is meant to augment the changes made on the 8/28/00 draft bill. The facilitators agreed to begin and maintain a list of words or phrases that may need definition in a final version of the draft bill. Elaine is including the list without definitions in the revised working draft of the legislation.

**Policy:** Concern was raised that the language in the policy statement might be either too strong or too vague as written. After discussion, the policy was revised and a consensus was reached on the revised version (see latest version).

**509.605:**
(1) The group discussed the phrase “migrate for life cycle needs” and whether or not this was meant to include whole populations of fish or individual fish, and whether it would require project owners or ODFW to do studies and prove that certain fish “migrate”. The group determined that it was not meant to be that complex, or to require studies, and the oral description given by Ron Garst would be very valuable to clarify this in the FPTF Report. Ron agreed to draft language for review by the FPTF at the 9/28 meeting. A number of changes were made to clarify the language of the statute. For example, the phrase “water frequented by anadromous”, was changed to “currently or historically inhabited by” to more accurately capture
how the fish use the water. Please review this section for other clarifying changes to the statute. Note: the hydro group needs to comment on this section.

(2) New Dams or Diversions. Language changes were also made to this section to reflect those made above. Additionally, the group discussed the process for seeking prior approval from the agency for passage facilities or waivers under Section (8). At this point, the group suggested that, first, the agency should determine whether or not native anadromous or resident fish inhabit or historically inhabited the body of water being considered for a new project or facility. If the agency determines that fish are or were present, the proponent of the project will then provide to the agency a proposal for passage or a request for a waiver under section (8). The group suggested that no fish passage facility should be built without prior approval from the agency.

MORE WORK NEEDED: The group DID discuss that this may need more discussion especially on the issue of culverts. Is there some way to make this process less burdensome for the local landowner proposing a culvert on his/her property? Could they simply call the agency for approval? Is there a cutoff between culverts and bigger fish passageways that could be articulated in the statute? The group agreed to consider this outside of the large group meeting and bring suggestions to a future meeting when discussing culverts.

(3) Existing Dams and Diversions. Some minor editing changes were suggested for this section. “May” was changed to “shall” in the portion dealing with notification of whether or not adequate passage exists. This section may need to spell out the potential next steps after such notice is given. The portion requiring completion of fish passage within the time specified by the department was removed for inclusion at a later portion in the bill. [Tentatively added to subsection (7)].

(4) Categories of Projects Without Adequate Fish Passage. A great deal of time was spent on this portion of the proposed bill. Members of the group pointed out that this is a very important section in the proposed bill. As such, it needs to be carefully crafted to make clear both the time and priority nature of the various categories. Many voiced concern that, as written in the 8/28 draft, the issues may seem confusing. Some suggested that the role of the prioritization system was not just to signify time for compliance, but also to enable both funding assistance and enforcement. It was noted that some funding sources will not provide financial assistance for correction of “violations”. Since compliance is the primary goal of this effort, there should be some clear point at which the problem becomes a violation, but not before an owner can first seek the financial assistance to get the job done. This needs more thought before the group is finished with its work. Whether there should be a ranking system was also considered (e.g. high, medium, and low priority), but no agreement on the rank or how such a system would operate was reached at this time.

It was also noted that some form of a “safety zone” for people/owners who get on the list and are working through the process of correction would be beneficial for compliance. This “safety zone” would serve to curb lawsuits or other action while the individual is attempting to fix the problem. This will require more thought and discussion at a later meeting.
ACTION: Suggestions for re-drafting the section were made and Elaine and Steve agreed to make a new effort at clarifying this section (see latest draft).

Next Steps
Because so much time was spent discussing the first sections of the draft bill, the group was asked to work within their constituent groups on the following questions prior to the September 28 meeting:

How should high priority structures be dealt with?
What about the so-called “prior approved” structures?
What is the best way to set up the identification, ranking and notification system that will allow for funding sources to assist with needed changes?
At what time does the notification of inadequate fish passage become a violation?
What else should be considered to aid voluntary compliance with the goal of fish passage?

ACTION: All members agreed to read the next version of the draft statute prior to the next meeting. We will begin with a review of the changes made at the 9/7 meeting and continue reviewing the draft statute for additional revisions.

Next Meeting: Thursday September 28, 10 a.m. - 3 p.m.
Local Government Building, 1201 Court Street NE, Salem.
Lunches will be provided so we can work over the lunch hour.

NOTE: Any changes to these notes may be suggested to the facilitators via telephone, e-mail or at the beginning of the next meeting. Please feel free to contact either Elaine or Donna if you have questions or concerns regarding the process or progress of the group.

Thank you again for participating in this process and for being prepared at our meetings.
HB 2102 FISH PASSAGE TASK FORCE

SUMMARY OF SEPTEMBER 28, 2000 MEETING

Facilitators: Elaine Hallmark, Hallmark Pacific Group, LLC
Donna Silverberg, DS Consulting

Members Present:
Dave Anderson  Cliff Bentz  Stephanie Burchfield
Jan DeVito (for Bev Hayes)  Kevin Hanway  Brad Harper
Mike Hayes (for Jason Green)  Craig Jones
Steve Kucas  Todd Olsen  Rob Schab
Willie Tiffany  Kevin Walling  Ron Yockim
John Youngquist

Members not present:
Bobby Brunoe; Phil Donovan; Roy Elicker; Brad Harper; Roy Hemmingway; Jan Lee; Carl Merkle; Jim Myron; Mark Riskedahl; Glen Spain; & Pete Test.

Resource Persons and Advisors present:
Charlie Corrarino, ODFW; Ron Garst, USFWS; Gary Johnson, COE; Steve Sanders, attorney for ODFW.

Observers: Dale Blanton

Facilitation Team: Elaine Hallmark, Donna Silverberg, Patricia McCarty

NOTE: The following are summary notes from the sixth meeting of the Oregon Fish Passage Task Force (FPTF). These notes are meant to capture the general discussion of those attending the meeting to both remind people of the discussion points and keep the process moving by highlighting homework assignments. They are not meeting minutes. Any agreements noted are not meant to suggest that a final agreement was reached. All agreements will be considered tentative until the full package is put together (FPTF Working Agreement IV.B.).

Review of Agenda and 9/7/00 meeting summary: No changes were suggested.

Review of Draft of Possible Legislation: The group reviewed the draft titled “Fish Passage Task Force Working Draft, Revised September 18th, 2000”, which contains the changes made at the September 7th meeting. Members suggested small editing changes to eliminate redundancies and make the language consistent. The facilitators made note of the suggestions and will include them in the next draft. The review of the substance of the draft led to more changes. These are discussed below.

Policy: Ron Garst pointed out that the meaning of “native anadromous and resident fish that migrate for life cycle needs” could be confusing for the purposes of this statute. He explained that since anadromous fish are migratory, the phrase could be shortened to “native fish that
migrate for life cycle needs”. The definition of “native fish” and “migrate” could clarify that the statute applies to anadromous and non-anadromous fish. He will provide definitions for the terms “native fish” and “migrate” for group review. The group agreed to remove the phrase “anadromous and resident” from the policy statement and other references in the draft statute, with the expectation that the definitions will clarify and support the intent of the policy statement.

**ACTION:** Ron Garst will provide a written definition of the terms “native fish” and “migrate” for review by the group.

**ACTION:** Steve Sanders will provide draft definitions for the terms currently listed in the definitions section.

**509.600:** John Youngquist suggested that this section be clarified so that maintenance requirements or emergency actions that might disturb fish do not require a major approval process.

**509.605:** At the September 7th meeting Steve Sanders agreed to check on the default definition of “person” to determine whether using it in this section is appropriate, without defining it further. Steve reported that the default meaning is not helpful for the purposes of this section. It was suggested, and accepted that “person, municipal corporation, political subdivision or governmental agency” be changed to “owner or operator”, since that is who is intended.

The group discussed how the use of the word “owner” alone could create difficulties. One example was that the “owner” of an obstruction could be difficult to determine from records. Another was that there could be multiple parties sharing costs, which could make the term “responsible party” unclear. It was thought that using the terms “owner or operator” would cover the parties who are required to provide the fish passage. These terms will be used in the next drafts.

**509.605(3)-(7):** Elaine first presented an overview of the structure of Sections 509.605(3) to (7). These relate to existing dams and diversions.

Subsection:
- (3) requires the Department to “examine” all artificial obstructions for adequate fish passage, subject to subsections (4) – (8).
- (4) lists the categories of projects without adequate fish passage.
- (5) describes when those projects will be reviewed for adequate fish passage or alternatives.
- (6) requires the Department to focus first on high priority projects.
- (7) requires the Department to seek cooperative partnerships to remediate passage problems, assure correction as soon as possible, and establish a time line for each project.

Subsection (3) contains the draft language “If the department finds there is not adequate passage . . . the department shall notify the owner or occupant of this determination.” The group discussed how that determination might be made, and the potential impact. Several members voiced an interest in participating in this determination. The group's discussion revealed the following points. There is no clear standard or criteria for making the determination of adequacy. Many factors could influence whether passage should be considered adequate. Involvement of owners could help the department get necessary information, and give owners an...
opportunity to negotiate with the department. It could also diminish the chance of serious conflicts, and maximize opportunities for creative solutions and agreements.

The group agreed that when the department initiates assessments of adequacy, it should notify the owner of its intention and ask for cooperation from the earliest step. There was a suggestion that this early notice could also outline the process and the opportunities (such as possible funding, negotiated solutions, etc.)

**ACTION:** Charlie Corrarino and Ron Garst will provide information from federal and state sources to assist with defining “adequate” passage, or how it could be determined. One suggested definition from the group was: “a system that does not impede maintenance of a sustainable population”.

**ACTION:** Cliff Bentz and Stephanie Burchfield will work together to develop a definition of “adequate passage”, or the criteria by which passage can be evaluated or judged.

Returning to an issue raised in previous meetings, the group discussed how to ensure that owners did not become “immediately” in violation of the statute. For instance, if a certain obstruction is known by the owner and the department to have inadequate passage, and there is no “legal” waiver of the requirement of passage, how would the owner avoid immediate liability even if it was a low priority project? ODFW agreed that owners might be responsible to fix the passage only after ODFW formally requires it. In addition, owners may not put in or modify passage without ODFW approval. An owner or operator may request an assessment from the department at any time.

**Note:** Language needs to be developed for these points.

509.605(4): This section lists categories for obstructions with inadequate passage. The group had a long discussion of the two most problematic categories, subsection (4)(a) and (4)(d). Subsection (4)(a) is projects where the department previously accepted alternatives in lieu of passage or waived passage requirements. Members expressed an interest in working with the department on the issues that will arise with projects in this category. Some issues identified by the group were:

- how to determine that the department did accept alternatives in lieu of passage
- what suffices for a “legal waiver” of passage requirements
- how the department’s previous decisions regarding fish passage should be considered
- how to determine an equitable resolution for those that do not have a “legal waiver”, but did get some kind of acceptance (subsequently referred to as the “equitable waiver group”)

Some members are concerned that owners relied on the department’s positions in good faith and should not now be required to arrange for and finance fish passage. Others are concerned that even if fish passage was not required at the time, it may now be needed to benefit the fish. Previous permission, especially that given decades ago, should not restrict the department from ensuring that fish passage is provided, nor absolve the owner from some financial responsibility. There was a clear concern about owners facing very large expenditures, without much opportunity to predict, or bear, the costs. Discussions on this topic are continuing. No decisions were accepted by the group, but merely concerns expressed.
The group discussed some ideas for how to deal with this situation. Subsection (5) describes when projects in each category in subsection (4) will be reviewed for adequate passage. Projects in (4)(d) (those constructed more than “X” number of years ago) will be prioritized, as high, medium and low, using the criteria listed. There was a suggestion that the process of prioritizing could be applied to projects in (4)(a) (which is not mentioned in subsection (5)). This is one place the department could give equitable consideration for its previous acceptance of no passage. In prioritizing these projects, the department could consider (for example) indications that it allowed or authorized no passage, along with the history of a project, and whether the department’s goal is to maintain, or re-establish, a fish run. Consideration of those factors may change the priority of a project.

Another suggestion was to set long timelines for passage to be completed, allowing owners to arrange financing, either in partnership with the state, or through their own resources. An example given was that high priority sites could be required to be completed within 10 years, medium within 15, and low, within 20. Another suggestion was for the department to consider how long ago a project was approved without passage or with inadequate passage. If a site is a high priority and the project was approved within the last 20 years (from 1980 on), additional passage would not be required unless funding is available to cover the costs to the owner. If the project was approved more than 20 years ago (prior to 1980), the department could require passage, to be completed within 10 years, and possibly share the cost or assist the owner in looking for funding. If passage is not possible at a site, it was suggested that the department could share the costs on alternatives, also. A Fish Passage Advisory Group, similar to the Fish Screening Advisory Group, may be able to develop some solutions for these problems, as they arise, and might assist in prioritizing or awarding available funding.

There was a suggestion that the legislation be clear about projects to which it did not apply. There may be certain situations that could be identified as “exceptions” to the requirement of passage. The possibilities suggested were projects with:
- a “legal” waiver
- letters from department staff saying that passage was not needed or required
- compliance with conditions in a water right decision

The group did not make any decisions regarding this suggestion, but began suggesting a category of projects that may have an “equitable waiver” (second and third bullets) as opposed to a “legal waiver” (first bullet). It was Steve Sanders’ opinion that no further requirements for passage could be imposed on those with a true “legal waiver.” He suggested that equitable considerations such as those discussed earlier might be applied to those in the “equitable waiver” category.

The theme that emerged from this discussion had two elements: early involvement of the owner or operator, and cooperation between the department and owner or operator on defining the problems and generating equitable solutions. The group reworked the steps in the sections of the statute relating to existing dams and diversions to allow for this early involvement and cooperation. Two flow charts (diagrams) emerged during the meeting. Following the meeting, Steve, Charlie, Elaine and Donna worked together to integrate the charts. The attached flow chart attempts to reflect the group’s thoughts at the end of the meeting.
ACTION: Concerns remained about the uncertainty of the expenditures that could be faced on any project. The facilitators asked all group members to think of and come back with suggestions for “sideboards” that would allow for requiring fish passage or alternatives where needed, while protecting owners from unlimited or unreasonable costs.

ACTION: All members should review the concepts for existing obstructions developed at this meeting (flowchart) and the remaining sections of the draft statute prior to the next meeting. We will begin with a review of the concepts for existing obstructions developed at the 9/28 meeting and continue reviewing the other sections of the draft statute for additional revisions.

Next Meeting: Thursday October 19th, 10 a.m. - 3 p.m. Local Government Building, 1201 Court Street NE, Salem. Lunches will be provided so we can work over the lunch hour. (Note: At the meeting, it was thought that the Fish and Wildlife Commission would be meeting on October 20 and would be making recommendations on some of these issues. Based on that information, the group recommended changing the next meeting date from Oct. 19 to October 26 if the facilitators found that enough of the people not present would be able to make that change. Subsequent to the meeting it was discovered that the Commission meets October 13 and is scheduling only an informational update, not discussion, on these issues. That, in addition to a number of scheduling conflicts, led to resetting the meeting for the previously scheduled date of October 19. Facilitators also asked members to schedule a regular meeting for November 9 and to save October 26, November 2 and November 16 as potential work group or backup sessions.)

NOTE: Any changes to these notes may be suggested to the facilitators via telephone, e-mail or at the beginning of the next meeting. Please feel free to contact Elaine or Donna if you have questions or concerns regarding the process or progress of the group.

Thank you again for participating in this process and for being prepared at our meetings.
HB 2102 FISH PASSAGE TASK FORCE

SUMMARY OF OCTOBER 19TH, 2000 MEETING

Facilitators: Elaine Hallmark, Hallmark Pacific Group, LLC
             Donna Silverberg, DS Consulting

Members Present:
Dave Anderson       Brian Barr (for Todd Olsen)       Cliff Bentz
Jan DeVito (for Bev Hayes) Roy Elicker                 Kevin Hanway
Mike Hayes (for Jason Green) Roy Hemmingway           Steve Kucas
Jim Myron           Rob Schab                        Pete Test
Willie Tiffany      Ron Yockim                        John Youngquist

Members not present:
Bobby Brunoe; Stephanie Burchfield; Phil Donovan; Brad Harper; Jan Lee; Carl Merkle; Mark Riskedahl; Glen Spain, Kevin Walling.

Resource Persons and Advisors present:
Ron Garst and Larry Rasmussen, USFWS; Ben Meyer, NMFS; Steve Sanders, attorney for ODFW.

Observers: Dale Blanton

Facilitation Team: Elaine Hallmark, Patricia McCarty

NOTE: The following are summary notes from the seventh meeting of the Oregon Fish Passage Task Force (FPTF). These notes are meant to capture the general discussion of those attending the meeting to both remind people of the discussion points and keep the process moving by highlighting homework assignments. They are not meeting minutes. Any agreements noted are not meant to suggest that a final agreement was reached. All agreements will be considered tentative until the full package is put together (FPTF Working Agreement IV.B.).

Review of Agenda and 9/28/00 meeting summary: Group members suggested changes to the wording in two paragraphs on page 3 to make it clear that discussions on the topics referred to in those paragraphs are continuing. The first change is to the statement that ODFW agreed that "owners will be responsible to fix the passage only after ODFW formally requires it". "Will" is to be changed to "might". The second change is to the last full paragraph at the bottom of the page. That paragraph attempts to restate concerns expressed by some group members about possible limits on the department, and limits to an owner's responsibility, when an obstruction was previously accepted without fish passage. This paragraph will be amended to reflect that discussions on this topic are continuing, and that these are not decisions accepted by the group,
but are merely concerns expressed. The revised September 28th meeting summary will be distributed by e-mail.

**Announcements and follow-up info:** Roy Elicker briefly introduced three handouts.

1. **Memo to the Joint Legislative Committee on Stream Restoration and Species Recovery,** from Neal Coenen, Acting Director, Fish Division, ODFW. The memo gives a brief update on the progress of the 2000 Fish Passage Task Force. Roy will present the update to the Committee on Monday, October 23, and invited participation from Task Force members.

2. **Senate Bill 1723 (HR 1444), “Fisheries Restoration and Irrigation Mitigation Act of 2000”**. This bill establishes a partnership program, Fisheries Restoration and Irrigation Mitigation Program, within the Department of the Interior. The program is to develop and implement projects to mitigate impacts to fisheries resulting from the construction and operation of water diversions by local government entities in the Pacific Ocean drainage area, specifically, Oregon, Washington, Idaho and Montana. Fish passage projects and inventories by the States on the need and priority for projects are eligible for funding. The non-federal share of costs is to be 35%. The bill authorizes the appropriation of $25 million yearly, for the years 2001 through 2005, and limits a single state’s eligibility to 25% of that amount.

   The bill was just passed and will go before President Clinton for his signature. The details of how the program will work remain to be developed. Funding under this bill will not be available until fiscal year 2002. In the meantime, attempts will be made to get money re-programmed to make funds available for fiscal year 2001. Roy stressed that Jan Lee was very active in getting this bill passed, and it is the product of two years of effort. ODFW is particularly pleased that the bill responded to the Department’s requests to specifically fund inventories.

3. **Rogue Basin Strategic Plan.** This Plan was developed by the Fish Access Team (FAT) in the Basin to deal with fish barriers. Roy suggested that the Task Force, or another group, such as a Fish Passage Advisory Group, might be able to use some of this plan as a model for how to proceed with planning on fish passage projects. Copies of this plan can be obtained from Roy.

Roy reported briefly on the Fish and Wildlife Commission meeting of October 13th. After a briefing by Roy on the Task Force’s progress, the Commission requested that the department continue to coordinate the fish passage issues with Commissioner John Esler.

Roy announced that Ed Bowles from Idaho has been hired as Director of the Fish Division.

Roy and Elaine acknowledged several resources that had been distributed by e-mail to the Task Force to give ideas on ways in which adequate passage might be characterized.

**Review of Concepts on Existing Obstructions:** Elaine used the flowchart that was included as an attachment to the September 28th meeting summary to review the current proposal before the Task Force on how to approach existing obstructions.
During the review of the flowchart, concern was expressed with having the department do a preliminary prioritization of passage needs, then working only with those in the high priority category or those subject to a legal or voluntary reopener. The suggestion was that obstructions should first be categorized as to whether they were required to install fish passage at all, and give the opportunity to owners or operators to challenge this determination. Discussion explained that culling out the high priority was really a workload management prioritization for the department.

There was also concern that the process, as constructed so far, did not answer questions about who pays, and what should happen if the owner or operator cannot pay for what the department requires.

Roy Elicker commented that he recognized that developing a process for prioritizing the existing structures that have no automatic trigger for review was turning out to be very complex. He added that after much thought, he has concluded that, from a practical workload perspective, the department’s capacity to address fish passage may be limited to those structures that have an automatic trigger. He also noted that he has a strong interest in getting a consensus to take to the legislature. He proposed that the statute simply require existing obstructions to provide fish passage or alternatives to passage when they come up for some kind of review or change. He felt that relying on the natural life span of structures would eventually get all structures reviewed. He noted that high priority obstructions that don’t come up for the state’s review will likely be addressed by the federal government under ESA regulations.

The group discussed this proposal. Roy said that he needs to discuss the proposal further with the department and the governor’s office, and members of the group said they need to discuss it with their constituents. Roy Hemingway of the Governor’s office arrived at the meeting during the discussion, but was not able to give any considered response with such little detail and background. Roy Elicker agreed to work with Steve Sanders and the facilitators to further develop the proposal and distribute a written version to the Task Force to review before the next meeting.

ACTION: Roy, Steve and facilitators will write up and distribute a draft version of the statute with Roy’s proposal to the group via e-mail. Task Force members will review it and discuss it with constituents, and come prepared to work on it at the next meeting.

The effect of the new proposal would be to delete the formal prioritization steps from the previously proposed process, and leave the remaining cooperative structures in place. Once an automatic trigger brings a structure to the department’s attention, the department and owner or operator would work together. The process would begin with determining if migratory native fish are, or were historically, present. If so, the department and owner or operator would cooperate to address passage issues, including funding, and completion timelines. Roy Elicker would like the draft legislation to encourage owners or operators to put passage in; he would also like to get owners or operators out of being in violation by default. He acknowledged that the governor’s office might support delay of enforcement of the passage requirement, but may not support the elimination of the department’s authority to require passage.
The group discussed some ideas for creating incentives for owners or operators to voluntarily improve fish passage. One of the ideas was that the new federal money to be made available to the states through the Fish and Wildlife Service (SB 1723) could be incorporated into a voluntary program set up by the department. The possibility remains that the program could be designed so that compliance with the state’s requirements would satisfy, with approval, ESA requirements. Some thought the voluntary program should be mentioned in the legislation.

Certain issues of concern to the group still remain to be decided under this proposal. An example is the question of how the adequacy of passage would be determined for each structure. Another example is how the owners or operators can have some certainty about their potential costs. If public financial assistance were available, how would the department prioritize it? (Should assistance, or cost share, be prioritized on the basis of the benefit to fish populations? Or, should it be available on a first come, first served, basis?)

The group briefly discussed the above questions. Roy suggested that effective passage could be defined as that which allows fish to pass freely at the time their life cycle requires it. Rob Schab and Cliff Bentz were interested in more specific information on how “effective” passage would be defined, and evaluated. Several points and suggestions came out of this discussion from various members. These were not discussed at length, nor was there any attempt at consensus:

- Some members have a strong interest in having “adequate” or “effective” fish passage clearly defined. Does it include the determination of whether passage is even desirable? Is it defined in numbers, or percentage of fish getting past a barrier? Is it “effective” passage relative to the benefit of the population as a whole? Is it directly over or around the barrier, or does it include trucking?
- The definition or process for determining effective passage may need to be decided in rulemaking, rather than by the Task Force for this legislation.
- If left to rulemaking, the legislation should specifically direct the department to create rules on effective passage.
- The rules should give the broadest possible latitude to determine alternatives if passage is not the best option, or if it is not possible.
- If the department will be reviewing for, or requiring, “effective” passage, it needs to be able to state what qualifies as “effective” passage.
- The concept of “population” should be better defined.
- The group, and the department, should remember that the draft legislation relies on concepts in other statutes and rules on which disagreement remains.
- The draft legislation should allow the department to require no passage, and no alternatives, if that is the best option. The legislation could state this directly, or it could go in the accompanying report, or that option could remain as one potential outcome of the net benefit test.

**ACTION:** Elaine asked all members to review the part of the draft statute that sets out criteria for determining if passage is adequate.
As mentioned in previous meetings, there was a suggestion that an advisory group, like the Fish Screening Advisory Group, could work on many of these issues. The group discussed whether it would be better to expand the Fish Screening group and amend its charter to deal with passage issues, or to create a separate group modeled on the Fish Screening group. No decision was made on this, although the group did acknowledge that the Fish Screening group is working very well, and would be a good model. Roy Elicker acknowledged that if the statute required establishing an ongoing fish passage task force, he would want to seriously consider combining the two task forces from an efficiency and work load perspective.

**Culverts:** Roy Elicker requested the group to discuss culverts a bit now, even though that had not been planned on the agenda. He was not sure whether his proposal would work for culverts, or whether a different approach would be needed. The law currently includes culverts under the definition of artificial obstructions. Roy mentioned that he was thinking that culverts may need to be mentioned separately in the draft legislation for two reasons. Culverts without adequate fish passage may be impacting a larger amount of fish habitat than dams and diversions, and without an automatic trigger for review, the department may need some specific mechanism to ensure passage at culverts.

The group quickly agreed that new culverts could be treated the same way as other new artificial obstructions. They would have to have adequate fish passage, and the owners would be responsible for the cost. Existing culverts do not have obvious “automatic triggers” for review of passage as do dams and diversions. Major road reconstruction or repair, Senate Bill 1010 Plans, “404(d)” permits and replacement were mentioned as possible triggers.

The group discussed what work was currently being done on culverts and exchanged some information and ideas. Following are some of the key points mentioned:

- The department would not likely support alternatives to passage for culverts. The draft legislation could state that no alternatives would be allowed for culverts, clarifying that passage is required.
- There is a good inventory of culverts that do not have adequate passage on state and county maintained roads.
- The inventory has been distributed to the counties, and some counties have plans and programs for providing passage, although some are waiting on funding to implement the plans.
- Culvert improvements qualify as passage for the purposes of the new federal cost-share program.
- To get the most benefit for fish, entities putting in passage at culverts could be required to prioritize the sites as a condition of getting federal money.
- Requiring smaller culverts to go through a permitting process could give the department opportunities to review passage on more culverts.

After considerable discussion, the group tentatively concluded that existing culverts could be treated the same as other existing artificial obstructions. They will be included in the definition of “artificial obstructions” in the draft legislation. The triggering mechanisms for review may have to be broadened somewhat to include the types of “triggers” that apply to culverts.

Definitions: Ron Garst had circulated a definition of “migrate for their life cycle”. The group suggested a few editorial changes, and with those, accepted the definition for use in the draft statute. The group also agreed that the existing statutory definition of “native fish” was appropriate for the way we are using it here. Therefore, no special definition needs to be created for the fish passage statute. Steve Sanders will continue work on getting definitions for the remaining terms in the definitions section of the draft legislation.

Next steps: The facilitators will work with Steve and Roy to develop a new draft of the legislation to reflect the group’s conversation at this meeting. Although the group did not make any decisions regarding Roy Elicker’s proposal, the new draft legislation will incorporate the proposal to give the group a chance to consider the proposal in context. The new draft will not show changes. Instead, it will be written as a clean draft, to show what the amended statute would look like on completion. The new draft will be distributed to the group by e-mail as soon as it can be completed.

ACTION: All members should review the revised draft statute prior to the next meeting. Members should come prepared to discuss the department’s proposal, and continue work on the remaining items.

Next Meeting: Thursday, November 9th, 10 a.m. - 3 p.m. The facilitators also asked members to save November 16th in case another meeting is needed.

NOTE: Any changes to these notes may be suggested to the facilitators via telephone, e-mail or at the beginning of the next meeting. Please feel free to contact Elaine or Donna if you have questions or concerns regarding the process or progress of the group.
HB 2102 FISH PASSAGE TASK FORCE

SUMMARY OF NOVEMBER 9TH, 2000 MEETING

Facilitators: Elaine Hallmark, Hallmark Pacific Group, LLC
            Donna Silverberg, DS Consulting

Members Present:
Cliff Bentz
Kevin Hanway
Jim Myron
Glen Spain
John Youngquist

Stephanie Burchfield
Bev Hayes
Todd Olsen
Willie Tiffany

Roy Elicker
Steve Kucas
Rob Schab
Ron Yockim

Members not present: Dave Anderson; Bobby Brunoe; Phil Donovan; Jason Green; Brad Harper; Jan Lee; Carl Merkle; Mark Riskedahl; Pete Test.

Resource Persons and Advisors present: Charlie Corrario, ODFW; Ron Garst, USFWS; Ben Meyer, NMFS; Steve Sanders, attorney for ODFW.

Facilitation Team: Elaine Hallmark, Donna Silverberg

NOTE: The following are summary notes from the eighth meeting of the Oregon Fish Passage Task Force (FPTF). These notes are meant to capture the general discussion of those attending the meeting to both remind people of the discussion points and keep the process moving by highlighting homework assignments. They are not meeting minutes. Any agreements noted are not meant to suggest that a final agreement was reached. All agreements will be considered tentative until the full package is put together (FPTF Working Agreement IV.B.).

Review of Agenda and 10/19/00 meeting summary: No changes were suggested for the meeting summary.

Review of Draft Legislation (revised October 31, 2000): The facilitators began by taking the group through a summary of the key concepts of the legislation, as revised in the last meeting. The focus of the review was on the balance between the requirement of fish passage and the process for implementing the goals of the legislation. The goal of the review was to see if the group agreed on the key concepts.

The majority of the discussion focused on one of the first concepts reviewed: when the department could take action to require passage or alternatives. The October 31st draft allows the department to require passage only under three circumstances: 1) when new structures are proposed; 2) when certain events trigger the requirement for existing structures; and 3) in an emergency. Glen Spain registered strong concern about eliminating the department’s underlying authority to enforce the requirement of passage under any circumstances, especially in egregious situations.
To resolve this issue, members discussed different interpretations of the purpose of the Task Force and the ultimate goal of the new legislation. Some suggested that the purpose of the Task Force is to address the inconsistencies in the existing statutes, and then to prioritize money and enforcement. Others believe that the purpose is to develop a system for a fish passage program that provides a net benefit for fish, and by its structure, promotes change on the ground. There was no disagreement expressed when one member articulated the overall goal of the legislation as saving fish populations.

Steve Sanders noted that the group faces the policy dilemma of whether, and how, to create a legislative structure that promotes fish passage primarily through incentives, or primarily through department enforcement. Restricting department action on passage was an attempt by the Task Force to balance owners’ interests in predictability of enforcement with the department’s resources to enforce. Some members expressed the strong belief that the department needs to retain clear enforcement authority for those situations where owners are not cooperative, or are intentionally avoiding the law.

The group then discussed how the department could retain an active, rather than purely reactive, role in ensuring passage. One concern expressed was that relying on a triggering event sends the wrong message as to the majority of structures without adequate passage. How would passage be achieved at structures with no triggering event on the horizon? The group began to explore the idea that more triggers were needed to give the department the opportunity to look at these structures. One suggestion was to utilize ongoing processes, such as watershed councils and recovery plans; if a completed recovery plan contemplated increased passage this could be a trigger for the requirement of passage.

The idea of prioritizing structures also resurfaced. The discussion explored linking priority with deadlines and funding, and using the funding to provide an incentive for cooperation. The following are some of the ideas suggested:

- Roy Elicker said that even without a legislative requirement to prioritize structures, the department would move forward with a priority based inventory. One suggestion was to create deadlines for completion of passage for structures of differing priorities. The deadlines could reflect the degree of the problem the obstruction presents.
- Broad categories of high, medium and low priority could be linked with equitable considerations of “prior approval”, funding, enforcement and deadlines:
  - Structures with “prior approval” from the department could be eligible for public funding, and perhaps full funding.
  - The department could actively require passage or alternatives at high priority structures, and to balance this, the owners or operators could be offered direct or indirect funding. If the owners or operators refused to cooperate, they would be responsible for all costs. Note: There was a question about whether funding should be made available on all high priority structures. Should it be made to owners or operators that have the resources to pay, or should it be limited to those who do not have the resources to get passage or alternatives in place in time to benefit the fish?
  - To address concerns about arbitrary enforcement by the department, the department’s enforcement authority could be restricted to only high, and perhaps medium priority structures. Or, low priority structures could be given an enforcement waiver, perhaps up
until some triggering event. Another suggestion was to give the department the discretion to issue waivers for structures, rather than waiving an entire category.

- To address concerns about the potential that some enforcement action on passage might be needed in an emergency situation, it was suggested that the Fish and Wildlife Commission retain that authority, while the department would be limited to the process set out in the statute.

After discussion in small groups the Task Force came to a tentative agreement on a modification of the general concepts developed at the last meeting. The question the group was discussing was “What kind of enforcement authority does the department retain and when does it use it?” The following are the basic elements of the proposal for existing structures: enforcement, prioritization, financial responsibility, and necessary caveats:

- **Enforcement**: The department would retain authority to enforce the requirement of passage or alternatives. Structures would be prioritized into high, medium and low categories. Medium and low priority structures could receive a blanket waiver, or a waiver at the department’s discretion, up to a triggering event.

- **Prioritization**: The department would prioritize structures through criteria that will be developed in rulemaking. The criteria should include consideration of the presence of listed species, the extent to which passage or alternatives will benefit fish populations, and possibly staff resources. (A longer list of possible criteria was developed in the September 28th meeting. See page 5 of the revised 9-28 legislation.)

- **Financial responsibility**: When passage is required at a structure as a result of some triggering event, the owner or operator pays the cost. The triggering events include: a fundamental change in permit status, major maintenance or structural modification, and abandonment. When the department is requiring passage at high priority structures with no anticipated triggering event, cost share should be offered. When an owner or operator voluntarily installs passage or alternatives they will be eligible for cost share. The extent of the cost share offered will be determined by rulemaking.

- **Caveats**: the following caveats were offered, but the group did not discuss them in any detail at the meeting:
  - how the priorities are created needs to be fleshed out;
  - some cost share should be offered when the department requires passage or alternatives on high priority structures
  - the process to “reopen” a structure to the requirement of passage or alternatives needs to be looked at carefully;
  - the actual statutory language needs to be reviewed.

The group then looked at the remainder of the key concepts in the draft legislation. The balance of the elements needs further discussion. There was a suggestion that the legislation should distinguish between new and existing structures in order to clarify when cost share opportunities apply.

**Definitions**: The group moved on to discuss definitions. Members agreed to remove the definition of “fundamental change in permit status” and instead, agreed to bring in examples for inclusion in the report and to assist with legislative intent.
ACTION: Charlie Corrarino will review and provide a revision of the definition of “fish that migrate for life cycle needs.” Steve Kucas agreed to send out a definition of “net benefit”.

Remaining issues for the next meeting:
- Development and application of the prioritization process
- Cost share (should it apply to culverts, etc.?)
- The obligation of the department to offer funding assistance; what happens if the department does not have funding to offer?
- Definition of emergencies, or emergency authority
- Definitions: guidance to rulemakers; review of decision to list species to which legislation applies instead of relying on the definition of “fish that migrate for life cycle needs”

Next steps: The facilitators will work with Steve and Roy to develop a new draft of the legislation to reflect the group’s conversation at this meeting.

ACTION: All members should review the revised draft statute before the next meeting. Members should come prepared to discuss the new draft, and continue work on the remaining issues.

Next Meeting: Thursday, November 30th, 10 a.m. - 3 p.m.; Water Resources Department, Conference Room “C”.

NOTE: Any changes to these notes may be suggested to the facilitators via telephone, e-mail or at the beginning of the next meeting. Please feel free to contact Elaine or Donna if you have questions or concerns regarding the process or progress of the group.
HB 2102 FISH PASSAGE TASK FORCE

SUMMARY OF NOVEMBER 30th, 2000 MEETING

Facilitators: Elaine Hallmark, Hallmark Pacific Group, LLC
Donna Silverberg, DS Consulting

Members Present:
Dave Anderson    Cliff Bentz    Stephanie Burchfield    Phil Donovan
Roy Elicker      Kevin Hanway  Bev Hayes               Steve Kucas
Jim Myron        Todd Olsen     Rob Schab               Glen Spain
Willie Tiffany   Ron Yockim

Members not present: Bobby Brunoe; Jason Green; Brad Harper; Jan Lee; Carl Merkle; Mark Riskedahl; Pete Test; John Youngquist

Resource Persons and Advisors present: Charlie Corrarino, ODFW; Ron Garst, USFWS; Steve Sanders, attorney for ODFW.

Observers: John Sample, OWRD

Facilitation Team: Donna Silverberg, Patricia McCarty

NOTE: The following are summary notes from the ninth meeting of the Oregon Fish Passage Task Force (FPTF). These notes are meant to capture the general discussion of those attending the meeting to both remind people of the discussion points and keep the process moving by highlighting homework assignments. They are not meeting minutes. Any agreements noted are not meant to suggest that a final agreement was reached. All agreements will be considered tentative until the full package is put together (FPTF Working Agreement IV.B.).

Review of Agenda and 11-9-00 meeting summary: One request for a change was made to more accurately reflect the extent of the group’s agreement. On page 3, in the first paragraph following the section on caveats, the second sentence will be modified to read: “The balance of the elements needs further discussion.” A modified draft will be distributed by e-mail.

Comments by John Breiling, Corps of Engineers attorney: The group briefly discussed an e-mail message from Mr. Breiling on his assessment of the impact of Measure 7 on the draft legislation. His feels the draft statute may be legally defective. Steve Sanders assured the group that the state was also concerned about the effect of Measure 7. Steve noted that the Oregon Department of Justice plans to issue a formal opinion on the measure on December 7th. Steve said that DOJ’s current view is that the Task Force’s draft legislation improves the position of the state. He recommended that the Task Force continue with its work and create the best law possible. The impact of Measure 7 will be assessed later.
Review of primary concepts in draft statute (Draft Revised November 13th, 2000): The meeting began with a review of the new draft to see if it captured the group’s intent at the last meeting. There were several suggestions to clarify points in the statute, which are listed below. The definition of emergency was new to the November 13th draft. As the group considered the structure of the statute, some were concerned that the definition of emergency required the department to wait too long before it could order passage, unless it could offer money for cost sharing. The group quickly returned to the discussion it had at the last meeting, on whether the department’s enforcement authority was unduly, or appropriately, restricted.

Glen Spain again objected to language restricting the department’s enforcement authority. He said that he supports incentives for owners to create passage, but not an erosion of the state’s obligation and power to enforce the passage requirement where needed. To address his concerns, the group embarked on a discussion about the emphasis on the department’s enforcement options. It was suggested that the actual number of artificial obstructions for which the department would need to exercise its full authority was quite small, and that the statute allowed the department to do so. The group discussed the function of the triggers and prioritization by the department, and the incentive nature of the statute.

Jim Myron suggested a change in the wording of the statute to solve the problem. The statutory language could clearly indicate where the department is to direct its enforcement authority, rather than where it is restricted from enforcement. For example, the statute could state “The department’s enforcement authority will be primarily directed at high priority obstructions”. In addition, the department could create a single list of priority sites, without designating sites as high, medium or low. The statute could remain silent on what action the department can and cannot take on non-high priority obstructions. To ensure that passage is addressed at lower priority sites, members suggested that the department could be allowed to move sites up in priority as high priority sites are completed.

The group discussed these ideas and how to retain both protection and predictability for owners and operators of non-high priority obstructions. One option suggested was to retain the process for applying for an exemption. Criteria suggested by the group are listed below.

There was also some discussion about whether the “emergency” trigger was necessary. If a situation were critical, perhaps the Commission could instead direct the department to designate the site as the highest priority. Roy Elicker stated that it was his understanding that the Commission wanted to retain the emergency authority to order fish passage in the appropriate situation. He also noted that the Commission regarded the authority as one it would rarely use. Roy offered to talk with the Commission about the emergency authority and report back to the group.

**ACTION:** Roy will discuss the option of eliminating and/or clearly defining the emergency trigger with the Commission and clarify what it is willing to accept. He will report back to the Task Force at the next meeting.

After a review of the morning’s discussion there appeared to be agreement in the group that, if drafted correctly, there could be consensus on the following points:

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Fish Passage Task Force
Summary of 11/30/00 Meeting
1) Fish passage or an alternative is required when an obstruction of any priority is triggered, and the owner/operator is responsible for costs; the cooperative process applies to all obstructions.
2) The department will create a prioritized list of obstructions, designating some as high priority.
3) The department will focus its efforts on fish passage at high priority sites.
4) When the department wants passage or alternatives at high priority sites without triggers it must offer cost share; if the owner/operator fails to cooperate, the cost share opportunity will be withdrawn.
5) Owner/operators can apply for exemptions for obstructions of any priority; the criteria might include:
   - no fish, now or historically;
   - effective mitigation (to be defined);
   - legal exemption;
   - natural barriers, or demonstration of no appreciable improvement from a fishway.

Definitions and remaining issues: The short time left in the afternoon was devoted discussion of definitions and remaining issues. Most of the decisions on these need to be made at the next meeting.

Net benefit: The baseline was clarified as the current productivity of habitat capability above the obstruction, or facility. Steve Kucas suggested that the measure for net benefit should be habitat rather than numbers of fish, and the department agreed. There was a suggestion that the net benefit measure could be delineated in rules, rather than the statute. Steve Kucas stated that he would like to have the concept of “in-proximity” formalized in the statute, and agreed to draft some language.

**ACTION:** Steve Kucas will draft a definition of “in-proximity” that reflects the intent that closer is best, while retaining the flexibility to move beyond the immediate site or population.

Construction: One concern with the draft definition was that “construction” is too broad. A suggestion was that the statute or rules identify what type of construction would trigger the requirement, rather than relying on terms like “major”. Examples were: raising the dam height, enlarging withdrawal gates, relocating diversions, modifying the footprint. Roy Elicker suggested that before the group went further with a definition he could speak with department engineers to get some idea of whether some structural modification definition could be developed.

**ACTION:** Roy will come back to the group with some draft definitions based on his discussions with department engineers.

Native fish that migrate for life cycle needs: Charlie Corrario provided a listing of fish that would come under this definition. The group agreed that the Commission could adopt by rule a listing or a definition of “native fish that migrate for life cycle needs.”
Cost share: There was agreement that the amount offered should be compatible with the proportion for fish screening projects – 60% in direct funding and/or in-kind contributions. The legislation should be drafted to reflect this intent.

Appeals: Steve Sanders offered to reevaluate this portion of the statute in light of the day’s discussion. Steve asked the group if they wanted a formal contested case as one option for appeal. He explained that, if the statute were silent on the issue, the Commission would have discretion to offer a contested case hearing, rather than a public hearing, when necessary. Some members expressed a preference for a contested case option, or some process close to that. It was agreed that it would be helpful to have language to compare the smorgasbord of options before the group made a choice.

**ACTION:** For the next meeting **Steve Sanders** will prepare separate drafts of an appeals section that allow for comparison of the options for a public hearing only, a contested case only, or a choice of processes.

Monitoring and evaluation: The group did not have time to discuss this item at the meeting. A draft will be prepared for consideration at the next meeting.

**ACTION:** **ODFW staff** will draft some language on this section of the statute for the group to review.

Fundamental change in permit status: At the last meeting members agreed to remove the definition of “fundamental change in permit status” from the statute and, instead, agreed to bring in examples for inclusion in the report and to assist with legislative intent.

**ACTION:** Members need to think about examples and prepare written examples for review at the next meeting.

Additional suggestions for clarifying the statute: The following were some ideas offered throughout the meeting that will be considered as the drafting continues:
- The statute should be clear that although the department’s authority to order passage is restricted, the owner/operator has the primary responsibility for ensuring passage.
- The language should signal, or state clearly, that as passage problems at initially high priority sites are resolved, other sites may be moved up in priority.
- The department should have unrestricted authority to enforce passage at its own sites.
- Add language stating that if an owner/operator fails to cooperate with the department, the owner/operator is responsible for all costs. Clarify what failure to cooperate means, or at least at what point the cost share opportunity is withdrawn.
- The creation of a Standing Fish Passage Task Force could be done by modifying the Fish Screening Task Force statute. If the Fish Screening Task Force is expanded, the required representation should be listed in statute.
- The department should have authority to waive the requirement for hydro projects under a certain THP; or the Commission could delegate smaller projects to department staff.
Next steps: The facilitators will work with Steve and Roy to develop a new draft of the legislation to reflect the group's conversation at this meeting.

ACTION: All members should review the revised draft statute before the next meeting.

Next Meeting: Monday, December 18th, 9 a.m. - 4 p.m.; US Fish and Wildlife Service, Oregon Office, 2600 SE 98th, (just off Division St. east of I-205) suite 100, Portland Oregon, 503-231-6179. The main conference room is upstairs. Parking is generally available in the lot, in either unmarked or "USFWS" marked spots. Parking is also available on the street in front of the building.

Agenda Items: Review new language: priority/exempt/emergency
   - Net benefit language
   - Appeals options
   - Construction
   - Waivers
   - Monitoring and evaluation
   - Cost share
   - Culverts

NOTE: Any changes to these notes may be suggested to the facilitators via telephone, e-mail or at the beginning of the next meeting. Please feel free to contact Elaine or Donna if you have questions or concerns regarding the process or progress of the group.
HB 2102 FISH PASSAGE TASK FORCE

SUMMARY OF DECEMBER 18th, 2000 MEETING

Facilitators: Elaine Hallmark, Hallmark Pacific Group, LLC
               Donna Silverberg, DS Consulting

Members Present:
Dave Anderson       Cliff Bentz       Stephanie Burchfield         Phil Donovan
Roy Elcker         Bev Hayes         Steve Kucas                  Jan Lee
Jim Myron          Todd Olsen        Mark Riskedahl               Rob Schab
Glen Spain          Pete Test

Members not present: Bobby Brunoe; Jason Green; Brad Harper; Kevin Hanway; Carl Merkle; Willie Tiffany; Ron Yockim; John Youngquist

Resource Persons and Advisors present: Charlie Corrarino, ODFW; Ron Garst, USFW; Steve Sanders, attorney for ODFW.

Observers: Michael Weinberg, Aide to Jan Lee; Richard Craven, Consultant and Fish Screening Task Force member.

Facilitation Team: Donna Silverberg, Patricia McCarty

NOTE: The following are summary notes from the tenth meeting of the Oregon Fish Passage Task Force (FPTF). These notes are meant to capture the general discussion of those attending the meeting to both remind people of the discussion points and keep the process moving by highlighting homework assignments. They are not meeting minutes. Any agreements noted are not meant to suggest that a final agreement was reached. All agreements will be considered tentative until the full package is put together (FPTF Working Agreement IV.B.).

Review of Agenda: Prior to the meeting, Glen Spain distributed a draft statute modified with his suggestions and related comments. He requested that a discussion of his proposed changes be added to the agenda. Jim Myron also distributed a paper detailing Oregon Trout's issues and suggestions for portions of the draft statute. The group agreed to address these during the day's discussion.

11-30-00 meeting summary: Jim Myron requested corrections to the meeting summary. On page 2, in the 3rd paragraph, the 4th sentence should be changed to read "In addition, the department could create a single list of priority sites, without designating sites as high, medium or low." On page 4, under Cost Share, the comma after the word "intent" will be changed to a period and the last part of the sentence will be deleted. Patricia McCarty told the group that a modified draft of the summaries for November 9th and November 30th will be distributed by e-mail.
Announcements: Jan Lee noted that a placeholder for the draft legislation has been made for the House. Roy Ellicker said he understood that there is also one for the Senate. The group briefly discussed the timeline for the Task Force in light of the upcoming session. It was noted that both the legislation and the report need to be completed soon. This will give members time to consult with constituents and legislative counsel to work on the legislation. Steve Sanders asked what the group would like to do if there is not 100% consensus. NOTE: After reviewing the Task Force Working Agreements, the group agreed that if there is consensus on a large portion of the issues (80% was used as an example) they would submit those issues on which there was a consensus in a final report and as part of draft legislation as ‘recommended’, but would omit those provisions for which there was no consensus from its recommendations and draft legislation and would then detail those issues without consensus, outlining the various viewpoints, in the written final report*. When the group questioned who would write the report, ODFW suggested that the facilitators draft a report for the group to review and agree on. The group agreed with this suggestion and requested that the report include meeting summaries, issues discussed, and where there are and are not agreements.

Review of 12/5/00 revisions of draft statute: The meeting began with a discussion of the draft statute’s definitions. The following notes the issues raised and changes made:

Artificial Obstruction: replace the word “blocks” with the word “precludes” before migration.

Construction: The group agreed that changes made in the last draft were helpful to distinguish the split between diversion or reservoirs and culverts. However, it was suggested that the definition could be enhanced by adding that construction is tied to an increased diversion of water—not just a greater use of the resource as seen in the following proposed definition:

“Construction” means original construction, major maintenance or structural modifications that allow for an increased diversion of water, except for culverts for which “construction” means culvert or roadbed replacement.

Emergency: Roy Ellicker reported that he discussed the emergency issue with Commission members. The Commission confirmed that it wants to retain some authority to order passage in special situations. For example, if a push-up dam were impacting a sensitive species of fish in a waterway, the Commission would want authority to take immediate action rather than awaiting a lengthy paperwork process. The group discussed whether the definition of emergency, and therefore the Commission’s authority to order passage without offering to share costs, should be related to effects caused by the obstruction. Some members were concerned about the Commission ordering owners or operators to install and pay for passage to remedy a situation in which their obstruction played no part. For example, the fault for a chemical spill should be against the guilty party, not the owner/operator of the obstruction. Operators would support structure-linked emergencies. Also, special concern was raised that “emergency” not be evoked simply because there is a lack of funding to support the desired action. ODFW staff noted that the Commission has never abused its emergency authority and, due to the consequences of such action, would not do so in the future. Finally, it was pointed out that the definition should
specifically address danger to fish populations. After more discussion, the group agreed on the following proposed definition:

“Emergency” means an unforeseen combination of circumstances related to or affected by the artificial obstruction that, because of danger to fish, calls for immediate action. The Commission may further define emergency by rule.

Fundamental change in permit status: The task force had at one time agreed to include specific examples of fundamental changes in permit status. This time, the group discussed their understanding of what would constitute a “fundamental change” in permit status. Some suggestions were re-licensing or licensing amendments, and possibly new or renewed water rights. Steve Sanders said that he thought the group’s original idea was that the statute addresses those situations in which additional regulatory approval is discretionary and conditions could be imposed on the applicant. There was agreement with this idea as well as that minor changes in permits or permit status should not trigger the passage requirement. At the group’s recommendation, Steve agreed to draft a definition that captured this intent.

**ACTION:** Steve Sanders will draft a definition of “fundamental change in permit status” for the group to review.

Migrate for life cycle needs: The group agreed that there was a consensus at the last meeting on a list of fish intended to be included in this definition. The list of species is important and ought to be adopted by Commission rule. Those members with an interest in the wording of the definition could work together on the final draft.

**ACTION:** Steve Sanders and Glen Spain will work on refining the definition for the next meeting.

Net Benefit: There was a brief discussion on adding to the definition language around “in-proximity” habitat. The group agreed that the definition in the habitat mitigation rules could work, if modified to focus on the population affected by development. Several members reiterated their desire for the department to be flexible in considering proposals for alternatives, and to look broadly when considering the population affected. To better understand the issue, members looked at a field map provided by USFWS. It was agreed that the group would like to see the widest latitude for achieving the goal of increasing numbers of fish by providing good habitat and passage.

**ACTION:** Steve Sanders will draft a definition of “in-proximity habitat” for the group to review.

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_Fish Passage Task Force_  
Summary of 12/18/00 Meeting  
Page 3 of 7
Other Sections:
The group discussed several elements in the remaining sections of the statute. The following
summary is organized sequentially under the sections discussed as opposed to the course of the
discussion. The additions and changes to the draft statute are italicized.

509.605(2): Remove the word “high” before priority. The following sentence will be added at
the end of subsection (2): “The prioritization list shall be subject to periodic review and
amendment by the Department and to formal review and amendment by the Commission no less
frequently than once every five years after adoption.” Glen Spain noted his disagreement with
the retention of the sentence subjecting priority obstructions to the Commission’s authority as set
out in 590.625(2). NOTE: Glen provided the group with footnoted draft that explains his
group’s objections to various points in the draft statute. This may be referred to for future
reference or discussions.

509.605(4): The majority of the group agreed that this subsection is acceptable as drafted, but
would like to see some separation of the cooperative partnerships concept and the department’s
submittal of a proposed determination. Also, there needs to be some distinction about when the
department will make such a submission—For failed cooperative attempts or when agreement is
reached or both? Glen Spain noted his disagreement with the draft as it stands because he
believes it could be strengthened by language suggested in his draft. The majority of the group
disagreed with him because his “up to 60%” language relating to cost share might lead to little or
no money being offered by the agency. This section is intended to be a part of the incentives
portion of the fish passage process and the group felt the intent, with minor edits, is accurately
reflected in the draft.

ACTION: Steve Sanders will redraft this section to allow the department to submit its
proposed determination of the required fish passage or alternatives, if necessary.

509.605(5)(b): The second sentence will be changed to read: “The alternatives, to be allowed,
must result in improvements in the quality or quantity of native migratory fish habitat that are
biologically likely to lead to an increased number of native fish than would the project with fish
passage.” A final sentence will be added to the subsection: “The comparison shall be based
upon conditions as they exist at the time of the comparison.”

509.605(7)(c): The group agreed that it was appropriate for the Commission to revisit
exemptions if conditions substantially change. They agreed on the following changes to the draft
statutory language.

Subsection (7)(c) will be changed to read: “The Commission finds there is no appreciable
benefit, as defined by rule, to providing passage.”

The following sentence will be added to the end of subsection (7): “With respect to (a)
and (c), the Commission shall review those exempt projects which do not have an expiration date
certain not less frequently than once every seven years to determine whether such exemption
should still apply, and may amend or revoke an exemption if it finds that circumstances have
changed such that the relevant requirements for qualification for that exemption are no longer
met or no longer apply. Any such finding shall be subject to ORS 509.645 rights to appeal and other procedural rights."

509.625(1): A small editing change was made in this subsection. The first clause of the first sentence ("Without affecting other remedies to enforce the requirement to install fish passage") will be moved to the beginning of the last sentence of the section to help clarify the intent.

509.625(2): The amount of funding will be modified to read "sixty (60) per cent or more". This change is to ensure that the statutory language does not limit the state from the possibility of passing through federal funds. This subsection, and the related subsections 509.605(2) and 509.605(4), were the subjects of a long discussion about the underlying approach of the draft statute:

Glen Spain and Bev Hayes each expressed serious concern about tying the department’s enforcement authority on non-triggered obstructions to a requirement to offer cost sharing. Glen stated that he could not support requiring the department to offer a specific portion of costs before it could order passage. Jim Myron noted that he would support a de-coupling of the enforcement authority and the cost share requirement, and remains concerned that a lack of public funding could tie the department’s hands. He recommended a cap on expenditures for individual projects to stretch public funds. Roy Elicker commented that this is where a diverse advisory group can help with funding decisions is crucial. Jim noted that a required cost share is acceptable. The problem is tying it to a fixed amount. What if those fund don’t ever become available? Bev Hayes said that she would need to talk with her agency before agreeing to support the concept of requiring the department to offer a minimum of 60% cost share before it can order passage.

The majority of the group agreed that the language in the December 5th draft, with the changes noted above, was acceptable because it best captures the intent of the group: to create an incentive based system for achieving fish passage throughout the state. Members noted that the wording does not require an owner or operator to take the funds, but that does require that the state provide assistance where needed to achieve the overall goals of passage.

ACTION: Glen Spain, Dave Anderson and Phil Donovan agreed to continue to work on developing some language that reflects an acceptable compromise.

ACTION: Steve Sanders will redraft these subsections to accomplish the following:
- link the cost share option to the priority list
- allow for flexibility in the actual portion of costs provided by the state
- ensure that federal dollars are not compromised by the portion set by the statute.

509.625(4): The group discussed the need for language to allow the department to respond when an owner/operator breaches an agreement on passage. Glen Spain offered some possible language, and the group worked on this briefly, finally suggesting that Steve Sanders try a new draft that addresses a breach.
ACTION: Steve Sanders will redraft this subsection to address a breach by an owner/operator of an agreement on passage, and to clarify that in that situation, costs will be the responsibility of the owner/operator.

509.645: This section will be changed to use the same language as HB 2102. Steve Sanders explained that the change would allow for public comment as well as give the Commission flexibility in the type of procedure utilized to resolve the dispute.

ACTION: Steve Sanders will make changes to this subsection.

509.915: In contemplating the merging of the Fish Screening Task Force (FSTF) with the Fish Passage Task Force it was noted that the FSTF has had time to smooth out its work and process. Pete Test suggested that the addition of several new people to deal with fish passage issues might slow it down and interfere with its effectiveness. It was agreed that a separate passage task force should be formed and given two years to iron out its work and process. After June of 2003, the two groups could be combined into one group. In the interim, the separate Task Forces would be encouraged to have joint meetings when they were dealing with joint issues. In any event, the FPTF should be given flexibility for deciding funding issues.

The group also discussed the membership for a passage task force. There was general support for limiting the membership to 9 or 11 people. The following draft membership list was developed:

2 public representatives (geographically diverse, if possible)
1 tribal representative
4 water users: representing agricultural users, municipalities, hydro operators and special districts
4 fish/fisheries representatives: commercial, recreational, and environmental

There was a suggestion that instead of listing the membership directly, the statute could state the number of members of the task force, name the interests that should be represented, and direct the Commission to distribute the interests equally between the membership. It was also suggested that federal agency representatives should be asked to participate as technical advisors to the passage task force.

ACTION: Steve Sanders agreed to redraft this subsection to reflect the agreements on the task force concept.

NEXT STEPS
HART process: Cliff Bentz raised the question about how the draft statute fit into the hydro reauthorization process, and suggested that the legislative report should address the differing views. He agreed to draft something for the group to review.

ACTION: Cliff Bentz will draft a section on the HART process for the legislative report.
The facilitators will work with Steve and Roy to develop a new draft of the legislation to reflect the group's conversation at this meeting.

**Next Meeting:** The next meeting is January 23, 2001, 9 a.m. – 2 p.m., at the Water Resources Department's Conference Room C in Salem.

**NOTE:** Any changes to these notes may be suggested to the facilitators via telephone, e-mail or at the beginning of the next meeting. Please feel free to contact Elaine or Donna if you have questions or concerns regarding the process or progress of the group.
HB 2102 FISH PASSAGE TASK FORCE
MEETING SUMMARY

JANUARY 23, 2001 MEETING

Facilitators: Elaine Hallmark, Hallmark Pacific Group, LLC
          Donna Silverberg, DS Consulting

Members Present:
Dave Anderson    Cliff Bentz    Phil Donovan
Roy Elicker     Bev Hayes     Steve Kucas
Jim Myron       Todd Olson    Willie Tiffany
Glen Spain      Kevin Hanway  Ron Yockim

Members not present: Stephanie Burchfield; Jason Green; Brad Harper; Roy Hemmingway;
                     Carl Merkle; Patty O’Toole; Mark Riskedahl; Pete Test; John Youngquist

Resource Persons and Advisors present: Charlie Corrarino, ODFW; Steve Sanders, attorney
                                      for ODFW.

Observers: Steve Beyerlin, Fish Screening Task Force; Richard Craven, Consultant and Fish
           Screening Task Force member; Michael Weinberg, aid to Jan Lee; Robin Harkless, DS
           Consulting.

Facilitation Team: Donna Silverberg, Elaine Hallmark, Patricia McCarty

NOTE: The following are summary notes from the eleventh meeting of the Oregon Fish Passage Task
      Force (FPTF). These notes are meant to capture the general discussion of those attending the meeting to
      both remind people of the discussion points and keep the process moving by highlighting homework
      assignments. They are not meeting minutes. Any agreements noted are not meant to suggest that a final
      agreement was reached. All agreements will be considered tentative until the full package is put together
      (FPTF Working Agreement IV.B.).

Review of Agenda: After reviewing the agenda, it was agreed to revise it slightly to address the
                  following items in order: Revisions to the meeting summary, meaning of consensus, major
                  issues remaining from the statute, including cost-share/enforcement, Fish Passage Task Force,
                  the integration of the FERC/Hydro licensing and Oregon’s HART process, feedback from
                  constituents, polishing language for the rest of the draft statute and the legislative report.

Announcements: Jan Lee announced that while she is finishing her duties representing water
                users on the FPTF, she is now part of the legislature and asked if anyone had a problem with her
                participating in the meeting. No objections were voiced. Members acknowledged the benefit of
                having a member of the legislature participate and understand what the Task Force is doing.
Revisions of 12-18-2000 Meeting Summary: Glen Spain had sent an e-mail to the group pointing out a misunderstanding reflected in the draft Dec. 18 meeting summary as to what the group had agreed to do regarding making a recommendation if full consensus was not reached on all issues. After discussion and clarification, the group agreed that it had intended to follow its originally agreed upon ground rules, and would not include as a recommendation anything that did not have full consensus. It therefore, agreed the following statement on page 2 of the draft meeting summary is incorrect: “After reviewing the Task Force Working Agreements, the group agreed that if there is consensus on a large portion of the issues (80% was used as an example) they would submit the draft legislation as ‘recommended’, and detail the issues without consensus in the report.” The incorrect statement in the draft will be replaced with the following correct statement of the group’s agreement: “After reviewing the Task Force Working Agreements, the group agreed that if there is consensus on a large portion of the issues (80% was used as an example), they would submit those issues on which there was consensus in a final report and as part of draft legislation as ‘recommended’, but would omit those provisions for which there was no consensus from its recommendations and draft legislation and would then detail those issues without consensus, outlining the various viewpoints, in the written final report.”

Dave Anderson noted that the definition of construction in the Dec. 18 meeting summary correctly reflects the discussion in the meeting, but needs some further editing. The meeting summary was approved as revised.

Meaning of consensus: Following up on the discussion regarding consensus, Elaine reviewed for the group Section III of the Working Agreements regarding the commitment to consensus. She noted that sub-section D states, “Consensus means the willingness to go along with the recommendation either in active support of it or in not opposing it”. Jan Lee and others reminded the group that the working agreements also allow for tentative agreements. It is possible that lack of consensus on one item may lead to lack of consensus on all or other items on which there was tentative agreement.

Cost Share Issues: Glen Spain and Dave Anderson had had some discussions attempting to resolve the differences around the cost share approach. They had noted three general problems with the current draft language regarding “cost share”.

1) It sounds too broad. They agreed any cost share should be limited to existing structures that do not fall under one of the “triggers” in the statute. (The group agreed this was the intention, and language should be clarified.)

2) The fixed amount or percentage amounts to a mandatory fixed payment to which Glen objects. He does not object to requiring a cost share; he only objects to the amount being mandatory, and would like some way to make the amount flexible depending on need or other factors.

3) The draft language makes the payment of the cost share a pre-requisite to the state’s ability to order fish passage installed at existing obstructions.
Considerable discussion followed regarding how to address the concerns. Dave clarified that cost share is intended only for existing structures which do not fall under 509.605 or the emergency clause. Glen agreed with having a cost share provision, saying it was a good source of incentive; however, he noted that the problem lies with the fixed amount as precondition to enforcement for non-triggered sites.

Others noted that the group is looking for rules to get things done on the ground without having to rely on courts to resolve — and looking for a level of certainty in protection of investments. Bev Hayes suggested that if the cost share is limited to those sites that were legally permitted before they were constructed (e.g. applied for water right and had no condition for passage) it might be acceptable. She prefers a narrow focus of the cost share program, and not having the ODFW give up all of its power to require fish passage on existing structures without providing a cost share. She viewed applying the cost share to those who thought they were building legally as one of fundamental fairness and equity.

Other points raised and suggestions made during the discussion included:
- Comfort with the emergency provision and the priority setting as a fall back from cost share and lack of funds
- A fixed minimum for cost sharing is necessary because it costs a great amount of money to make changes in these projects. In the absence of this, the group had discussed 20 years for enforcement to allow an owner to come up with the money
- This standard allows the Commission to begin moving forward on priorities
- Economic need could be a way of narrowing cost share eligibility — perhaps in rulemaking instead of in the statute
- The role of the proposed standing task force could be to look at equitable payment of for construction; the fish screening task force has been successful in weighing concerns of owners and the public
- Support for limiting cost share to “legally permitted before construction”
- A representative of the Warm Springs tribes had indicated to a member that they would likely oppose the 60/40 requirement.

Steve Sanders developed a chart that showed the various statuses of obstructions, who pays for fish passage improvements, whether it applies to culverts and whether it must be on the priority list. It helped the discussion and focused differences.

Glen suggested amending the draft statute to limit the cost share to the class of structures that were legally built and deserve equitable consideration. There was discussion of what “legally built” was intended to mean. The discussion indicated most intended it to mean that the obstruction had a legal water right. Several versions of draft language were discussed. Other discussion centered on the issue of whether the obstruction should have been given a legal water right prior to its original construction or could have been given one later. After considerable discussion the group agreed that if the obstruction had become legal, even if not prior to construction, it should be eligible for a cost share to retrofit it.
There was difficulty in determining how to phrase that an obstruction had been “legally built” in that referring to former fish passage statutes gets into conflicting provisions which may cause problems. Referring to the state approval process under ORS 537 (water rights) seemed to help.

Willie Tiffany expressed concern that this adds more triggers and moves further from the exemption program. The proposal was clarified to acknowledge that the opportunity for an exemption remains. The opportunity is to receive funding where no exemption exists if the site was legally permitted to exist at some point in time. (i.e. projects with permitted water right that didn’t have fish passage). Any obstruction with a legal waiver, could of course, come in voluntarily and request the cost share assistance to voluntarily address passage needs. (This might come up if the ESA is affecting such a project.)

The group discussed the intent of the draft, and agreed that the goal is to give a form of equitable treatment through a cost share for legally constructed projects and to retain the power to enforce fish passage requirements without providing a cost share to illegally constructed projects.

**Proposed draft language for section 509.625 (2):** “Except where an emergency exists, per 509.625(1), for existing structures not undergoing a fundamental change in permit status, abandonment or structural modifications that allow for an increased diversion, and which were permitted and were built without fish passage pursuant to ORS 537 or prior equivalent, were constructed prior to 1909, or have an exemption under ORS 509.605(8), the Commission may order fish passage construction or alternative mitigation if non-owner or non-operator funding of 60% or more can be provided.”

This language will be inserted in the draft statute and discussed with constituents. Some members still have concerns about whether it is adequate, but most are thinking it is a good compromise on this difficult issue. A question came up over how this would affect exempt small ponds; the group agreed on a need to talk with Pete Test and others over this issue.

A suggestion was made to add a similar section that would allow existing culverts to receive a cost share. Considerable discussion of the need for this followed. It was noted that there are many programs now underway to upgrade culverts, especially by the state, counties and federal government (Forest Service). These programs are moving as quickly as funding becomes available. One idea was to leave the language requiring fish passage to be installed in culverts that hit one of the “triggers” and remain silent on the other existing culverts. Requiring a report to the next legislature from the Fish Passage Task Force on the progress that has been made in upgrading culverts would provide the opportunity to add language next session if needed to make more progress. Several members indicated they needed to consult their constituents and think about what is needed for culverts.

**Permanent Fish Passage Task Force:** Steve Sanders had not yet drafted the language reflecting the discussion at the last meeting. He asked the group for further clarification of what needed to be in the statute, including the following:

--How to describe representation on the new/combined task force.
--Is it combined after 4 to 6 years?
--Is it a Fish Passage Task Force with screening as a subcommittee?
--Should rule making establish the task force?

The group agreed it should be a separate task force for now. Some members of the fish screening task force could be appointed to the new fish passage task force to benefit from the experiences of the screening task force. The group agreed that the details did not need to be in the statute.

Consensus: FWC shall establish by rule the membership and duties of a standing FPTF.
 ACTION: Steve Sanders will draft appropriate language.

FERC/Hydro Issues: There was not enough time to get into a full discussion of the issues related to hydroelectric dams regulated by the Federal Energy Regulatory Commission (FERC). It was agreed to set another meeting and have these issues discussed then. Cliff Bentz gave a quick preview of the three key issues to address in looking at whether the language in the draft statute affects hydro projects.

1) This process should be implemented through the Oregon HART process for these FERC regulated hydro plants so as not to require duplicate processes;
2) There is a bi-state issue (affecting Idaho Power)
3) Federal preemption issue – the area of fish passage requirements has been preempted by federal statutes for hydro projects.

ACTION: A Hydro subcommittee will look at how the proposed draft affects these issues and bring proposed language changes to the next meeting. The subcommittee members are: Cliff Bentz, Todd Olson, Bev Hayes, Stephanie Burchfield, Steve Kucas and Steve Sanders.

Next Steps: An additional meeting to resolve all final issues will be held on February 8 from 8:30 to noon in Salem (room to be determined). The facilitators will work with Steve Sanders and Charlie Corrarino to revise the draft statute according to today’s discussions and get it out to people right away. Members will review the concepts with constituents and send in any comments to facilitators as soon as possible before the next meeting, so they may be factored into the agenda. Any “polishing language” suggestions/corrections should be forwarded to the facilitators as soon as possible. They will incorporate them in italics into the draft statute to be reviewed at the next meeting. (Several people mentioned areas that needed editing or clarifying in the draft, including definition of construction, fundamental change in permit status and of net benefit.)

The February 8 meeting will be aimed at completing consensus on all issues. The following will be specifically reviewed:
1. FERC/Hydro issues
2. Culverts (whether to include in cost sharing provisions)
3. Any remaining issues related to the cost sharing provisions
4. “Polishing” language (final editing of draft statute)
5. Draft(outline for Report (if possible)

**Next meeting: February 8, 8:30-Noon, Room 350 State Capitol Bldg. (Third Floor)**
HB 2102 FISH PASSAGE TASK FORCE
MEETING SUMMARY

FEBRUARY 8, 2001 MEETING

Facilitators: Elaine Hallmark, Hallmark Pacific Group, LLC
             Donna Silverberg, DS Consulting

Members Present:
Dave Anderson  Cliff Bentz  Phil Donovan  Pete Test
Roy Elicker    Bev Hayes  Steve Kucan   Jan Lee
Jim Myron      Todd Olson  Willie Tiffany Rob Schab
Glen Spain     Kevin Hanway Ron Yockim  Stephanie Burchfield
Ron Garst      John Youngquist

Members not present: Jason Green; Brad Harper; Roy Hemmingway; Carl Merkle; Patty O’Toole; Mark Riskedahl

Resource Persons and Advisors present: Charlie Corrarino, ODFW; Steve Sanders, attorney for ODFW.

Observers: Michael Weinberg, aid to Jan Lee; Robin Harkless, DS Consulting; Christine XXX, WRC

Facilitation Team: Donna Silverberg, Elaine Hallmark

NOTE: The following are summary notes from the twelfth meeting of the Oregon Fish Passage Task Force (FPTF). These notes are meant to capture the general discussion of those attending the meeting to both remind people of the discussion points and keep the process moving by highlighting homework assignments. They are not meeting minutes. Any agreements noted are not meant to suggest that a final agreement was reached. All agreements will be considered tentative until the full package is put together (FPTF Working Agreement IV.B.).

Agenda Review; Meeting Summary and Announcements: The agenda was accepted as proposed. No corrections were made to the draft summary of the Jan. 23, 2001 meeting, except to note that the date was inadvertently left off the heading. Elaine noted that Willie Tiffany will be arriving late, but can be paged if needed; Rep. Jan Lee reminded all that she is not representing the Oregon Water Resources Congress as she is now in the legislature.

Hydro Subgroup Report:
Cliff Bentz presented proposals that the Hydropower sub-group had discussed, which were contained in the second half of a letter from Cliff dated February 2 and slightly revised in a letter dated February 7, both of which had been circulated to the Task Force. The first proposal was to insert language intended to ensure that the requirements of this fish passage legislation are implemented through the HART process for federally licensed hydroelectric projects undergoing

Fish Passage Task Force
Summary of 2/8/01 Meeting
a fundamental change in permit status. After some discussion of how the process worked, the Task Force reached consensus that such integration should be required. It was clarified that the language used was not intended to limit ODFW authority, but instead to integrate that authority with the statutory HART process. The language accepted to be inserted at the appropriate place in the statute was:

"Where the fundamental change in permit status is the expiration of the license of a federally licensed hydroelectric project, the Commission’s determination shall be submitted to the Federal Energy Regulatory Commission (FERC) solely through and as required by ORS 543.060 et seq."

509.610 (3): The Hydro group proposed removing the adaptive management language from the provisions regarding maintenance and monitoring of fish passage or alternatives to passage, on the basis that adaptive management should be governed by the FERC license. Others noted that potential modifications of unsuccessful alternatives to passage are dealt with in other sections of the statute. The Task Force agreed to accept the modification as long as it retained application to both fish passage and alternatives to passage.

Federal Preemption Language for Report
Cliff Bentz reported that Idaho Power believes federal law preempts state regulation regarding hydroelectric projects. It proposed to the group, that it will agree to consensus on the legislation with the “will not object” position, if the legislative report contains a clear statement concerning Idaho Power’s opinion regarding preemption, and so long as the bi-state issue (see below) is addressed in the statute. Proposed language to include in the report making clear the difference in opinion on federal preemption was accepted by the group. It was agreed to check with Bev Hayes regarding suggestions she was reported to have to improve the “process” or relational language, before finalizing the report language.

Bi-State Consistency:
Idaho Power has federally licensed hydroelectric projects which have one side in Oregon and one side in Idaho. It does not want to be put in the position of having inconsistent requirements by the two states and therefore, proposed exempting bi-state waters or else including language requiring agreement between the two states before Oregon could take any enforcement action under this statute. After discussion, the group agreed on the concept of keeping Idaho out of the dilemma of conflicting requirements, while at the same time not making the authority of the State of Oregon subject to veto by the State of Idaho. Since the situation only arises on the Snake River, which serves as the border between the two states, it was decided to exempt projects located in the Snake River and on land in both Oregon and Idaho from the provisions of this statute. A small sub-group drafted some language tentatively acceptable to the Task Force, which is to be reviewed by the State, including the Governor’s office, to be sure it is not overbroad and is practical. They suggested Steve Sanders look at the 10(j) process, and assess whether this language maintains the status quo in respect to everything else. The group needs to receive Steve Sanders’ views in writing, circulated via email.
Culverts and other Structures
Elaine reviewed the Task Force discussions from last session and noted comments received from members between meetings, indicating that the draft legislation addresses the culvert issue in most areas, and their desire to see them included also in the cost share area. After discussion of what is a lawfully installed culvert (since many do not require specific permits) and whether a definition of “lawfully installed” is needed, it was decided that the alternative language being considered for ORS 509.625 (2) should include existing culverts that are not otherwise required in the statute (by triggering events) to install fish passage. This would make these existing culverts eligible for the cost share. It was clarified that nothing in this statute runs counter to the culvert language in the Forest Practices Act or preempt it. Discussion also led to the decision to add language to make the cost share cover other existing obstructions, such as small ponds, gauging weirs, etc. The Task Force wanted to be sure the Report would clarify that the last sentence of section 509.625 (2) allowing the Commission to order owners or operators of all other obstructions to install fish passage at the owner/operator’s own expense is intended to include those that were not lawfully installed, meaning installed without required authorization under whatever statute or land use planning regulations would apply.

Definitions:
Comments had been received to clarify several definitions. Some were minor and some were substantive, per the following.

(2) Construction: There was concern over whether “major maintenance” included in the definition was modified by the “increased diversion of water” requirement. After discussion, the definition of construction was changed to include “major replacement” rather than “major maintenance”, as it is intended to trigger a requirement for fish passage installation if some event requires a major reconstruction, such as occurred on the Lake Oswego dam on the Tualatin River. “Structural modifications” is modified by the slightly revised language “that increase storage or diversion capacity.” The Task Force made clear that they do not intend fish passage requirements to be triggered solely by old facilities replacing parts to make them more efficient. The “major replacement” or “structural modifications” would generally be affecting that part of the structure that affects fish passage.

(3) Emergency: Two edits had been proposed. One was to insert the word “materially”, which was agreed upon. The other raised the question of whether the language should be in regard to danger to “fish” or to a “fish population.” After discussion, the language was revised to read “adverse impacts to a fish population.”

(4) Fundamental Change in Permit Status: Discussion clarified that this was not intended to include a direct water right transfer or routine maintenance permits. Those were added to the examples.

(5) In Proximity: Discussion clarified that “range” was unclear. It was changed to within the same watershed or basin. It is intended that the Water Resources Dept. basin delineations would be used.
(7) **Net Benefit:** Clarifications to the “net benefit” definition and the wording of section 605 (6) (a) and (b) had been submitted by Cliff Bentz. They were intended to clarify the language, not to change the intent of the Task Force. After discussion, the wording of both sections was changed to the format Cliff had proposed, with some editing.

**509.605 (2):** Ken Bierly had submitted comments which raised the question whether this section might make barrier removal projects ineligible for OWEB funding. Charlie reported that he had checked with Ken and found that if the statute is only mandating a priority list, OWEB funding would not be precluded. The Task Force urged that the current language be verified with Ken, as it is not the intent of the Task Force to preclude OWEB funding, but rather to encourage it.

**509.605(8):** A question had been raised as to whether it was appropriate to have the Commission making the decisions in this section and then including an appeal back to the Commission under 509.645. Discussion clarified that this process of requesting the Commission to review a decision it has made happens frequently. The party can then appeal to the courts.

**Draft Language re Purpose and Oregon Waters Inventory:** The Corps of Engineers, Gary Johnson and John Breiling, had submitted proposed language to add to the statutory purpose and to add a section detailing an Oregon Waters Inventory requirement. Discussion pointed out that this is a great idea, but it is being addressed under the TMDL process, the Oregon Outstanding Resource Waters, the Clean Water Act 303(d) list, and inventories at FPA, DEQ, and other state agencies. The consensus of the Task Force is that it’s too late in this process to add it, and not enough money exists to do the inventories already required. It was a good suggestion, but not feasible at this time. Glen will speak to Gary and John to acknowledge their efforts in this regard.

**Next Steps:**

Even though the final consensus is not yet in, until the bi-state language is approved, the Task Force agreed that Jan Lee should get legislative counsel drafting this bill as an amendment to HB 2540, which she had submitted as a place-holder. The proposed bill can be sent to the Legislative Counsel after Steve Sanders ok’s the provisions he is to review and incorporates the new language regarding the integration of the HART process. Also, a list of statutes needing repeal will need to be made. A small group, consisting of Steve Sanders, Jan Lee and Charlie Corrarino should meet with the Legislative Counsel to describe the intent and the need for the language as written (negotiated); they’ll report their progress and circulate the drafted amendment.

Communications with the Task Force will continue via email; if there are big concerns, the group will reconvene. The report will be drafted as quickly as possible and circulated for comments. The draft format for the Report submitted by the facilitators looks good. Members will e-mail suggestions for the Report to them as soon as possible. The Report should include a copy of the proposed legislation as drafted by the Task Force. Discussion about how much history to include in the Report, led to some differing views. Some background about the 1865 Law and the long period of non-enforcement based on conflicts of statutes should be included to explain why the group met and for as long as they did. The facilitators will work with Charlie Corrarino to develop the background.
A tentative meeting was scheduled for March 7 from 2-5:00 in Salem, if necessary, to discuss the drafted bill and the report and to attain final consensus of the group (in case there are substantial changes in the drafted bill). The Task Force should develop a strategy for going together to the hearing to reinforce the consensus. Jan Lee will ask for the hearing to be scheduled March 19.
HB 2102 FISH PASSAGE TASK FORCE
MEETING SUMMARY

MARCH 7, 2001 MEETING

Facilitators: Elaine Hallmark, Hallmark Pacific Group, LLC
Donna Silverberg, DS Consulting

Members Present:
Dave Anderson Cliff Bentz Roy Hemmingway Stephanie Burchfield
Roy Ellicker Bev Hayes Steve Kucas Jan Lee
Jim Myron Todd Olson Willie Tiffany Rob Schab
Glen Spain Ron Yockim Pete Test

Members not present: Phil Donovan; Jason Green; Brad Harper; Carl Merkle; Patty O’Toole; Mark Riskedahl; John Youngquist; Kevin Hanway

Resource Persons and Advisors present: Charlie Corrarino, ODFW; Steve Sanders, attorney for ODFW.

Observers: Brendan McCarthy, Legislative Counsel; Michael Weinberg, aide to Jan Lee; Robin Harkless, DS Consulting.

Facilitation Team: Donna Silverberg, Elaine Hallmark

NOTE: The following are summary notes from the thirteenth meeting of the Oregon Fish Passage Task Force (FPTF). These notes are meant to capture the general discussion of those attending the meeting to both remind people of the discussion points and keep the process moving by highlighting homework assignments. They are not meeting minutes. Any agreements noted are not meant to suggest that a final agreement was reached. All agreements will be considered tentative until the full package is put together (FPTF Working Agreement IV.B.).

Purpose and Agenda: The purpose of this meeting was primarily to discuss and resolve, if possible, one final issue related to the recommended fish passage legislation. The items agreed to for the agenda were:

1. Determine if consensus could be reached.
2. Implications and steps to be taken if no consensus could be reached
3. Review and comment on the legislation as drafted by legislative counsel
4. Review and comment on the draft Report
5. Next steps and finalizing the Task Force’s work

Review of Drafted Legislation: Jan Lee’s office delivered copies of the first draft of the bill from legislative counsel, Brendan McCarthy (who came later to participate in the discussion.)
Steve Sanders updated the group on discussions with the Legislative Counsel. The LC had had problems with some of the Task Force wording and definitions and had made some changes. Since the group was waiting for other key members to arrive, it began the statutory review first, took time to read it, then went to the consensus questions and then returned to other items related to the draft statute. All of the discussion regarding the statute is consolidated in this section.

For the most part, the Task Force liked the revised language used by legislative counsel. In a few places, there were shifts that changed the intention. The following items were discussed in the review of the draft statute:

The LC thought there was confusion in the back and forth use of the terms Department and Commission and wanted to resolve who has the authority for what. The Task Force explained that they had thought about this in drafting the proposal, and had made the decision to use one or the other for specific purposes. The Commission decides policy issues; the department decides and acts on technical matters (such as whether or not the fish are present). If appealed, then the Commission makes a decision.

The Definitions were discussed, with Steve pointing out other changes. Some edits for clarification were agreed to.

Discussion clarified that obstructions with pre-1909 unadjudicated water right claims would be viewed as “lawfully installed” until final adjudication, then adjusted according to the determination.

It was agreed to use “alternatives to passage” rather than mitigation for consistency throughout the draft legislation.

ACTION: Steve will double check “determinations” and make certain that an appeal was contemplated/intended to the Commission from all “determinations”.

Steve will add back the language intended to cover “unlawful” obstructions in 509.625(3)(b), and will take all the Task Force’s proposed wording changes back to legislative counsel.

ACTION: If members have any other details to contribute, please send all to Steve and Jan Lee for incorporation into the amendment.

Potential for Consensus on the “Bi-state” issue: Roy Hemmingway reported that the most important thing the governor will do is make certain the bill protects the fish. Anything in the bill that provides an exemption for an entire class will not be allowed. Section 11 does that for hydroelectric projects on the Snake River, and he cannot accept it. The State has done its best to avoid litigating regarding authority of states over fish passage. He does not want to concede in advance in this legislation what limitations federal preemption might impose on the states.

Cliff Bentz expressed Idaho Power’s concerns about being “whip-sawed” between the two states and the federal government. Others asked if a provision requiring coordination between the
states would help? The answer was that it doesn’t solve the problem if the states do not agree. Further discussion attempted to explore possibilities for resolution. The state’s concern is that with an exemption in the statute, ODFW goes into the HART process without an obligation under law; they are weaker. The suggestion of stating HART can’t overrule ODFW’s recommendation regarding passage did not seem to resolve the issue.

Another suggestion was to include the bi-state exemption for two years (with a sunset clause) while working with Oregon and Idaho to resolve the issue. If after two years no resolution occurs, the law applies. Others thought there would be no way to resolve this general issue with the state of Idaho.

If the new legislation isn’t put into place, ODFW will have to require passage under the old law, with no possibilities of waiver. Idaho Power’s representative, Cliff Bentz, cannot support the bill at all if this issue is not dealt with. The governor’s test will be: similar treatment for all projects and a basic requirement for passage. The Task Force was reluctant to move to a “non-consensus” approach, after all its hard work and the pragmatic approach it has been able to reach in the draft legislation. It urged the Governor’s office and Idaho Power to take some more time to see if they cannot resolve this one issue.

**ACTION:** The governor is prepared to look at other options; a representative from Idaho Power, contacted by Cliff, will meet with Roy and the governor in the next week or two. Elaine and Donna will help set the meeting up.

**Comments on Draft Report:** The Task Force generally liked the approach of the draft report. Some clarifications/edits had been circulated from Dave Anderson, Kevin Hanway and Willie Tiffany. These were all accepted and incorporated. Other minor wording changes were given to the facilitators. Clarifications of concepts included:

- Adding Pete Test and John Youngquist as members representing Water User Organizations and changing Oregon Water Resources Congress to a water supplier. Facilitators were asked to double check that there was no tribal participation at any of the meetings, and if so, to keep in the description of the attempts to include them.

- Adding a description of the resource participants, including the federal agencies, attorney general, etc.

- Deleting reference to the change in “footprint” of an obstruction in section 2.

- Adding a note in section 4 to clarify that prioritization will not affect the responsibility of an owner or operator to address fish passage when a trigger event occurs.

- Clarifying in section seven that cost share is 60% or more, is not limited to just costs of construction, but applies to all costs of providing fish passage. In the same section, clarifying that “lawfully constructed” is determined by the regulations in effect at the time of construction.
In section 9, making it clear that this statute is not intended to change state authority under other state and federal laws.

**ACTION:** Stephanie will check the references to the cites on p. 11 regarding the hydroelectric task force.

Ron Yockim raised a concern with the reference in the Background section to a full discussion of the history of the Fish Passage statutes in a law clerk’s memo to be attached. He believes there are inaccuracies and/or inadequacies in the memo. Suggestions were made to clean the memo up, leave it and add new information, or leave it out altogether. The preference was to keep a reference to an historical document, and to have Steve Sanders revise the document to be used, in consultation with Ron or any others who want to review or give input.

**ACTION:** Steve will edit and add new (historical) information to the memo. He will then circulate the memo to the rest of the group by March 14.

**NEXT STEPS:**
If Idaho Power and the governor can get consensus, circulate the language to the rest of the group for final review and sign-off. Jan Lee would then introduce the Task Force recommendation as an amendment to HB 2540. Legislative Counsel advised that amendments are allowed through April 15th.

If no consensus is achieved, the facilitators will notify the Task Force within the next two weeks. There will then be no Task Force recommendation in the form of proposed legislation. Jan Lee advised that she would still introduce an amendment to HB 2540, but she was not sure what elements it would contain. The facilitators will then transform the report to a “non-consensus” report, and describe the issues addressed by the task force and the different views on the issues. They will circulate the report to all Task Force members for review and comment before the Department submits it to the legislature.
Subject: FPTF NEWS!!
Date: Wed, 21 Mar 2001 10:37:56 -0800
From: "Elaine Hallmark" <ehallmark@mediate.com>
Organization: Hallmark Pacific Group
To: "Willie Tiffany" <wtiffany@orlocalgov.org>,
    "Todd Olson" <Todd.Olson@pacificorp.com>,
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    "Roy Hemmingway" <Roy.HEMMINGWAY@state.or.us>,
    "Roy Ecker" <roy.ecker@state.or.us>,
    "Ron Yockim" <ryockim@msei.net>, "Ron Garst" <ron_garst@fws.gov>,
    "Richard D. Bailey" <Richard.D.BAILEY@wrd.state.or.us>,
    "Phil Donovan" <nsializ@aol.com>, "Pete Test" <pete@oregonfb.org>,
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Greetings Fish Passage Task Force Members:

We have a CONSENSUS! - if you all agree. Representatives from the Governor's office and from Idaho Power met yesterday with us, and reached agreement on language to substitute for the current paragraph on the "bi-state" issue found in the legislative counsel draft of 3/7/01 in Section 2 (11) at the bottom of page 5. (In the Task Force's draft of 2/28/01 it was section ORS 509.605 (10).) The acceptable language is:
"To the extent preempted under federal law by the Federal Power Act or by the laws governing projects located on bi-state waters, federally licensed hydroelectric projects are exempt from this 2001 Act."

Please let us know that you consent to this substitution by close of day THIS Friday, March 23. NOTE: We need a positive affirmation from everyone.

The meeting also raised a potential "wordsmithing" issue with paragraph 10 in that same section of the legislative council draft, regarding the integration with the HART process. Apparently SB 319, about to be adopted, is making some amendments to the process and our language needs to be made consistent with it. Steve Sanders is checking on it now and will circulate any proposed revised language.

NEXT STEPS
1. If there are no objections, this language will go into the legislative counsel draft on Monday, March 26, and the legislative counsel draft amendment will be printed and circulated on Wednesday March 28.

2. Jan Lee is attempting to schedule HB 2540, with the proposed amendment, for hearing on April 6, 9 or 11. Please notify us right away if there is a problem with any of those dates, so we can let Jan know. She would like to have a good cross section of the Task Force available to speak at the hearing.

3. Steve Sanders will be circulating the revised "Fish Passage History Memo" by the end of this week. This piece is intended to be attached to the Report as background.

4. The facilitators will circulate the revised draft report on Monday, March 26 (as soon as we have confirmed we have a consensus). We will need to have your comments back by the 29th in order to have a final version to be compiled with the attachments, printed and ready for distribution to the Legislature prior to the hearing. The Department will compile, print and distribute the report.

Thanks for all your good work! Maybe we can find a time to bring out the champagne at the legislature. Please help us finish this up by getting any comments in quickly, and affirming you are part of the consensus.

Elaine and Donna, your ever hopeful facilitators

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APPENDIX IV.

MEMO ON FISH PASSAGE HISTORY
DATE: March 15, 2001

TO: Steve Sanders, AAG

FROM: David Taylor, Paralegal 2  
Natural Resources Section

SUBJECT: History of Laws Governing Fish Passage in Oregon

Oregon laws mandating fish passages over obstructions date back before statehood. On August 14, 1848, the United States Congress established the territorial government of Oregon. *An Act to Establish the Territorial Government of Oregon*, Section 1 (reprinted in Organic and Other General Laws of Oregon, p. 52 (Deadly and Lane, 1843-72) and in Statutes at Large and Treaties of the United States of America, 9 Stat. 323). The Act provides “that the rivers and streams of water in said Territory of Oregon in which salmon are found, or to which they resort, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.” *Id.* at Section 12.

The Oregon Constitution was approved in 1857 and went into effect on February 14, 1859. Oregon Constitution Article XVIII, Section 7 provides that all laws in force in the Territory of Oregon when the Oregon Constitution took effect continue until altered or repealed. The fish passage requirements enacted by Congress therefore remained in effect.

From statehood through the present, the Oregon legislature passed laws governing fish passage. Early criminal statutes required any “person or corporation” constructing dams or obstructions to provide for fish passage, defining “person” to include corporations.

In the 1890’s, however, the legislature passed acts making fish passage requirements and their enforcement less clear. In 1895, the legislature charged the state’s Fish and Game Protector with enforcement of fish passage requirements. At the same time, however, the legislature gave the Commissioner of Fisheries the duty to require construction of fishways in all streams used by salmon for spawning.

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1 See, General Laws of Oregon, ch VIII, §700 (Deadly & Lane 1843-1874); Annotated Laws of Oregon, v I, ch VII, title II, §1950 (Lane 1892); General Laws of Oregon, HB 40, §7, p 102 (Leeds, 1895); The Codes and Statutes of Oregon, v II, title XXXVI, ch LXXVI, §4085 (Bellenger & Cotton, 1901); Lord’s Oregon Laws, v II, title XXXVIII, ch V, §5288, p 1970 (1910); Oregon Laws, v II, title XLII, ch 1, §7496, p 2983 (1920); Oregon Code Annotated, §39-427 (1930); OCLA §82-426 (1940); Or Laws 1955, ch 707, §§44, 49; Or Laws 1973, ch 723, §101.

2 General Laws of Oregon, ch VIII, §§700, 781 (Deadly & Lane 1843-1874).


From 1901 to 1910, the legislature split the regulation of game and food fish, charging the Game and Forestry Warden with regulation of game fish and the Fish Commission with commercial fishing oversight. From 1911 to 1920, the legislature consolidated fish passage enforcement for both food and game fish under the Fish and Game Commission. In 1921, the legislature again split regulation of game and food fish, with the Game Commission overseeing regulation of game fish and the Fish Commission regulating food fish. The statutory distinction between game fish and food fish has remained in effect through today.

With this split, the legislature also created different provisions for fish passage requirements. Game fish statutes made it “unlawful for any person to construct any artificial obstruction across any stream in this state frequented by game fish[,]” Game fish statutes defined “person” to include “any individuals, firms, partnerships or corporations.” The game fish provisions did not authorize the Game Commission to waive fish passage requirements. Food fish statutes, however, appeared to authorize the Fish Commission to waive the requirement where dam construction would make fish passage impracticable. In return, the dam builder would convey land to the state for a fish hatchery.

In the early 1950s, Fish passage requirements were recodified for game fish at ORS 498.730 and food fish ORS 509.605. In 1955, the legislature amended ORS 509.640 to clarify that the Fish Commission could accept a hatchery in lieu of a fishway for food fish.

In 1963, food fish statutes were amended to provide that no “municipal corporation, political subdivision or governmental agency” could construct an artificial obstruction without providing fish passage unless permitted by statute. This change was based on the agency’s understanding that governmental entities were not included within the definition of persons.

In 1965, the legislature amended both food and game fish statutes regarding pre-construction approval of dams. Under food fish statute revisions, builders had the burden of obtaining pre-construction approval of fish passage. Game fish amendments did not place the burden on dam builders, instead simply authorizing the Game Commission to inspect the dam’s plans and specifications before construction to determine whether passage was required.

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6 Oregon Laws 1913, ch 232, §43.
7 Oregon Laws 1921, chs 105, 153.
8 Oregon Laws 1921, ch 153, §62.
9 Oregon Laws 1921, ch 153, §2(n).
10 Oregon Code Annotated, §§39-427 (1930), recodified at OCLA §82-426 (1940).
11 Oregon Laws 1921, ch 105, §49.
14 Oregon Laws 1955, ch 707, §54.
16 Oregon Laws 1965, ch 570, §131.
The legislature revised food and game fish provisions again in 1973. Game fish provisions (ORS 498.730) were repealed and replaced by ORS 498.268 (requiring fish passage for game fish “in such location and of such design as the [Fish] commission determines will provide adequate passage[].”). In 1995, ORS 498.268 was renumbered to the current ORS 498.351. The 1973 changes to ORS 509.605 simply referenced the changes to the game fish statute.

After the 1950’s, the commission did not strictly enforce the fish passage requirements, although it is not perfectly clear why. Evidently, staff thought that compliance with the chapter 509 fish passage requirements (that allowed the operator of a facility to provide hatchery production in place of passage) also satisfied the requirements of chapter 498 (that did not allow hatcheries to substitute for passage). In some cases, the records do not show why the staff waived the fish passage requirements. In 1996, the Department of Justice advised the commission that compliance with one set of statutes did not automatically satisfy the other statutory fish passage requirements, and that the staff did not have authority to waive fish passage requirements.

In 1997, the legislature temporarily amended fishway statutes to grant the State Fish and Wildlife Commission authority to waive food or game fish passage requirements in lieu of alternative mitigation and formed a fish passage task force to prepare a proposal to update the fish passage laws. The 1999 legislature extended the sunset provision of the 1997 legislation until June 30, 2001. The task force prepared the draft legislation to which this legislative report is attached.

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