Testimony to the Oregon Fish & Wildlife Commission - Friday December 17, 2021

Good morning, my name is David Moskowitz, Executive Director of The Conservation Angler. TCA is a regional wild fish and rivers advocacy organization based in Washington. I am calling in from my home office in Portland, OR.

We wish to welcome both Dr. King and Dr. Khalil to the Commission and we are glad to see a full slate of Commissioners this morning.

TCA greatly appreciates the opportunity to address the Commission during the Public Forum which remains an invaluable opportunity for engagement and outreach with the interested public.

I will describe the gist of the documents I provided in my email to you yesterday regarding the Commission's predominant and overriding conservation duty.

There are four documents provided for your review.

First, this is a 1997 memorandum from the Department's Legal Counsel from the Attorney General's office providing ODFW with an interpretation of its legislative mission as described in OR Revised Statutes at 496.012.

The second document is a Memorandum from ODFW Director Jim Greer to staff regarding the finding in that 1997 AG Letter.

The third document is ODFW testimony from Acting ODFW Director Rod Ingram to the Legislature regarding proposed legislation that reiterates the AG's findings on the intent of the mission statement in ORS 496.012.

Finally, the fourth document is a letter from the OR Attorney General's office to former ODFW Fisheries Division Administrator Ed Bowles

The gist of these documents is that it confirms that the mandate in ORS 496.012 creates an overriding and predominant duty to prevent the serious depletion of any indigenous wildlife species and that this duty is not to be balanced by the second clause in ORS 496.012. However, the second clause is significant, because there it does envision that the Commission would "balance" - not just once, but twice - in your meeting your secondary duty which is "to provide optimum recreational <u>and</u> aesthetic (which are consumptive and non-consumptive) benefits to present <u>and</u> future generations.

The Commission's conservation duty is not only "overriding and predominant" but also is also a multi-dimensional duty to preserve indigenous wildlife species - for viewing and pursuing – for all Oregonians – both present and future generations.

Contact:

David Moskowitz
The Conservation Angler
david@theconservationangler.org
971-235-8953

HARDY MYERS
Attorney General

PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

March 30, 2002

Ed Bowles, Administrator
Fish Division
Oregon Department of Fish and Wildlife
2501 SW First Avenue
PO Box 59
Portland, Oregon 97207

Re: Authority to Manage Fish with a Preference for Naturally Produced Fish

Dear Mr. Bowles:

You have asked whether the Fish and Wildlife Commission (Commission) has authority to adopt rules as part of the proposed Native Fish Conservation Policy that would establish the conservation of naturally-produced native fish species as the Department's "overriding obligation," "top priority," or "principal obligation" for fish management. We conclude that the fish and wildlife laws confer such authority.

In fact, as discussed below, the Oregon Court of Appeals essentially answered this question in 1985 in response to a lawsuit challenging the Commission's authority to adopt the original wild fish management plan and associated administrative rules in 1984.[1] Although the legislature enacted some changes to the relevant statutes since then, we are unaware of any changes that would significantly affect the analysis and conclusions contained in that opinion.

Likewise, in a 1987 response to an opinion request, we discussed at some length the Commission's ability and duty to harmonize potentially conflicting statutory mandates.[2] Among other things, we specifically analyzed whether the Commission must manage fish so as to maintain species at an "optimum level" or restore "native stocks of salmon and trout" *i.e.,* those that naturally propagate in a given watershed.[3] We concluded that the Commission must do both, and that the obligations were consistent. That is, it was reasonable to assert that addressing the health of individual native stocks is necessary in order to assure optimization of species. We have no reason to change this conclusion.

---

[1] *Schlip v. Oregon Fish and Wildlife Com'n*, 75 Or App 462 (1985).
[2] Letter dated February 19, 1987 from Donald C. Arnold, Chief Counsel, General Counsel Division to Dr. Harry Wagner, Chief of Fisheries, Oregon Department of Fish and Wildlife (OP-6089).
[3] ORS 496.430.

BACKGROUND

For various reasons, beginning in mid-1999, the Department of Fish and Wildlife (Department) and the Commission decided to rewrite the existing Wild Fish Management Policy[4] and replace it with a new Native Fish Conservation Policy. This new policy will guide the management of both so-called wild fish and hatchery-produced fish in individual basins. At the same time, the Department is developing a new Hatchery Management Policy that will guide management and reform of Oregon's hatchery facilities and fish production methods.

The debate over the virtues of hatchery-produced fish versus naturally produced or wild fish is both lengthy and emotional. The Department agrees that the weight of credible scientific evidence shows that hatchery-produced and wild fish differ measurably in many traits, including physiology, disease response, morphology, breeding success, and predator avoidance.[5] At the same time, the Department believes hatcheries can play a role in producing excess fish for harvest and, in some cases, supplementing or rebuilding depressed wild fish populations. We fully recognize that this latter role is highly controversial. Nonetheless, we neither need nor intend to resolve this biological controversy for the purpose of this letter.

In developing the Native Fish Conservation Policy, the Department has drafted numerous iterations of proposed rules, staff reports, and public information briefings. One consistent theme has been the desire to restore, enhance, and conserve self-sustaining native fish in their natural habitats, *i.e.,* naturally produced native fish. At the same time, staff has clearly acknowledged and stressed the role that hatchery-produced fish can play in providing commercial, sport, and tribal catch opportunities and even interim genetic reserves or safety nets for imperiled wild populations.

In early 2002, the Commission directed the Department to appoint a task force with representatives from stakeholder groups to review draft rules, improve the Native Fish Conservation Policy, and build public support. Shortly after the Native Fish Conservation Policy Task Force convened, staff presented a draft policy in the form of proposed administrative rules. One task force member noted immediately that using the term "native fish" throughout the proposed rules without any distinction between wild and hatchery fish could lead to undesired results.[6]

For example, one of the draft goals required that the Department "prevent the serious depletion of any native fish species." Some task force members were concerned that this and other provisions could force the Department to restore, maintain, sustain, and conserve hatchery-produced fish. They suggested that the Department could avoid such unintended consequences by inserting the phrase "naturally-produced" when the intent is to exclude hatchery fish.

---

[4] OAR 635-007-0525 through 635-007–0535, first adopted in 1984 and amended in 1990.

[5] We do not intend to provide a literature review in this letter or resolve the hatchery vs. wild fish debate. Literally hundreds of articles and other references take up this debate, many of which are easily accessible through various Internet resources and federal and state agencies.

[6] Although at this point the draft rules did not define the term "native fish," staff explained that the term includes hatchery-produced fish. The final draft rules (9/20/02 version) state that " 'Native fish' means indigenous to Oregon, not introduced. For purposes of this rule, this includes both naturally produced and hatchery fish."

This, in turn, led to draft rules declaring in successive versions that conservation of naturally produced (*i.e.,* wild) native fish is the Department's "overriding obligation," "top priority," or "principal obligation" for fish management. The draft rules state that hatcheries "shall be used appropriately to help achieve the goals of the policy." However, the Department wants the policy to clearly state that in general, natural production, habitat improvement, and fishery regulation are preferable to hatchery production and other forms of artificial intervention.

This emphasis on naturally produced native fish offends other members of the Task Force. Some members believe that hatchery-produced fish should be given equal treatment or fear that hatcheries will be eliminated. They assert that the Commission lacks the authority to favor naturally produced fish over hatchery-produced fish. We respectfully disagree.

STATUTORY AUTHORITY

In enacting the various wildlife and commercial fisheries statutes, the legislature delegated extremely broad and not entirely consistent authority to the Commission. Nothing in the Oregon fish and wildlife statutes expressly directs the Commission to favor naturally produced native fish over hatchery-produced fish. In fact, nothing in the fish and wildlife statutes expressly distinguishes wild fish from hatchery-produced fish.

ORS 496.171(2), which applies to the provisions concerning threatened or endangered wildlife species, defines "native" as "indigenous to Oregon, not introduced." This definition, however, does not necessarily exclude hatchery-produced fish. ORS 496.430, which applies to the provisions concerning the salmon and trout enhancement program (STEP), defines "native stocks" as "those anadromous fish that naturally propagate in a given watershed." However, even this definition is broad enough that arguably it could include out-planted hatchery fish or hatchery strays[7] that propagate naturally.[8]

The Department's administrative rules concerning fish management and hatchery operations attempt to distinguish between naturally produced or wild and hatchery-produced fish. "Wild fish" means "any naturally spawned fish in the taxonomic classes, Agnatha, Chondrichthyes, and Osteichthyes, belonging to an indigenous population."[9] "Naturally Spawned" means "fish produced in the natural environment as the result of natural reproduction."[10] "Hatchery produced fish" means "a fish incubated or reared under artificial conditions for at least a portion of its life."[11]

---

[7] A "stray" is a hatchery fish that spawns naturally in a location different from the location intended when the fish was stocked. OAR 635-007-0501(53).
[8] *See* OP-6089 at 7, 42 Op Atty Gen 161, 164 (No. 8075, Nov. 19, 1981).
[9] OAR 635-007-0501(57).
[10] OAR 635-007-0501(31).
[11] OAR 635-007-0501(24).

Oregon's Wildlife Laws[12]---ORS chapter 496

Oregon's current wildlife policy was enacted in 1973 as part of a comprehensive re-codification of existing game laws and was amended in 1993 and again in 2001. ORS 496.012 states:

> It is the policy of the State of Oregon that wildlife[13] shall be managed to prevent serious depletion of any indigenous species[14] *and* to provide the optimum recreational and aesthetic benefit for present and future generations of the citizens of this state. (Emphasis added).

With respect to this provision, our office previously stated as follows:

> Although the phrasing of the policy section of ORS 496.012 provides these statements in an equal manner, we understand that optimum recreational and aesthetic benefits can only exist to the extent that serious depletion of the species is prevented. Where a species is seriously depleted, it will not be possible for *optimum* benefits to be provided. Accordingly, the Commission's and Department's overriding obligation is to manage to prevent serious depletion, which thereby enables the Department and Commission to provide *optimum* recreational and aesthetic benefits. (Emphasis in original)[15]

The policy statement contained in ORS 469.012 is followed by a list of "co-equal" goals that the Commission must implement in furtherance of the overarching policy:

> (1) To maintain all species of wildlife at optimum levels.[16]
> (2) To develop and manage the lands and waters of this state in a manner that will enhance the production and public enjoyment of wildlife.
> (3) To permit an orderly and equitable utilization of available wildlife.
> (4) To develop and maintain public access to the lands and waters of the state and the wildlife resources thereon.
> (5) To regulate wildlife populations and the public enjoyment of wildlife in a manner that is compatible with primary uses of the lands and waters of the state.
> (6) To provide optimum recreational benefits.
> (7) To make decisions that affect wildlife resources of the state for the benefit of the wildlife resources and to make decisions that allow for the

---

[12] The wildlife laws consist of ORS chapters 496, 497, 498, and 501. ORS 496.002.
[13] The term "wildlife" includes fish, wild birds, amphibians, reptiles, and wild mammals. ORS 496.004(18).
[14] The term "species" means "any species or subspecies of wildlife." ORS 468.004(14).
[15] Letter dated March 10, 1997 from Assistant Attorney General Cheryl F. Coon to Acting Director Rod Ingram.
[16] "Optimum level" means "wildlife population levels that provide self-sustaining species as well as taking, nonconsumptive, and recreational opportunities." ORS 496.004(12).

> best social, economic and recreational utilization of wildlife resources by all user groups.[17]

These wildlife management goals are not necessarily consistent with one another; nor are they necessarily consistent with the wildlife management policy they are supposed to implement. However, we have advised in the past that when the legislature establishes competing and potentially inconsistent policy goals, it necessarily also delegates to the implementing agency the discretion to decide how to balance those goals so long as the result is consistent with the policy.[18] In fact, ORS 496.138 expressly directs the Commission to "implement the policies and programs of this state for the management of wildlife," consistent with the policy of ORS 496.012, and to "adopt such rules and standards as it considers necessary and proper to implement and policy and objectives of ORS 496.012."

In 1981, the legislature directed the Commission to conduct a Salmon and Trout Enhancement Program (STEP).[19] The legislature stated as follows:

> Consistent with other provisions of law, it is declared to be a goal of the people of the State of Oregon to restore native stocks of salmon and trout to their historic levels of abundance. In order to achieve this goal in a cost-effective manner, the State of Oregon shall engage in a program to rehabilitate and improve natural habitat and native stocks and ensure that the level of harvest does not exceed the capacity of stocks to reproduce themselves. The State of Oregon shall promote rehabilitation of salmon and trout populations by reintroducing the fish to habitats by using the salmon and trout enhancement program and remote hatchboxes.[20]

The policy statement tends to show a legislative preference for restoring "native stocks of salmon," which is defined as "those anadromous fish that naturally propagate in a given watershed."[21] However, the first sentence of ORS 496.435 begins with a significant qualification: the goal of restoring native stocks of salmon must be accomplished "[c]onsistent with other provisions of law."

We previously advised that because of this qualification, "the commission may not, to the exclusion of all other considerations, pursue measures to restore natural stocks if such action

---

[17] ORS 496.012. Before 1993, the policy statement provided that "wildlife shall be managed to provide the optimum recreational and aesthetic benefits for present and future generations of the citizens of this state." The first goal included "prevent the serious depletion of any indigenous species." This latter phrase was deleted from the goal and inserted into the policy statement by 1993 Or. Laws ch. 659 § 2.

[18] *See, e.g.,* 41 Op Atty Gen 1, 3 (No. 7919, July 1, 1980), in which we advised that the obligation contained in ORS 496.012(5) may be carried out only as balanced with other competing and sometimes inconsistent goals, and only in furtherance of the state policy; Letter dated March 8, 1993 from Assistant Attorneys General Cheryl Coon and Peggy Harrison to Commissioners, Oregon Fish and Wildlife Commission and Randy Fisher, stating on p. 7 that "conflicts in the fish and wildlife laws generally are resolved by a review of all applicable law in accordance with accepted canons of statutory construction."

[19] ORS 496.430 to 496.455.

[20] ORS 496.435. The last sentence was added in 1999.

[21] ORS 496.430.

would be inconsistent with its obligation under ORS 496.012 and 506.109 to maintain all species at optimum levels."[22] Even though the legislature clearly expressed a preference in ORS 496.435 for naturally propagating stocks, the legislature recognized that hatchery production may be required to help restore and maintain natural salmon spawning populations.[23] We express no opinion regarding the biological soundness of this conclusion, either then or now.[24]

ORS 496.171 to 496.192, Oregon's Threatened and Endangered Species Act, was enacted in 1987 and amended in 1995. This statute contains little policy direction and is unhelpful to our analysis. It primarily concerns the actions of state agencies on state-owned lands. Similarly, the Oregon Fisheries Restoration and Enhancement Act of 1989[25] does not provide substantive policy direction and is unhelpful here. It basically provides a source of funding for projects designed to enhance or restore Oregon's fishery resource.

ORS 496.275, enacted in 1995, resulted in the cooperative salmon hatchery program rules in OAR 635-009-0400 through 0455. This statute focuses on "salmon production facilities," *i.e.,* hatcheries, "to meet local production and harvest needs as well as to help restore and maintain natural salmon spawning populations," although production projects must be operated "consistent with objectives to protect and restore natural fish production."[26]

Oregon's Commercial Fishing Laws[27]---ORS chapter 506

Oregon's commercial fishing laws express similar policies and goals as those contained in the wildlife policy. As a matter of policy, ORS 506.109 states that:

> food fish shall be managed to provide the optimum economic, commercial, recreational and aesthetic benefits for present and future generations of the citizens of this state.

As with the wildlife policy, this policy statement is followed by a list of food fish management goals:

---

[22] OP-6089 (1987) at 7.

[23] *See* OP-6089 at 7, ORS 496.275(1).

[24] Note too that ORS 496.435 requires the State of Oregon, *i.e.,* the Commission, to "ensure that the level of harvest does not exceed the capacity of stocks to reproduce themselves." Analyzing this in the context of other directives to optimize food fish for harvest is beyond the scope of this letter.

[25] The program is funded by a surcharge on all sport fishing and commercial salmon fishing licenses, *ad valorem* landing fees, and other revenues. The program provides grants for projects that will benefit Oregon's sport or commercial fisheries, or both.

[26] ORS 496.275(1).

[27] The commercial fishing laws are all laws enacted for the protection, propagation, and preservation of food fish or for the protection and development of commercial fisheries in this state, including but not limited to ORS chapters 506, 507, 508, 509, 511, and 513. ORS 506.001. A few members of the Task Force referred to these provisions as the "food fish code," apparently to distinguish them from the game fish laws. However, the term "food fish" means "any animal over which the State Fish and Wildlife Commission has jurisdiction pursuant to ORS 506.036." ORS 506.036 grants jurisdiction, with certain exceptions, "over all fish, shellfish, and all other animals living intertidally on the bottom, within the waters of this state."

> (1) To maintain all species of food fish at optimum levels in all suitable waters of the state and prevent the extinction of any indigenous species.
> (2) To develop and manage the lands and waters of this state in a manner that will optimize the production, utilization and public enjoyment of food fish.
> (3) To permit an optimum and equitable utilization of available food fish.
> (4) To develop and maintain access to the lands and waters of the state and the food fish resources thereon.
> (5) To regulate food fish populations and the utilization and public enjoyment of food fish in a manner that is compatible with other uses of the lands and waters of the state and provides optimum commercial and public recreational benefits.
> (6) To preserve the economic contribution of the sports and commercial fishing industries in a manner consistent with sound food fish management practices.
> (7) To develop and implement a program for optimizing the return of Oregon food fish for Oregon's recreational and commercial fisheries.[28]

As some task force members pointed out, the wildlife laws cannot supersede the commercial fishing laws.[29] ORS 506.031 states that the commercial fishing laws "shall be enforced regardless of any conflicting provisions in the wildlife laws of this state. No act lawfully done under the commercial fishing laws is unlawful in the event that such act conflicts with any provision of the wildlife laws of this state." Likewise, ORS 496.016 states in part that "[n]othing in the wildlife laws is intended to affect any of the provisions of the commercial fishing laws." However, for reasons described below, we do not believe these provisions prohibit the Commission from adopting a policy favoring wild or naturally produced fish.

In 1983, the legislature enacted ORS 506.124, which directs the Commission to adopt rules governing public and private salmon hatchery practices and to submit quarterly reports to the Emergency Board on the impact of hatchery practices on the salmon resources. In response to this statutory directive, the Commission promulgated rules in 1984 concerning salmon management and hatchery operations. In part, these rules formally adopted existing policies that the Department had been following for several years.[30] The 1984 rules included a Fish

---

[28] ORS 506.109.

[29] These task members generally oppose the portions of the draft policy that favor naturally produced fish. They did not articulate why they believe there is a conflict between the wildlife laws and the commercial fishing laws. We assume they rely on the provisions in ORS 509.109 requiring that food fish be managed to provide "optimum benefits," be maintained "at optimum levels," permit "optimum utilization of available food fish," and optimize the return of Oregon food fish. The commercial fishing laws do not define the term "optimum" or any variation of it. The only statutory term we are aware of is that contained in ORS 496.004(12), which defines "optimum level" to mean "wildlife population levels that provide self-sustaining species as well as taking, nonconsumptive and recreational opportunities." This definition was added in 1993, apparently in reference to the goal contained in ORS 496.012(1), which requires maintaining "all species of wildlife at optimum levels," because that is the only place the term "optimum level" is used.

[30] In May 1978, the Commission approved a Wild Fish Management Policy. The policy stated that "[t]he protection and enhancement of wild stocks will be given first and highest consideration." From 1979 to 1981, the Department

Management Policy and a Wild Fish Management Policy. At least two formal documents resulted from these actions.

First, several individuals petitioned for judicial review of the Commission's rules pursuant to ORS 183.400, which allows any person to challenge the validity of any rule in the court of appeals.[31] Petitioners alleged that the escapement goals and ocean harvest quotas set pursuant to these rules devastated the ocean coho salmon fisheries and should be invalidated. They argued that the Commission's adoption of the Wild Fish Management Plan, which provided that wild and hatchery coho salmon be managed so as to protect and enhance the wild stocks, violated ORS 506.109. The court stated as follows:

> Although the rules adopted to enhance wild stocks of Coho may indeed have the negative impact on Coho fisheries that petitioners allege, it is the commission's duty to manage food fish for present *and future* generations of Oregonians. It is the Commission's judgment that preserving wild stocks of Coho under [previous] OAR 635-07-525 is in the best interest of the entire Coho fishery for long-term benefits; such a decision is well within the statutory mandate of ORS 506.109. Petitioners may not agree with the Commission's policy, but it is not for this court to substitute its judgment--or petitioners'--for that of the Commission's; our scope of review is strictly limited. ORS 183.400(4). Furthermore, as the Commission points out, nothing in ORS 506.109 requires that historical allocations to users or seasons be maintained.[32] (Emphasis in original)

Second, our office issued a letter in response to an opinion request from Representative Paul Hanneman concerning whether the wild fish policy must be limited to game fish.[33] We concluded that nothing in ORS 506.031 or elsewhere invalidates the Commission's adoption of the 1982 coho management plan. First, the coho plan was consistent with the provisions of ORS 496.430 and 496.435, which reiterate the legislative policy that "native stocks" be protected. Second, ORS 506.119 authorizes the Commission "to formulate and implement the policies and programs of this state for the management of food fish and [to] perform all acts necessary to administer and carry out the provisions of the commercial fishing laws." We stated that the adopting of the salmon management plan was not inconsistent with ORS 506.031. In other words, the coho plan did not "conflict" with the commercial fishing laws.

---

managed ocean coho salmon pursuant to its Wild Fish Management Policy. In 1982, the Commission adopted, but did not promulgate as an administrative rule, a "Comprehensive Plan for Production and Management of Oregon's Anadromous Salmon and Trout," which included a specific section on coho management. The coho plan specifically incorporated the 1978 wild fish policy. *See Schlip v. Oregon Fish and Wildlife Com'n,* 75 Or. App. 462, 464 Fn. 4 (1985) and letter dated December 31, 1985 to The Honorable Paul Hanneman, State Representative from Larry D. Thomson, Chief Counsel, General Counsel Division to (OP-5680).

[31] *Schlip v. Oregon Fish and Wildlife Com'n,* 75 Or. App. 462 (1985).

[32] *Id.* at 465, footnotes omitted.

[33] OP-5680.

Private Salmon Hatchery Permits---ORS 508.700 through 508.745

In the 1970s, the legislature authorized the Commission to issue permits, "subject to such restrictions and regulations as the commission deems desirable," for constructing and operating hatcheries for chinook, chum, coho (silver), or pink salmon.[34] However, the legislature expressly prohibited the Commission from issuing a permit "[w]hich may tend to deplete any natural run of anadromous fish or any population of resident game fish."[35] Thus, we have an express legislative statement that hatchery-produced fish from private hatcheries must not be allowed to "tend to deplete" naturally produced fish. It is reasonable for the Commission to conclude that it may not authorize state-run hatcheries that could have the same effect.

Furthermore, in subsequent legislation enacted in 1989, the legislature found that "protecting the natural runs and genetic diversity of anadromous fish is essential to the long-term health of Oregon's natural resources and sport and commercial fisheries."[36] To that end, the legislature directed the Department to develop and implement monitoring programs to determine the proportion of hatchery fish straying and to adopt rules containing stray rates that are "likely to cause deterioration of the genetic diversity and habitat necessary to maintain long-term species viability or that causes a deterioration of natural or native stocks of salmon."[37]

Even though the legislature acknowledged that private hatcheries are a significant part of Oregon's salmon resource, it directed the Commission to monitor and regulate them so as to optimize their contribution to Oregon's salmon resource "in conformity with" its findings of the need to protect the natural runs and genetic diversity.[38] Again, there is no reason to think that the legislature expects any less from state-operated hatcheries.

The Oregon Plan---ORS 541.405

The Oregon Plan started as a recovery plan for coastal coho salmon and then expanded to include a plan to recover steelhead trout in a broader geographic area. It has evolved into an umbrella for a number of recovery efforts involving numerous salmonid populations in different rivers and geographic locations, as well as restoring the watersheds of Oregon in general.

Like the fish and wildlife statutes' policy statements, the statutory mission statement for the current Oregon Plan is broad and lacks substance:

> The mission of the Oregon Plan is to restore the watersheds of Oregon and to recover the fish and wildlife populations of those watersheds to productive and sustainable levels in a manner that provides substantial environmental, cultural and economic benefits.[39]

---

[34] ORS 508.700.
[35] ORS 508.710(1).
[36] ORS 508.718(1).
[37] ORS 508.718(2)(b).
[38] ORS 508.718(3).
[39] ORS 541.405(1)(a).

We are unaware of any interpretation of this mission statement that helps our analysis of the issue at hand. However, one of the statutory goals for achieving this mission is the "[p]roduction of populations of threatened or endangered species to achieve levels of natural production consistent with overall restoration goals."[40] This appears to support a preference for natural production.

The stated purpose of the Oregon Plan is "to enhance, restore and protect Oregon's native salmonid populations, watershed, fish and wildlife habitat and water quality, while sustaining a healthy economy."[41] The Oregon Plan must, among other things, "[f]ocus state policies and resources on achieving native salmonid recovery and watershed restoration while sustaining a healthy economy and environment."[42] However, the statute does not define the term "native salmonid populations," so it is unclear whether the term includes hatchery-produced fish or not.

CONCLUSION

Nothing in the fish and wildlife statutes expressly directs the Commission to favor naturally produced native fish over hatchery-produced fish. However, we conclude that authority to do so may be implied by reading all of the statutory provisions together.

The Commission has broad authority to interpret its statutes and harmonize potentially conflicting statutory mandates. When faced with imprecise and not entirely consistent goals, it is the Commission's duty to attempt to harmonize its statutory mandates. In general, the Commission should attempt to construe its statutory requirements in a way that will give effect to as many legislative policies as possible. In the complex and technical area of fish and wildlife management, any reasonable attempt to harmonize conflicting statutory policies would receive substantial judicial deference if challenged in court.

The Department's previous Wild Fish Management Policy provided in part that "[t]he protection and enhancement of wild stocks will be given first and highest consideration. Hatchery stocks of fish may be released where necessary to provide optimum benefits from the resource." We advised in 1987 that taking all of the statutes together, this policy was legally sound. We have no reason today to change that opinion.

The proposed language for the new Native Fish Conservation Policy would establish the conservation of naturally produced native fish species as the Department's "principal obligation" and first priority for fish management. At the same time, the draft rules call for the "appropriate" use of hatcheries. For the same reasons discussed in our 1985 and 1987 letters of advice and in

---

[40] ORS 541.405(1)(b)(G).
[41] ORS 541.405(4).
[42] ORS 541.405(5)(c).

Schlip v. Oregon Fish and Wildlife Com'n, we conclude that the Commission has authority to pursue management measures that favor naturally produced fish.

Sincerely,

Shelley K. McIntyre
Assistant Attorney General
Natural Resources Section

SKM:lal/GEND1209.DOC

MEMORANDUM

Oregon Department of Fish and Wildlife

Date: July 15, 1997

To: All Staff

From: Jim Greer

Subject: Clarification of Wildlife Policy

During the legislative session, Oregon Trout introduced Senate Bill 1079 which was intended to clarify parts of the Wildlife Policy as outlined in ORS 496.012. Oregon Trout felt there was a need to clearly indicate that the first obligation of the Fish and Wildlife Commission is to prevent the serious depletion of native species. Their concern was the Commission and the staff was viewing the mandates in the opening paragraph of the Wildlife Policy as equal mandates.

The specific language in question is as follows; "**It is the policy of the State of Oregon that the wildlife shall be managed to prevent the serious depletion of any indigenous species and to provide the optimum recreational and aesthetic benefits for present and future generations of the citizens of the state**". The interpretation of the underline portion of the policy was the crux of Oregon Trout's concern. In our testimony on the bill, we pointed out that our attorney's, on several occasions, had advised the Commission that these mandates to the Commission are not to be considered equally.

Our attorneys have stated that although "**ORS 496.012 provides these statements in an equal manner, we understand that optimum recreational and aesthetic benefits can only exist to the extent that serious depletion of a species is prevented. Where a species is seriously depleted, it will not be possible for optimum benefits to be provided. Accordingly, the Commission's and the Department's overriding obligation is to manage to prevent the serious depletion, which thereby enables the Department and the Commission to provide optimum recreational and aesthetic benefits.**

Office of the Director
2501 SW First Avenue, P.O. Box 59, Portland, Oregon 97207, Tele: (503) 872-5272 FAX: (503) 872-5276

Oregon Trout's response to this information was that this interpretation had not been well distributed to the staff. That is certainly possible but it is a problem we can and will correct. Although Senate Bill 1079 did not pass out of committee, we did agree to provide our attorney's interpretation of this portion of the Wildlife policy to all of our staff. With that in mind, I am sending this memo to all fixed stations with the understanding that copies will be made available for all employees at that station to read and use in any future discussions of statutory mandates in the policy.

Please call if you have questions concerning the information in this memo.

cc: Fish and Wildlife Commission
Executive Management Team
Jim Myron, Oregon Trout
Senator Bob Kintigh
Paula Burgess

Oregon

DEPARTMENT OF
FISH AND
WILDLIFE

DIRECTOR'S OFFICE

April 18, 1997

STATEMENT ON SENATE BILL 1079

by

Oregon Department of Fish and Wildlife

The Department of Fish and Wildlife wishes to comment on Senate Bill 1079 which modifies the Wildlife Policy under which the Fish and Wildlife Commission manages the fish and wildlife resources of the state.

After considerable debate and input from several groups and organizations, the 1993 Legislature passed House Bill 2538 which revised the Wildlife Policy. The final legislation was the result a carefully crafted compromise by individuals representing legislators, agricultural community, timber industry, conservation groups, sportsman groups and the Department of Fish and Wildlife. The Commission has stated that they believe the 1993 legislation created a Wildlife Policy that was stronger and more balanced than the previous policy.

The Commission has reviewed Senate Bill 1079 and asked their legal counsel for a review of the language changes in the bill to ascertain how the changes would affect the present Commission decision process. Legal counsel has indicated to the Commission that the language in the bill is consistent with the legal advice provided to the Commission on several occasions. Briefly, that advice has been that the first sentence of the policy should be interpreted to mean that management to prevent the serious depletion of any indigenous species is the overriding obligation that must be met before recreational and esthetic benefits are made available.

The Commission, in reviewing the language added in Section 2, subsection 7, feels it is also consistent with the decision making

John A. Kitzhaber
Governor

2501 SW First Avenue
PO Box 59
Portland, OR 97207
(503) 872-5272
FAX (503) 872-5276
TDD (503) 872-5259
Internet WWW:http://www.dfw.state.or.us/

process they have used on issues. The Commission, when faced with decisions on controversial issues, has stated publicly at various times that their first duty is to the resource and if they are to err in their decision, the err should be on the side of the resource.

The Department understands the intent of this language is to assure that appointees to the Commission do represent the public interest of the citizens of the state and Commission seats should not be assigned to special interest groups. The present Commission has a wide diversity of backgrounds but does not represent any particular interest group.

The Commission feels that the success or failure of Senate Bill 1079 to be passed by the 1997 Legislature will not change the way they or their legal counsel interpret the present Wildlife Policy as the bill language is consistent with that interpretation.

The Department of Fish and Wildlife appreciates the opportunity to submit these comments for your consideration .

Senate Agriculture and Natural Resources Committee

Contact Person: Rod Ingram, Acting Director, 872-5272

[H]ARDY MYERS
[A]TTORNEY GENERAL

[D]AVID SCHUMAN
[D]EP[UTY] ATTORNEY GENERAL

1515 SW 5th Avenu[e]
Suite 410
Portland, Oregon 97201
FAX: (503) 229-5120
TDD: (503) 378-5938
Telephone: (503) 229-5725

DEPARTMENT OF JUSTICE
PORTLAND OFFICE

March 10, 1997

BY FACSIMILE

Rod Ingram
Acting Director
Oregon Department of Fish and Wildlife
2501 SW First Avenue
P.O. Box 59
Portland, Oregon 97207

Re: Fish and Wildlife Policy and Goals Pursuant to ORS 496.012

Dear Rod:

You have inquired about the proper interpretation of ORS 496.012, with respect to any balance which it suggests between the prevention of "serious depletion of any indigenous species," and providing "optimum recreational and aesthetic benefits for present and future generations." You have asked that I confirm prior advice that, in our view, these two statements should be interpreted to mean that management to prevent serious depletion of any indigenous species is the overriding obligation that must be met before recreational and aesthetic benefits are made available.

As you know, we have provided advice to you on related aspects of ORS 496.012 on numerous occasions, both orally and in writing. Most recently, we provided advice during the 1993 Legislative Session when the legislature considered House Bill 2538, which amended the policies and goals of ORS 496.012. *See* memoranda dated March 28, 1993, April 19, 1993, and May 6, 1993. In OP 6089, dated February 19, 1987, we also discussed the fish and wildlife policies and goals of ORS 496.012, as they then existed. Between 1987 and 1993, we provided oral advice on many occasions as to the interpretation of ORS 496.012 and its consistency with other fish and wildlife statutes.

In our view, ORS 496.012 provides both policy and goals with respect to the fundamental responsibilities of the Oregon Department of Fish and Wildlife ("Department") and the Oregon Fish and Wildlife Commission ("Commission"). The policy provides that wildlife is to be "managed to prevent serious depletion of any indigenous species *and* to provide the optimum recreational and aesthetic benefits ... ." Although the phrasing of the policy section of ORS 496.012 provides these statements in an equal manner, we understand that optimum recreational and aesthetic benefits can only exist to the extent that serious depletion of the species is prevented. Where a species is seriously depleted, it will not be

possible for *optimum* benefits to be provided. Accordingly, the Commission's and Department's overriding obligation is to manage to prevent serious depletion, which thereby enables the Department and Commission to provide *optimum* recreational and aesthetic benefits.

If I can be of any further assistance, please do not hesitate to call.

Sincerely,

Cheryl F. Coon
Assistant Attorney General
Natural Resources Section

CC:kt/CFC0541.LET

MEMORANDUM

OREGON DEPARTMENT OF FISH AND WILDLIFE

INTRADEPARTMENT

DATE: January 19, 1990

TO: Jim Martin

FROM: Ken Witty

SUBJ: Grande Ronde-Imnaha chinook in Columbia River winter harvest seasons.

I have reviewed proposed commercial, sport, and C & S winter regulations for the Columbia River, and I have concerns about the potential level of harvest of Grande Ronde Imnaha chinook stocks.

Using a 5 percent harvest level on 120,800 fish and a C & S fishery of 8,450 fish, approximately 14,490 upriver chinook will be harvested in this fishery. We estimate that approximately 4 percent of this harvest or 580 fish are Grande Ronde-Imnaha stocks.

Considering that other fisheries such as the sockeye gillnet fishery will harvest additional Grande Ronde-Imnaha chinook stocks and considering the already severely reduced Grande Ronde-Imnaha chinook run, I suggest that this harvest rate is too high. Adjustments should be made to reduce harvest of Grande Ronde-Imnaha chinook stocks.

I realize that management plans allow this level of harvest, but I suggest that management plans have allowed the extinction of Snake River coho and sockeye stocks, and I fear the same fate for chinook stocks.

I would appreciate a response to this concern.

cc. Jim Lauman/Steve Williams
Bob Hooton
Rich Carmichael

JAN 22 1990