

Washington Salmon: understanding allocation



**Washington State
House of Representatives
Office of Program Research**

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by

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House of Representatives

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The authors wish to thank those who took the time to assist us in understanding the history and current status of salmon allocation. We appreciate the comments of those from the sport and commercial fishery, the tribes, and state agencies who reviewed this document and provided us with valuable insight on this complicated issue. Readers are reminded that information presented in this document is continually changing and that current status information can be obtained from those contacts listed in Appendix III.

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House of Representatives
State of Washington
Olympia

Dear Reader:

Fishing, especially salmon fishing, represents one of Washington's cultural mainstays. The earliest settlers spoke of "salmon so thick you could walk across a stream." It, along with timber, was one of the state's first industries. Prior to that, the Indians incorporated salmon into their religion, culture and commerce.

Today, as we near the states centennial, the salmon numbers may have diminished but their significance remains. Residents and non-residents ply the waters in search of salmon as a sport fish. Commercial fishermen attempt to fill their vessels' holds with the glistening bodies.

Managing the salmon fisheries in Washington has become almost maddeningly complex. A salmon passes through the waters of several states, two nations, and is sought by competing groups in each area. Scientists still work to unravel the salmon's intricate biology.

Serving as Chairman of the House Natural Resources Committee, I am acutely aware of these complexities. I asked committee staff to prepare a report for the person who wishes to understand the salmon allocation process. This report explains, in simple terms, how we reached the current state of affairs, who plays what role, and how you can become involved. Its objective is to provide you, the reader, with an unbiased perspective on the past and the present. Armed with this you can work to accomplish your vision of future salmon allocation.

I hope you find the report useful and informative.

Very truly yours,

A handwritten signature in black ink, reading "Dean Sutherland", with a large, sweeping flourish at the end.

DEAN A. SUTHERLAND, Chairman
House Natural Resources Committee

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Introduction

Anadromous fish, primarily salmon and steelhead, are critically important to many sectors of Washington's population. Maintaining the health of the salmon fishing industry is critical to the economies of many Washington communities. Improving the stability of fishing seasons and enhancing the harvestable salmon will create more opportunity for salmon fishermen.

The harvestable salmon must be allocated among recreational and commercial fishermen, Indian and non-Indian fishermen, off-shore foreign and domestic fishermen, and river fishermen. Each group would like to see their allocation increased.

Before any change in allocations can be discussed, a basic understanding is needed of how the current allocations were established.

It is the purpose of this guide to give the reader an understanding of the history and development of Washington's current salmon allocation scheme. This guide discusses legal decisions that have served as the basis of the allocation formula between Indian and non-Indian fishermen. An understanding of the allocation among gear groups, between commercial and recreational fishermen, and between Indian and non-Indian fishermen also requires some knowledge of the federal and international policies implemented under the U.S.-Canada Salmon Interception Treaty and the Magnuson Fishery Conservation and Management Act.

Indian And Non-Indian Allocation

The allocation of harvestable salmon between Washington non-Indian and Indian fishermen has resulted from years of turmoil, confrontation, and finally negotiation. It begins with treaties negotiated in the 1850's.

Treaties of the 1850's

Historically, the Northwest Indians depended on wild fish, animals, and vegetation of the area as their major food source. Anadromous fish (salmon and steelhead) were key elements in their diet, their religious practices, and their trade customs.

The Indians' use of the salmon and steelhead resource was dictated by the behavior of these species. In some cases, tribal members moved from place to place to harvest the salmon and steelhead and naturally developed "usual and accustomed fishing grounds and stations." They devised methods of harvesting fish that reflected where the salmon were in their biological cycle (spawning, migrating, or feeding). A feeding salmon will respond to one harvesting method while a salmon preparing to spawn will respond to a different method. Harvest methods also reflected where the salmon were located geographically (river mouths, head waters, high seas, inland salt water, or lakes). Six species of anadromous fish were found in Washington: coho, chinook, sockeye, chum, pink, and steelhead trout. Each species dictated different harvest methods and locations.

In the mid-1850's, the Indian tribes carried on trade over a wide geographic area with each other and with the newly arrived non-Indian settlers. Salmon was a key element in this trading activity. No regulation of the taking of salmon was necessary because of the limited population and the abundance of fish, although the tribes managed the fisheries to allow sufficient salmon to reach spawning areas and regulated the fishery to conform with religious and cultural traditions.

At this same time, the United States sought to make available land in the Pacific

Northwest for the impending migration of non-Indian settlers. Isaac Stevens, the first Governor and Superintendent of Indian Affairs of the Washington Territory, was authorized by the federal government to negotiate with the several tribes in the Washington Territory. Some tribes were highly organized, while in other cases, in order to proceed with negotiations, Stevens grouped bands, villages, or communities of Indians into tribes and designated a spokesman.

The landmark federal court decision by Judge Boldt in *U.S. v. Washington*, 384 F.Supp. 312 (1974), contained a description of the treaty negotiations. From that description, the following historical account has been accepted and repeated throughout the line of court cases that followed from 1974 to the present.

The principal purposes of the treaties were to extinguish Indian claims to the land in Washington Territory and to allow a peaceful transition to occur between Indians and non-Indians in the area. The Indians reserved parcels of land for their exclusive use (reservations), however, a primary concern of the Indians during the negotiation was that they have the freedom to move around to gather food, particularly salmon, at their usual and accustomed fishing places. Stevens and his commissioners assured the Indians that they would be allowed to fish at those usual and accustomed locations.

The treaty language of particular importance to the issue of Indian fishing rights is the following:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with the citizens of the territory....together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands." Treaty of Medicine Creek, Art. 3, 10 Stat. 1132 (1855).

This language or substantially similar language is found in the other treaties negotiated with Western Washington and Columbia River Tribes.

Principles Of Indian Treaty Interpretation

Article VI, Section 2 of the United States Constitution is of key importance in understanding both the significance of the Indian treaties as well as their interpretation. Article VI, Section 2 states:

"The Constitution...of the United States...and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Three basic conclusions can be drawn from Article VI, Section 2 and case law. These are:

1. The federal government can preempt the ability of state governments to regulate fishing, either by legislation or by treaty;
2. Treaty rights, as a federal action, supercede state law; and
3. The State may not enact legislation that conflicts with the treaty rights of any subjects of a signatory nation. Asakura v. City of Seattle, 265 U.S. 332 (1924).

A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations. E.g., Lone Wolf v. Hitchcock, 187 U.S. 553

(1902). The Stevens' Treaties were signed not by two nations at war, but as nations acting as arm's length negotiators. Therefore, the treaties must be viewed in light of the perceived intent of the parties.

There is no record of English being spoken at the Indian treaty councils. Stevens conducted the treaty negotiations in the Chinook jargon, a trade language of limited vocabulary and simple grammar. The negotiators then translated the treaty into the respective tribal languages.

Presumptively the United States had the superior negotiating skills and superior knowledge of the language in which the treaties were written. Because of the presumed superior negotiating position, the courts have ruled that, "the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." Jones v. Meehan, 175 U.S. (1899).

By the treaties, the Indians gave up millions of acres of land in exchange for much smaller parcels of land reserved for their exclusive use. The Indians also reserved the right to fish at their "usual and accustomed grounds and stations", even if those locations were off the reservation. The treaties were "not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted." United States v. Winans, 198 U.S. 371 (1905).

History of Regulation

Throughout the 20th century, the fishing industry, commercial and sport, saw an increase in the number of fishermen and an increase in the efficiency of the methods used to catch a decreasing number of fish. Large scale development of the commercial fishing industry in the last decades of the nineteenth century brought with it, the need for regulation of fish harvests.

By the second half of the twentieth century, the salmon resource suffered from heavy competition among different non-Indian user groups. Compounding the problem, industrial waste and municipal sewage pollution poisoned the fish, logging practices destroyed spawning streams, and hydroelectric dams cut off whole river systems.

Regulation of anadromous fish is complicated by several factors: the different habits of the various species; the variety of methods used to take the fish; the variety of jurisdictions that a given fish run may pass through; and the fact that within the state of Washington, one specie, steelhead trout, is managed by the Department of Wildlife as a sport fish while the other species are managed by the Department of Fisheries as commercial food fish. Regulation must also take into account conflicting interests of sport and commercial fishermen, Indian and non-Indian fishermen, and the balance between harvesting too much or too little.

Regulation in Puget Sound and Coastal Waters

Until recent years the pattern of state regulation of tribal fishing was based on the position that the treaties only provided the right to equal access. The treaty phrase "taking fish...in common with" was interpreted by the state to mean that all regulations applied to both Indian and non-Indian alike. This interpretation did not reserve any special right on the part of the Indian to take fish. The concern for equal access produced regulations that unequally impacted the Indian and non-Indian fisheries.

The pattern of Indian fishing was based on the behavior of the salmon. Salmon begin their life cycle in freshwater streams, migrate

to the ocean to mature, and then return to the freshwater streams to spawn. Historically, Indian fishermen have harvested the returning salmon primarily at the river mouths (terminal areas), while non-Indian fishermen harvest the salmon primarily in open waters (Puget Sound or the Pacific Ocean). Due to their respective fishing patterns, the non-Indians have the potential to catch all the harvestable salmon (those salmon not needed for spawning) leaving very few, if any, fish to be harvested by Indians in terminal areas. The State did not manage its fish resource for the fishery at the end of the chain. In 1960, the Indian harvest was 5 percent of the total salmon catch. As a result, in the 1960's, Indian activists began dramatizing their circumstance by fishing openly in defiance of state regulations.

Regulation on the Columbia

The current regulation of commercial fishing on the Columbia River divides the river into 6 zones. Non-Indians fish the lower Columbia below Bonneville Dam (Zones 1 -5) and the Indians fish above the Dam (Zone 6). Indians claim but have not exercised a tribal fishing right below Bonneville Dam, nor have they sought affirmation of the right under U.S. v. Oregon, 302 F.Supp. 899 (1969).

Before 1957, the Columbia River was open to all fishermen during prescribed seasons. Hydroelectric activity on the river was destroying some of the historic Indian fishing sites. In 1957, filling of the Dalles Dam reservoir inundated the Indian fishing station at Celilo Falls. The four Columbia River tribes were compensated by payment to them of \$25 million dollars for loss of that specific fishing site.

In 1963, Oregon began setting escapement goals for certain fish runs, and in 1964, Oregon and Washington closed the river to protect the summer chinook salmon run. By 1968, the conflict between Indian commercial fishermen and the State of Oregon had intensified. John Day Dam had been constructed. Fish runs were declining. Oregon was strictly enforcing a closure of the river's commercial fishery. The Indians opposed the regulations as infringing upon their treaty rights. Several arrests resulted.

The Era of Litigation

The conflict moved from the water to the courtroom. As a result, two distinct legal positions developed. The Indians argued that the treaties reserved to them the right to fish at all usual and accustomed places without restriction, even if the places were off the reservation. Non-Indians argued that the right to fish was secured to Indians in common with all citizens of the territory and no citizen had any special status.

The Puyallup Trilogy

The first legal case involved Indian net fishing of steelhead trout on the Puyallup River (Puyallup v. Department of Game, 391 U.S. 392 (1968)). This case became known as Puyallup I, the first in a series of three appeals, each ultimately decided by the United States Supreme Court.

In Puyallup I, initiated in 1963, the Washington Department of Game and the Department of Fisheries sought to determine whether the Puyallup Tribe and individual tribal members were subject to state regulations that prohibited net fishing in the Puyallup River.

The U. S. Supreme Court held that the right to fish at all "usual and accustomed grounds and stations" as stated in the Medicine Creek Treaty cannot be qualified by state law or regulation. Further, this right extends off the reservation. But, the State can regulate the manner of fishing, the size of the take and commercial fishing by Indians off the reservation only if such regulation is necessary for conservation. Additionally, the regulation must meet appropriate standards and must not discriminate against the Indians. The case was sent back to the state Superior Court to determine whether the state regulations were necessary for conservation.

In order to conserve the fish resource, the State believed it had to prohibit net fishing in the Puyallup River. The effect of the regulation was to eliminate Indian fishing because the Indians fished in the river with nets. The State however, did not restrict the non-Indian sport fishermen using rod and reel. After the case was remanded to the state superior court, the Department of Fisheries changed their regulation to allow net fishing for salmon in

the Puyallup River but continued to prohibit it in the Bay and in the spawning areas of the River. The Department of Game continued its complete ban on net fishing for steelhead.

On the second hearing, the Washington State Supreme Court held that the regulation banning all net fishing for steelhead in the Puyallup River was necessary for conservation of that specie. A state expert testified that the Puyallup River required an escapement of 25 to 50 percent and that the river could not support a commercial fishery. The Indians bore the brunt of the Game Department regulation because they traditionally fished at the end of the fish's biological cycle (in the rivers) and only with nets. They also fished these runs for commercial purposes.

This State Supreme Court decision was appealed to the U. S. Supreme Court in Puyallup II (Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973)), and the Court reversed the State Court, holding that the effect of the Game Department ban was to discriminate against the Indians by eliminating all Indian fishing on the River (because the Indians fish with nets) and leaving the river open only to non-Indian sports fishermen. The State of Washington was directed to come up with a method that would accommodate Indian and non-Indian fishing with the requirement for conservation. The Court also articulated that the treaty right reserved to the Indians could not be allowed to destroy the resource.

On remand from the U.S. Supreme Court, the Washington state Supreme Court conducted a two-week trial gathering evidence for its determination that 45% of the harvestable natural steelhead run on the Puyallup River was available for taking by the treaty Indian net fishery and 55% by the non-Indian sport fishery.

This allocation was upheld in the third appeal to the U.S. Supreme Court in Puyallup III (Puyallup Tribe v. Department of Game, 433 U.S. 165) decided in 1977. Emphasizing the mandate in Puyallup II, that the fish resource must be fairly apportioned, the court in Puyallup III rejected the tribal claim to an exclusive right to take steelhead that passes through its reservation. In this instance, the state had met the court's mandate to accommodate Indian and non-Indian fishing with the need for conservation.

The Belloni Decision

In 1968, Washington and Oregon, through the Columbia River Compact (an agreement between the two states to jointly manage the Columbia River commercial fishery) opened a commercial fishery from Bonneville to the confluence of the Deschutes River for both Indian and non-Indian fishermen. The members of the Compact believed that the decision in the Puyallup I case meant that opening any fishery meant opening it to Indian and non-Indian alike.

That same year, Richard Sohappy and 13 other individuals sued the State of Oregon to prohibit interference with off-reservation fishing rights (Sohappy v. Smith). In a separate action, the U. S. sued the state of Oregon on behalf of four Columbia River tribes (U.S. v. Oregon). The cases were consolidated.

Judge Belloni's decision in Oregon in the combined cases of U.S. v. Oregon and Sohappy v. Smith, 302 F.Supp. 899 (1969), established a set of principles that were later incorporated into the federal court decision of Judge Boldt in Washington. The tribes' argument was adopted by the court.

The Indians have a treaty right to take a "fair share" of the fish from any given run. States can only regulate this treaty right if the regulation is necessary for the conservation of the fish. The method of regulation must be the least restrictive method to assure sufficient escapement for preservation of the species.

The state must recognize Indian treaty fishing rights as separate and distinct from non-Indian fishing rights. The state can manage fish for a variety of purposes, one of which is conservation, and can impose regulations to accomplish its management objectives. However, it can only regulate Indian fishing for conservation purposes. A "fair share" of the fish must reach Indian fishing sites and Indians can use means which are prohibited to non-Indians.

In promulgating regulations, the state must give the Indian's appropriate notice and opportunity to participate meaningfully in the rule-making process. The court maintained continuing jurisdiction over this suit and in 1974 after the Boldt decision, the state of Washington joined the suit as a defendant. As in the later case of U.S. v. Washington, the court became the manager of the resource.

The Boldt Decision - Fifty Plus Formula

After the Belloni decision in Oregon, conflict over the Indian treaty right to fish continued to escalate in the state of Washington. A violent confrontation in 1970 between Indians fishing on the banks of the Puyallup River and State Game Department wardens and police officers reinforced the fact that some resolution was critical to avert further violence. U.S. Attorney Stan Pitkin brought suit in U.S. District Court on behalf of seven Indian tribes (other tribes joined this suit later) against the State of Washington (Departments of Fisheries and Game, and later, the Reef Net Owners were joined as defendants) to declare the status of the Indians' fishing rights off the reservation and to seek enforcement of the rights that would be declared by the court. Additionally, the Indian claims included damages for loss of habitat that could impair the fishing right through reduced fish production. This latter claim was separated in the first trial and subsequently became known as Phase II litigation.

On February 12, 1974, Federal District Court Judge George Boldt issued the Court's opinion in U.S. v. Washington, 384 F.Supp. 312 (1974). The parties did not dispute the fact that fishing on the reservation was not subject to state regulation, but they did dispute to what degree the state could limit off-reservation fishing. Judge Boldt ruled that the off-reservation treaty right included the opportunity to take 50% of the harvestable fish plus any on-reservation catch, and off-reservation catch needed for subsistence and ceremonial purposes. This became known as "the 50% plus formula". The impact of this formula was directly related to the term "harvestable". Harvestable means the number of fish that remain to be taken by any fishermen at usual and accustomed grounds and stations after deducting those necessary for spawning escapement and tribal subsistence and ceremonial needs.

The State could only restrict off-reservation Indian fishing if "*reasonable and necessary to prevent demonstrable harm to the actual conservation of the fish.*" Conservation was defined as "*those measures which are reasonable and necessary to the perpetuation of a particular run or species of fish.*" Before a reasonable method can be used to restrict the treaty fishing right, all alternatives, including the restric-

tion of non-Indian fishing, had to be exhausted.

The State was to manage the fishery to provide tribal fishermen the opportunity to take an allocation of this harvest that included fish that *would have passed* their usual and accustomed fishing grounds *but for* the interference of non-Indian fishermen fishing in waters beyond the jurisdiction of the State of Washington.

It took several years to clearly define what "opportunity to take" meant and what would be included in the total harvestable catch.

The State and the tribe had concurrent jurisdiction off-reservation and tribes could be self-regulating if they met the criteria established by the court relating to tribal government structure, fishery biologists, and enforcement personnel.

The geographic area covered by this decision included that portion of Washington west of the Cascades and north of the Columbia River drainage area and included the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of Grays Harbor watershed and offshore waters adjacent to those areas.

In order to ensure compliance, the court maintained continuing jurisdiction. The case was appealed and affirmed by the Ninth Circuit Court of Appeals. 520 F.2d 676 (1975).

Modification of the Boldt Formula

By 1979, the State Department of Fisheries found itself in an awkward position. The department was a party in a federal court suit which ordered it to establish rules to protect Indian fishing rights while at the same time, the department was prohibited by the state supreme court from complying with the federal court order. Once the state (as the Departments of Fisheries and Game) established regulations under the federal court order, private citizens challenged them in State Court. The state Supreme Court declared Fisheries rules and regulations in violation of the U.S. Constitution and rejected the federal district court's interpretation of the treaty fishing right. The Department of Game never did accept the federal court interpretation of the treaty rights. Washington v. Washington State Commercial Passenger Fishing Vessels, 443 U.S. 660, 672 (1979).

At this point, the federal court, through the request of the U.S. Attorney for the Western District of Washington, became actively involved in the management of the fishery. The Federal District Court explained its frustration in an often quoted statement:

"The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases..., the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century." Passenger Fishing Vessels, 573 F.2d 1123, 1126 (1978).

The United States Supreme Court, in explaining its reasons for reviewing this issue, stated, *"because of the widespread defiance of the District Court's orders, this litigation has assumed unusual significance."* Passenger Fishing Vessels, 443 U.S. 660, 674.

The court agreed *"to resolve what, if any, right the Indians have to a share of the fish, to address the implications of international regulation of the fisheries in the area, and to remove any doubts about the federal court's power to enforce its orders"*. Passenger Fishing Vessels, 443 U.S. 660, 674.

In its decision, the U.S. Supreme Court ruled that the Indians' treaty right to fish guaranteed the tribes' right to harvest a share of each run of anadromous fish that passes through tribal fishing areas. The court firmly rejected the state courts position that the treaties merely granted equal opportunity of all citizens to take fish and that no citizen had rights superior to any other. Indian and non-Indian fishermen are equal in the sense that neither party may deprive the other of a fair share of the runs.

The court relied on the Puyallup III decision for support of its interpretation of "right to take" language. In that case the court recognized that the treaties secured the right to a substantial portion of the run of steelhead in the Puyallup River (45%) and not just a right to compete with non-Indian fishermen on an individual basis. The court also recognized state regulatory power for conservation purposes over on-reservation fishing by rejecting the Indians' claim to a right to take all the steelhead from the river as it flowed through

the reservation so as to deprive other citizens of their "fair apportionment" of the runs.

In Passenger Fishing Vessels, once the "right" was reaffirmed, the measure of a "fair apportionment" was articulated by the court. The harvestable portion of fish under the treaties should initially be divided into equal shares. The 50% allocation to the Tribes could be reduced if the tribes' need could be satisfied by a lesser amount. The lesser amount must be sufficient to provide a "*moderate living for Indians.*" This initial 50% now included fish caught by Indians on the reservation and fish caught for ceremonial purposes. For both Indian and non-Indian, all fish identified to a particular run caught in state waters or U.S. waters by members of a treaty Indian tribe or by non-Indian Washington residents were included in the calculation of "harvestable portion".

Implementing the Federal Court Orders

The issue to be resolved under the court's continuing jurisdiction was how to count the fish and when to count the fish. After the decision in Passenger Fishing Vessels, the court, under its continuing jurisdiction in U.S. v. Washington, continued to approve management plans for the different areas and species. As data improved, more and more sophisticated measurement allowed greater and greater accuracy. The court liberally applied the Boldt formula as modified by Passenger Fishing Vessels and rarely found that the state met the threshold of conservation necessity for regulation of off-reservation Indian fishing. The message from the court was clear:

1. the parties have the expertise to fashion management plans for salmon runs;
2. a negotiated plan will be much preferable to one fashioned by the court;
3. very few excuses will be accepted; and
4. negotiation of disputes is encouraged.

The Fisheries Advisory Board (FAB) was created to help resolve disputes over implementation by requiring that disputes go first to the FAB subject to review by the court.

(U.S. v. Washington, 459 F.Supp 1020, 1061.) Some examples of specific attempts to implement the formula are: (1) A 50-50 allocation did not mean one phased in over four years (1981-1985) when data showed that the Indian share of chinook salmon on Puget Sound fell far short of their share as early as 1980 (U.S. v. Washington, 626 F.Supp. 1405, 1458); (2) Neither did 50-50 mean equal division of those salmon entering the Quinault River when only a small portion of the Quinault river salmon could be identified as off-reservation salmon (626 F.Supp. 1405, 1428); and (3) The non-Indian catch now includes the non-resident catch in state-regulated waters (626 F.Supp. 1405, 1486).

The Ocean Fishery

The federal court recognized from the beginning that management of the ocean fishery directly impacted the salmon runs in the rivers of the state of Washington and the Columbia River.

In a suit brought by three north coastal Indian tribes (Hoh v. Baldrige, 522 F.Supp. 683 (1981), now known as Hoh v. Verity), the Federal District Court as part of its ruling, required a salmon management plan for the ocean fishery. The court further defined the allocation of fish. The treaty tribes' fishing right allows the taking of approximately fifty percent of each run of salmon, managed on a river-system by river-system, run-by-run basis. The parties may depart from this rule by agreement that is not in conflict with the court's order or upon an agreed application to the court for approval prior to implementation. Previously, the Secretary of Commerce had implemented a management plan based on a system of single specie aggregation. This allowed the North Coastal Indian tribes to take collectively 50% of the combined coho run for the north coastal river systems. This management plan left some rivers without any harvestable coho salmon. By requiring a river-by-river, run-by-run management plan, the Secretary had to further constrain the ocean fishery to meet escapement goals and allow a harvestable run on each river in the north coastal area.

Equitable Adjustment

The treaties guarantee Indian and non-Indian fishermen the opportunity to take up to 50% of the *harvestable number* (rather than actual catch) of a salmon run. Under U.S. v. Washington, the Salmon Management Plans, negotiated in an attempt to comply with the federal court's orders, ensure that each fishery shall be accorded that opportunity. If either fishery is not provided an opportunity to catch their allocation because of a conservation closure, the imbalance must be redressed by means of an equitable adjustment. "*Conservation closure*" means a closure of fisheries by the State because in-season data indicates that if one side continues fishing, it will fish into the escapement goal. The imbalance will also be adjusted if post-season data indicates a smaller run size than in-season data had indicated, and if one side inadvertently fished into the escapement goal.

Equitable adjustment claims may be made when

1. the less successful party was prevented from harvesting its share due to a conservation closure or an imprecise management decision,
2. when the escapement goal of a management unit was not achieved, or
3. when one party's actual catch exceeded its share.

In its simplest form, the equitable adjustment will be the lesser of:

1. the number of fish the less successful party would have caught but for the condition(s) which prevented the full harvest, or
2. the number of fish necessary to equalize the catch.

Under the principles of equitable adjustment, each party is to be accorded an opportunity to take its share of the harvestable fish in a management unit. Equitable adjustment claims cannot be made based on management decisions as to where, when, or how to harvest the fish. Fish are considered available if a fishery may be mounted while meeting escapement goals.

In the Hoh v. Baldrige Framework Management Plan, equitable adjustment operates on a slightly different basis. It recog-

nizes the annual fluctuations in catch due to imprecise management decisions. When the parties cannot agree to a pre-season fishing regime, the parties return to a numerically set escapement goal and a numerically determined harvest from which deviations will then be equitably adjusted. A party who deviates from an agreed pre-season fishing regime will be penalized by the amount of fish taken as a result of the deviation. The deviating party will receive less fish and the other party will receive more fish. The penalty is usually imposed the following year and is always subject to escapement limits.

As of July, 1988, the court had not approved the Framework Management Plan however, the plan as presented to the court was being used by the parties as a guideline for annual management plans.

Foregone Opportunity

One principal articulated in the Boldt decision was that wastage should not occur. An application of the principal occurs in the doctrine of foregone opportunity. This doctrine comes into play when one party, either Indian or non-Indian, chooses not to harvest their share of the salmon. In that case the other party may notify the non-harvesting party that they intend to harvest the balance of the non-harvesting party's salmon. If such harvest takes place, the harvesting party is not required to repay for the "extra" fish caught. Foregone opportunity applies only within one season and between parties, not between gear groups.

For example, consider if the Indian fishing fleet chose to fish in the San Juan Island area for sockeye or pink salmon and not to fish in Bellingham Bay for chinook. This would result in more fish entering the bay than the number necessary to meet spawning escapement goals, or in other words, wastage. The non-Indian commercial fishermen could ask for the opportunity to net both their share and any uncaught portion of the Indian share.

The party asserting the defense of foregone opportunity must show that excesses were identified in-season, and that the other side had notice that the fish would be taken.

Current Status

The Columbia River

Under the continuing jurisdiction of the Federal district court in U.S. v. Oregon, the Columbia River fishery was managed by a series of annual management plans even though Judge Craig had requested that a long-term management plan be developed. Finally, in 1977, eight years after the original decision, a five year management plan was presented to the court and was approved.

In 1982, negotiations began on a long term management plan for the Columbia River and its tributaries. Since complete agreement was not reached, annual approval of interim management plans among the parties continued through the court. The parties included the Columbia River tribes (the Yakima Indian Nation, the Warm Springs Tribes, the Umatilla Tribe, and the Nez Perce Tribe), the federal government, and the States of Washington, Oregon, and in 1985, Idaho.

In 1986, an agreement was almost completed, but the federal government issued a directive that established a new federal policy. The Reagan administration did not want federal agencies to bind the federal government and subsequent administrations through long term agreements in lieu of court trials to policies that could not be changed. The federal court had been supervising the management of the Columbia River fishery since the Belloni decision in 1969. The purpose of this negotiated settlement agreement was to provide a long-term comprehensive management plan for the Columbia River anadromous fish without the frequent litigation that had plagued this issue. Long-term consent agreements made under court order are seen by the executive branch as an encroachment by the judicial branch on the power and discretion of the executive and legislative branches of government. A directive was issued from U.S. Attorney General Edwin Meese that set guidelines for U.S. attorneys negotiating consent agreements. They could not negotiate provisions that would require an agency to promulgate rules that they could not change through normal rule making procedures, or

that would obligate the federal government to something that they would not be required to do if the case went to trial. This meant that the federal government would not be a party to negotiating an agreed settlement.

A settlement has now been reached that accommodates the federal position. The government can withdraw from the agreement after notification from the Secretaries of Commerce or Interior. It also expresses a commitment to avoid litigation in settling management disputes.

As the matter stands, the agreement has been signed and submitted to the court by Oregon, Washington, the federal government, and the four Columbia River tribes. The State of Idaho objects to it based on their concern for the impact of the agreement on the escapement of steelhead to Idaho rivers. If the court approves the agreement (even over the objection of the state of Idaho), all parties who are parties to the law suit will be bound to the terms of the agreement.

Washington's Initiative 456

Initiative 456 (RCW 75.56), was passed by the voters in 1985. It stated that:

"No citizen shall be denied equal access to and use of any resource on the basis of race, sex, origin, cultural heritage, or by and through any treaty based on the same...[A]ny special off-reservation legal rights or privileges of Indians established through treaties that are denied to other citizens were terminated by [the Indian Citizens Act of 1924]."

It further declared that

"...all resources in the state's domain shall be managed by the state alone such that conservation, enhancement, and proper use are the primary considerations."

The language of the initiative poses an issue of state versus federal law. The federal treaties and federal court decisions supercede state laws and state court decisions. Agreements made and entered into under U.S. v. Washington and U.S. v. Oregon as part of a court order fall under the jurisdiction of Federal Court and any regulations that are promulgated to implement these agreements should not be subject to challenge under this initiative.

Puget Sound and the Washington Coast

After Judge Boldt retired from the case in U.S. v. Washington, Judge Craig was assigned to replace him. Eventually, Judge Craig was the presiding judge in both U.S. v. Washington and U.S. v. Oregon. These two separate law suits each have their own Judges again. When Judge Coyle (U.S. v. Washington) became the presiding Judge in 1986, there were 35 sub-proceedings in this case. These have been reduced to three and are summarized below.

1) The Bellingham Bay case seeks to establish the jurisdictional line between reservation and non-reservation jurisdiction in Bellingham Bay for purposes of settling an equitable adjustment claim. The federal magistrate has recommended that this case be resolved in favor of the non-Indian claim. The presiding judge currently has this recommendation under advisement.

2) The All Citizens' lawsuit was filed by the Indian tribes as a sub-proceeding of U.S. v. Washington to determine whether Washington origin fish caught by non-residents of Washington in waters outside the jurisdiction of Washington should be counted toward the non-Indian allocation of salmon. The parties have entered into a stipulated dismissal and the case has been dismissed without prejudice which means it can be brought again in the future.

3) The Intertribal Allocation case is a suit between South Sound tribes and North Sound tribes to settle the Indian allocation of salmon among the tribes. The court has entered an order establishing a procedure for mediation of this dispute and has set a time frame for the process. Mediation has begun and implementation is set for 1989.

The Decision Makers

From the moment of birth, a salmon begins a life-journey that takes it through waters governed by two states, through national waters off the coast of the United States, through international waters, and back again where it spawns and dies. This multi-jurisdictional journey involves several agencies and the most complex system of regulation of any other food fish in the world.

For convenience, salmon management can be divided into four separate but interrelated jurisdictions: the ocean (outside 3 miles), the coast (inside 3 miles), Puget Sound including the Straits of Juan de Fuca, and the Columbia River. Allocation decisions in one jurisdiction impact one or more of the other jurisdictions. To facilitate decision-making, user groups and the regulating agencies have developed a decision framework. Attachment 1 illustrates the relationship of the user-group to the decision-making hierarchy. Though each group might not participate in each decision, most groups chose to become involved.

International Waters

US-Canada

Salmon Interception Treaty

Washington salmon migrate through both U.S. and Canadian waters. During migration, the salmon are exposed to both U.S. and Canadian fishermen. Prior to 1985, no regulations limited the harvest of salmon by the fishermen of the neighboring country. Canadian interception of salmon originating in Washington was increasing. There was a need to stabilize this trend for purposes of conservation as well as a desire by Washington fishermen to harvest more fish, especially those produced in Washington.

In 1985, the United States and Canada signed the Salmon Interception Treaty, an agreement that was over 15 years in the making. It represents a method that enables each state or province to harvest the salmon it produces by reducing the interception of these stocks. The treaty states:

"...each Party shall conduct its fisheries and its salmon enhancement programs so as to:

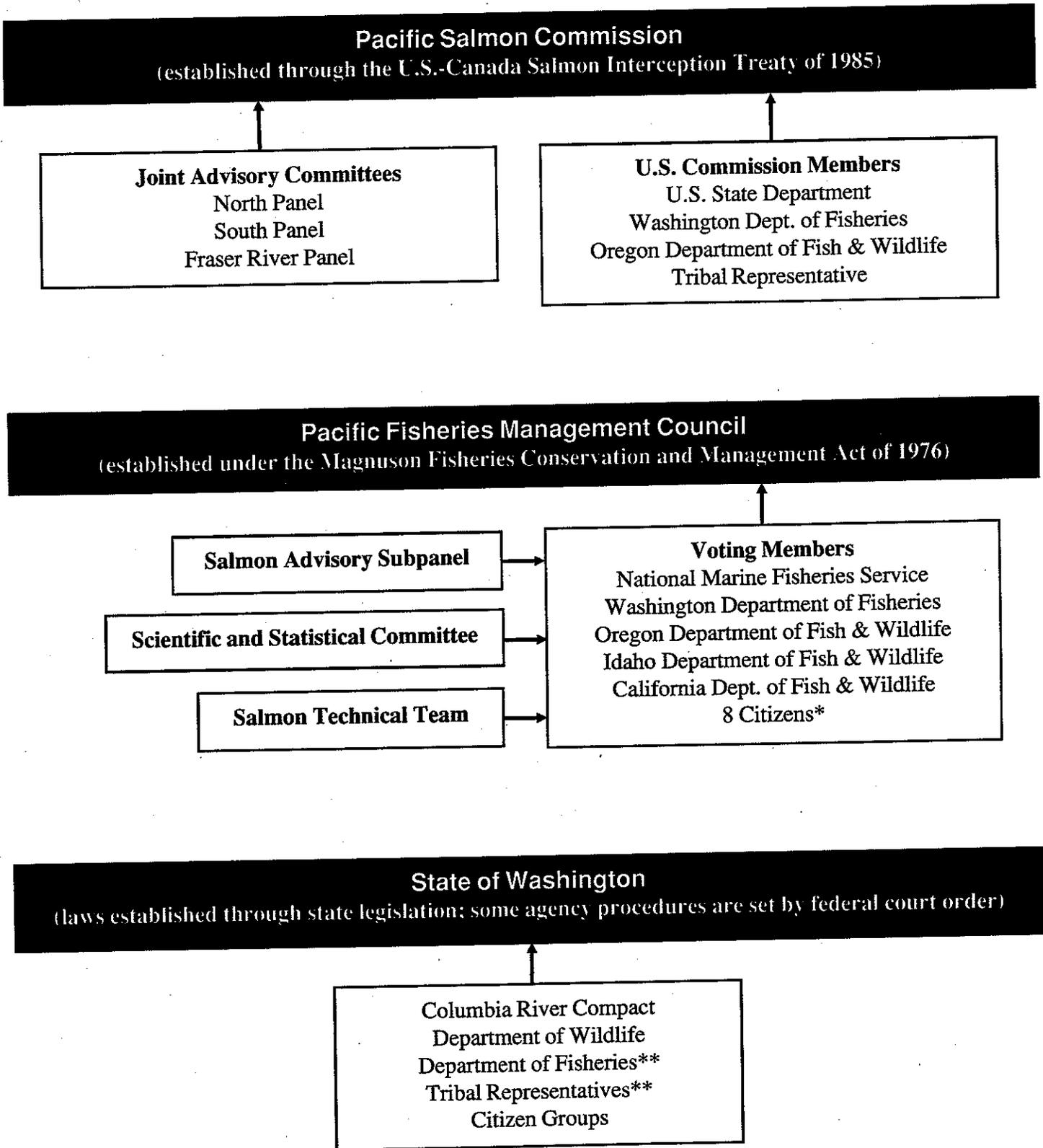
- (a) Prevent over-fishing and provide optimum production; and,*
- (b) Provide for each Party to receive benefits equivalent to the production of salmon originating in its waters."*

The U.S. and Canada agree to achieve these objectives bearing in mind the desirability of avoiding undue disruption of existing fisheries and taking into account the annual fluctuations in stock abundance.

The Pacific Salmon Commission

Salmon migrating between Alaska and the Columbia River are administered, at least in part by the Pacific Salmon Commission (PSC), a management body created by the U.S.-Canada Salmon Interception Treaty. The PSC consists of eight members, four from Canada and four from the U.S. The U.S. Commissioners, appointed by the President, must include one person representing the federal government, the State of Washington, the

Attachment 1: Organizations Involved In Salmon Allocation



* Each member state receives one voting member; the four other citizens are selected on an "at-large" basis.

** The Department of Fisheries and the Washington tribes jointly share management of the salmon resources. Before Fisheries adopts fishing regulations it asks the tribes to review the regulation. Differences are resolved through negotiation or through appeal to the Fisheries Advisory Panel, a federal dispute resolution process.

State of Oregon, and the treaty tribes. Each party may appoint four alternates to the Commission who attend all meetings of the Commission but do not vote unless a member cannot attend. Collectively the U.S. members of the Commission get one vote, and the Canadian members get one vote. The Commission must vote unanimously to adopt a policy. The U.S. vote is determined by consensus of the three non-federal members.

Three panels provide policy assistance to the Commission. The Northern Panel, comprised of Alaskan state and federal representatives, advises on salmon stocks originating between Cape Caution, British Columbia, and Cape Suckling in Alaska. The Southern Panel advises on salmon stocks originating south of Cape Caution, except for stocks of sockeye and pink salmon originating in the Fraser River which are managed by the Fraser River Panel. In each case, the Canadian members collectively have one vote and the U.S. members collectively have one vote.

The Southern Panel consists of one U.S. representative, one representative each from Oregon and Washington (appointed by the Governor), two treaty tribal representatives, and one appointee alternating annually between commercial and recreational interests appointed by the U.S. Secretary of Commerce. U.S. section recommendations must be made by a majority vote, and the two states and one treaty tribe must concur in the recommendation.

Four members make up the Fraser River Panel. They include one U.S. representative, one treaty tribe member, one appointee of the Governor of Washington, and a commercial fishing representative appointed by the U.S. Secretary of Commerce. The pre-season recommendations of the U.S. panel require consensus, while in-season recommendations require a majority vote of those present, and Washington and the treaty tribes must concur. Unlike the northern and southern panels which are advisory only, the Fraser River panel has management responsibilities.

Commission Decisions

PSC decisions affect salmon catches from Oregon to Alaska. The Commission may set harvest quotas by species and geographic areas. The local jurisdictions (states and provinces) then allocate the fish further among competing gear groups and river versus ocean fisheries. Washington does not have PSC quotas.

Chinook Salmon

In 1985, the PSC established a harvest schedule designed to allow the rebuilding of depressed chinook salmon stocks by 1998. The schedule limits Alaskan and Canadian interception of U.S. chinook stocks to levels significantly below historic catches.

Coho Salmon

A harvest level of 1,750,000 coho is set for Canadian fishermen in 1985 and 1986. The regime focuses on limiting Canadian interception of U.S. stocks. Washington coho do not migrate into Southeast Alaska in significant numbers. This contrasts to historical catches that ranged from about 750,000 in 1975 to over 2,250,000 in 1984. Any increase in Canadian harvest after 1987, will be the result of increased Canadian coho production.

Pink and Sockeye Salmon

Determination of the U.S. allowable catch of Fraser River sockeye and pink is complicated, and it varies from year to year. For example, the Fraser River Annex under the treaty currently limits the aggregate U.S. catch of sockeye from 1989 through 1992 to 7 million fish. The annual variations can be extreme. For 1985-86 the U.S. agreed to reduce its sockeye harvest by 50,000 fish in exchange for an equal reduction of coho taken by Canadian fishermen. The allowable U.S. take of pinks remains at 3.6 million in each year that the runs are available.

The Ocean

The Pacific Fishery Management Council

The Pacific Fishery Management Council and seven other regional councils were created under the Magnuson Fishery Conservation and Management Act in 1976. The primary role of all eight councils is to develop, monitor, and revise the management plans for fisheries conducted in a zone 3 to 200 miles off the U.S. coast. The PFMC develops annual harvest plans for fisheries off the coast of California, Oregon, and Washington. State fisheries' management decisions within three miles of the coast must be consistent with the PFMC adopted plan.

The PFMC is not a federal agency, but is a regional body funded through the Department of Commerce. It has thirteen voting members including the regional director of the National Marine Fisheries Service; chief fishery officials of Oregon, Washington, California, and Idaho; and eight knowledgeable private citizens chosen by the Secretary of Commerce from lists submitted by each state governor. Non-voting Council members include the executive director of the Pacific Marine Fisheries Commission, the regional director of the U.S. Fish and Wildlife Service, representatives of the Alaska Governor's Office and the U.S. Department of State, and the Pacific Area Commander of the U.S. Coast Guard.

The PFMC is supported by a professional staff headquartered in Portland, Oregon. The Commission receives additional support from a Scientific and Statistical Committee, several fishery management plan (FMP) development teams; and a citizen advisory panel.

The ocean salmon fisheries off Washington, Oregon, and California have been managed by a FMP since 1977. Annual amendments to the 1978 FMP were used to provide required management flexibility each season until the framework concept was agreed upon. A framework plan allows flexibility to adjust annual management regulations in response to varying stock abundance without the necessity of amending the plan. Beginning with the 1985 season, the salmon FMP has been a framework plan.

The PFMC provides the final authorization for agreements reached among groups involved in or affected by the ocean fishery. Because inside fisheries often affect ocean fisheries, these agreements are negotiated by representatives from affected inside fisheries as well as the ocean fishery. These representatives include sports and commercial gear groups, treaty tribes, and the states.

One fundamental task of the PFMC involves working with user groups to develop annual catch levels by specie and area. The region-wide distribution of salmon stocks requires that numerous affected parties participate in the process. In Washington, PFMC approved regulations directly apply to ocean harvests from the Columbia River north to Cape Flattery.

During each year's discussion, participants evaluate and negotiate escapement goals, harvest quotas, seasons, fish size limits, and possible gear and trip limitations for chinook and coho. The participants evaluate the biological considerations of each fishery, such as the presence of weak stocks, the relative abundance of hatchery and natural stocks, and the interrelationship of all stocks. For each recommendation, they consider the economic impact and the ease of administration.

PFMC decisions must also consider the fact that most fish in the ocean will eventually spawn in the rivers of Puget Sound and the Straits of Juan de Fuca. Its decisions will directly impact inside fisheries. Thus, it must take into explicit account that inside fisheries depend on balanced management of the ocean fishery.

In comparing the actions of the PSC and the PFMC, a major difference is the level of detail at which the PFMC operates. For example, the PFMC is concerned with allocation of fish by rivers of origin and catch methods. PSC decisions affect the PFMC participants directly. United States fishermen can only catch fish allocated to the U.S. through the PSC. Washington fishermen, sport and commercial, must work within the PFMC to receive their allocation of the U.S. share.

Puget Sound And Coastal Waters

State Administration of Anadromous Fish

Two state agencies regulate anadromous fish in Washington, the Department of Fisheries (regulating salmon and sturgeon) and the Department of Wildlife (regulating steelhead).

Department of Fisheries

The Department of Fisheries administers laws affecting food fish and shellfish. Generally, food fish includes all saltwater and anadromous fish except steelhead and cutthroat trout. State law directs the Department to:

"...preserve, protect, perpetuate and manage the food fish and shellfish in state waters and offshore waters.

...the department shall seek to maintain the economic well-being and stability of the fishing industry in the state. The department shall promote orderly fishing and shall enhance and improve recreational and commercial fishing in this state." (RCW 75.08.012.)

The department's jurisdiction includes Puget Sound and inland rivers, the Columbia River and the Washington coast. The department serves as the representative for the state's interest in anadromous fish management on the Columbia River Compact, the Pacific Fisheries Management Council, and two panels under the U.S.-Canada Treaty.

The department receives most of its funding from the state general fund, a fund based primarily on the state's sales tax. Additional general fund revenue comes from licenses purchased by commercial and sports fishermen. In 1986, the sale of sports and commercial salmon licenses amounted to about \$1.8 million, or about 8% of Fisheries' annual budget.

Following the decisions of the PSC and the PFMC, the department prepares an allocation plan together with the treaty tribes and non-Indian sports and commercial interest groups. This plan or series of plans, determines a harvest allocation for fish by river of origin and gear group.

Management decisions for the inside fisheries become more complex than management decisions for the ocean because of the additional gear types (purse seining, non-Indian gillnetting, and reef netting) and three species

of salmon not commonly caught in the ocean (chum, pink, and sockeye). Other factors that further complicate management decisions are run strength, hatchery runs and natural runs, run timing, and overlapping runs. The department's decisions must allow for the passage of runs from northern areas to their spawning river, whether in Hood Canal, south Puget Sound, or elsewhere.

As with the PFMC, these decisions are reflected in catch limits, maximum and minimum fish size, gear restrictions, season length and sequence, and open and closed areas. The decision-making process includes opportunities for interest group participation. Salmon allocation decisions, while based on science, are subjective in nature. The species' biology establishes bounds which managers must respect.

Department of Wildlife

The Department of Wildlife administers game fish in state waters. Its statutory duty is to:

"...preserve, protect and perpetuate wildlife....[G]ame fish may be taken only at times or places, or in manners or quantities as in the judgement of the wildlife commission maximizes public recreational opportunities without impairing the supply of wildlife." (RCW 77.12.010.)

The Department is involved in the Indian/non-Indian fish allocation question because of its management of steelhead. Under state law, other game fish cannot be commercially caught by non-Indian fishermen. (RCW 77.16.060 states in part, "Game fish taken incidental to a lawful season established by the director of fisheries shall be returned immediately to the water.")

Although the Department retains administrative responsibility for steelhead including regulating the Indian commercial catch, it did not receive any state general fund money for this task until 1987. The department's state generated funding came entirely from the sale of licenses, tags, and punchcards to hunters and fishermen. In 1987, the Legislature appropriated General Fund money to the agency for the first time. Some of this money goes to support the steelhead program.

Complicating the department's job of administering steelhead is its absence as a voting member of the Columbia River Compact, the PFMC, and the panels advising the PSC.

The Columbia River

Northwest Indian Fisheries Commission

The Northwest Indian Fisheries Commission was established in 1974 by the Indian tribes that had been a party to the U.S. v. Washington case. Those tribes include the Hoh, Jamestown Klallam, Lower Elwa Klallam, Port Gamble Klallam, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Puyallup, Quilleute, Quinault, Sauk-Suiattle, Upper Skagit, Skokomish, Squaxin Island, Stillaguamish, Suquamish, Swinomish, and Tulalip.

The eight commissioners, elected by the tribes, and the staff of the commission provide services through the three main divisions that comprise the Commission: fishery management services, information services, and intertribal coordination. Among other tasks of the Commission staff, their policy analysts and biologists provide services related to the implementation of the U.S.-Canada Salmon Interception Treaty. Commission staff is involved in the coordination of planning requirements of the Puget Sound Salmon Management Plan.

Columbia River Compact

Because the Columbia River represents a major avenue for fish migration, it requires special attention by the two states adjoining it. In 1918, Washington and Oregon entered into an agreement, the Columbia River Compact (RCW 75.40.010), to jointly administer commercial fishing regulation on the river. Quite simply, the law states that the Department of Fisheries in Washington and the Oregon Fish and Wildlife Commission will regulate the Columbia River fishery through mutual consent. The two states have determined that each state may have individual seasons and bag limits in sports fisheries, but must have identical seasons in the commercial area.

Only the two states have a vote in making final decisions on regulations. To develop joint regulations, the two states often involve the affected interest groups plus the state of Idaho, the Washington Department of Wildlife (as manager of steelhead trout in the state), and the Indian tribes. When the states cannot agree, regulations from the previous year remain in effect. In other words, the states must agree to change the status quo.

Columbia River Inter-Tribal Fish Commission

The Columbia River Inter-Tribal Fish Commission serves as the coordinating technical body on fishery management issues for the following four Columbia River Indian tribes involved in U.S. v. Oregon: Nez Perce, Warm Springs, Umatilla, and Yakima. Tribes are members through their tribally appointed representatives.

After the courts reaffirmed the tribes' right to co-manage the fish resource in the early 1970's, these four tribes formed the Columbia River Inter-Tribal Fish Commission in 1977. The Commission staff includes biologists, policy analysts, law enforcement officers, and other specialists who work with other participants to advise the member tribes on fishery management. The Commission has no authority to regulate fisheries. That authority is reserved by the tribes.

Bonneville Power Administration

Another agency having an impact on the fish runs originating in the Columbia River system is the Bonneville Power Administration (BPA). The BPA was established fifty years ago to provide low-cost electric power, flood control, rural electrification, and irrigation to semi-arid farmland. BPA practices and the construction of dams on the Columbia River system have added to the destruction of salmon runs.

In 1980, the Pacific Northwest Electric Power Planning and Conservation Act was passed which mandated that BPA pursue least-cost energy, utilizing conservation and renewable resources first. It created the Northwest Power Planning Council (NWPPC) and gave it authority to develop a fish and wildlife restoration plan for the Columbia River Basin. It established as a national policy that the restoration of fish and wildlife would be placed on equal footing with activity to produce electricity. This plan was to be developed based on the best available data to help speed implementation. The NWPPC is undertaking a multi-million dollar program to double salmon runs in the Columbia River Basin. The program will be funded by BPA rate payers and implemented by fishery agencies, the tribes, power producers, and irrigation districts.

BPA's role in salmon allocation is an indirect one. Choosing how water will be used for power generation impacts fish production and migration. For example, one method of enhancing restoration of salmon runs is to allow sufficient spill over dams to let juvenile salmon migrate to the ocean. This decreases the flow for producing electric power. It is this conflict that BPA must resolve in line with the 1980 congressional directive that the restoration of fish and wildlife be placed on a par with the production of electricity.

Salmon Allocation In A Typical Year

Salmon allocation begins with the Pacific Salmon Commission. The Commission's three panels, Northern, Southern, and Fraser River, recommend fishing regimes to the Commission. Once adopted by the Commission, they become parameters within which other administering bodies must operate, such as the Pacific Fisheries Management Council, the Canadian Department of Fisheries and Oceans, and the State of Washington.

For fish destined for Washington, Oregon, and California waters, the next administering body becomes the PFMC. In February of each year, the PFMC begins preparing salmon management plans for ocean fisheries. Beginning in March, fishing groups meet with the PFMC to evaluate the proposals. Through a series of public meetings and negotiations, participants evaluate alternative catch levels allocated among gear groups, species, Indian and non-Indian fishermen, escapement, and necessary gear restrictions. Attachments II and III illustrate the form that the regulations take. Attachment IV contains a schematic of the process the PFMC uses to arrive at the final regulations.

Once the PFMC process determines the ocean harvest (the area outside the state's three-mile jurisdiction), the Washington Department of Fisheries and the tribes adopt management plans for state controlled waters. The fish plans must be consistent with the PFMC framework plan. The state and tribal plans cover all waters within three miles of the Pacific coast, the Straits of Juan de Fuca, Puget Sound, and the state's rivers.

For salmon and steelhead entering the Columbia river, the Columbia River Compact controls management of commercial fishing.

Attachment 2: Sport Salmon Fishing Regulations

Queets River to the Sekiu River

- Open for salmon angling Sunday thru Thursday, June 28-Sept. 24 OR until either chinook or coho quota is met
- Quota: chinook, 2,500 (minimum size 24")
coho, 26,100 (minimum size 16")
- Limits: two salmon per day but only one can be a chinook salmon
- Gear: one rod per angler, barbless hooks required

Leadbetter Point to the Queets River

- Open for salmon angling Sunday thru Thursday, June 28-Sept. 24 OR until either chinook or coho quota is met
- Quota: chinook, 28,000 (minimum size 24")
coho, 74,300 (minimum size 16")
- Limits: two salmon per day
- Gear: one rod per angler, barbless hooks required

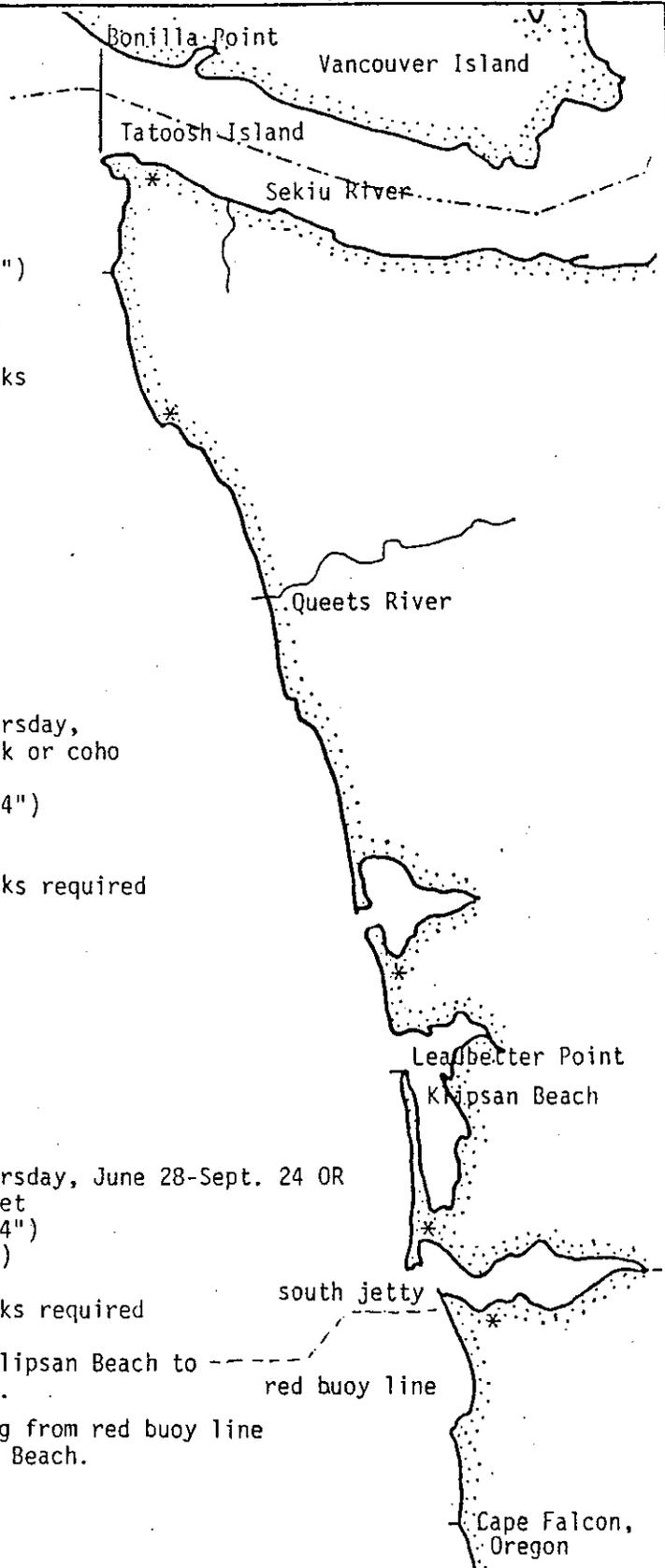
Salmon Fishing Closure: 0-3 miles

Cape Falcon, Oregon, to Leadbetter Point

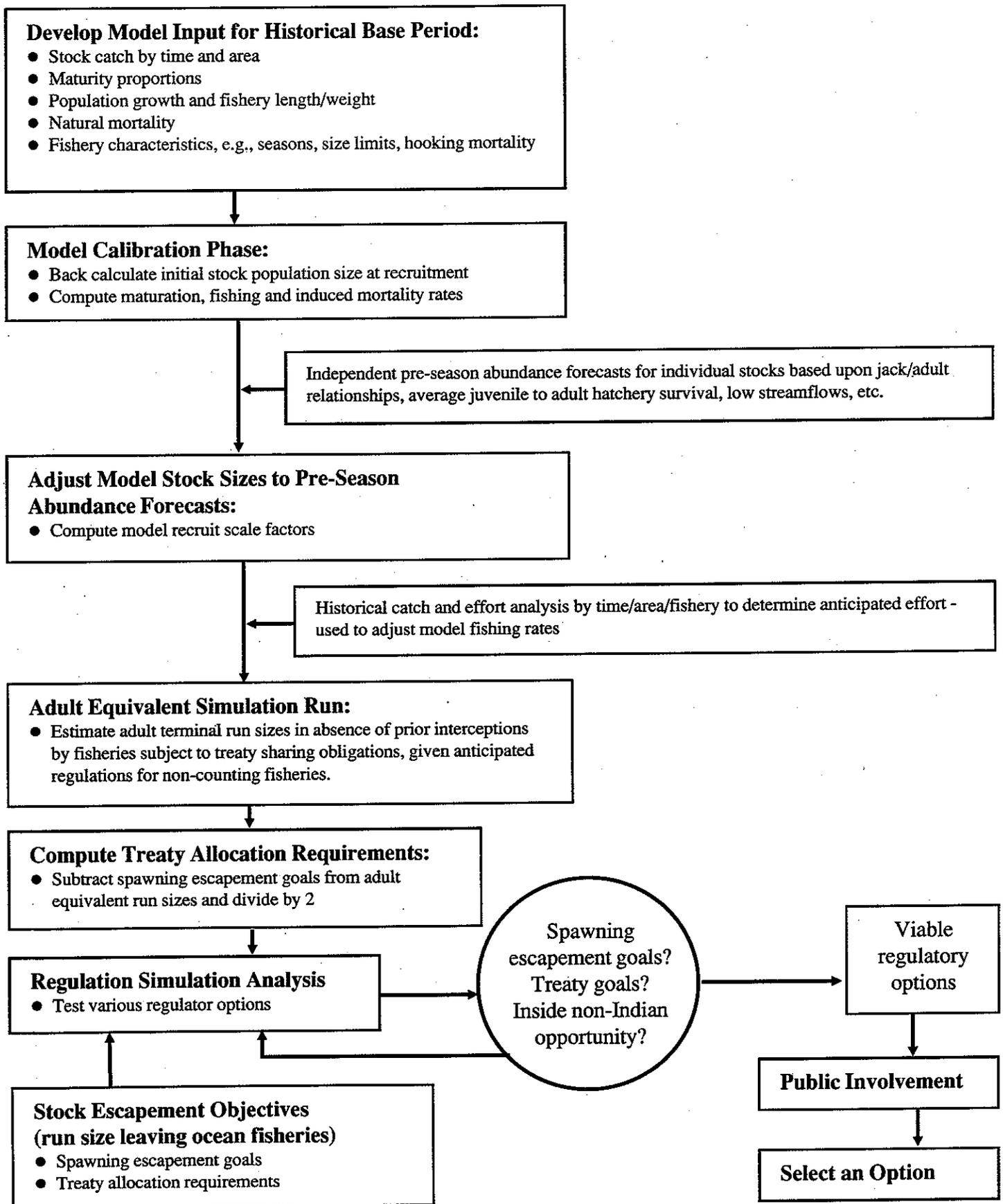
- Open for salmon angling Sunday thru Thursday, June 28-Sept. 24 OR until either chinook or coho quota is met
- Quota: chinook, 14,100 (minimum size 24")
coho, 100,500 (minimum size 16")
- Limits: two salmon per day
- Gear: one rod per angler, barbless hooks required

Salmon Fishing Closure: 0-3 miles from Klipsan Beach to Leadbetter Point.

No salmon fishing from red buoy line north to Klipsan Beach.



Attachment 4: Process Used To Select Management Options



Source: Final Framework Amendment for Managing the Ocean Salmon Fisheries Off the Coasts of Washington, Oregon and California Commencing in 1985, Pacific Fisheries Management Council, October, 1984.

Attachment 3: Commercial Salmon Fishing Regulations

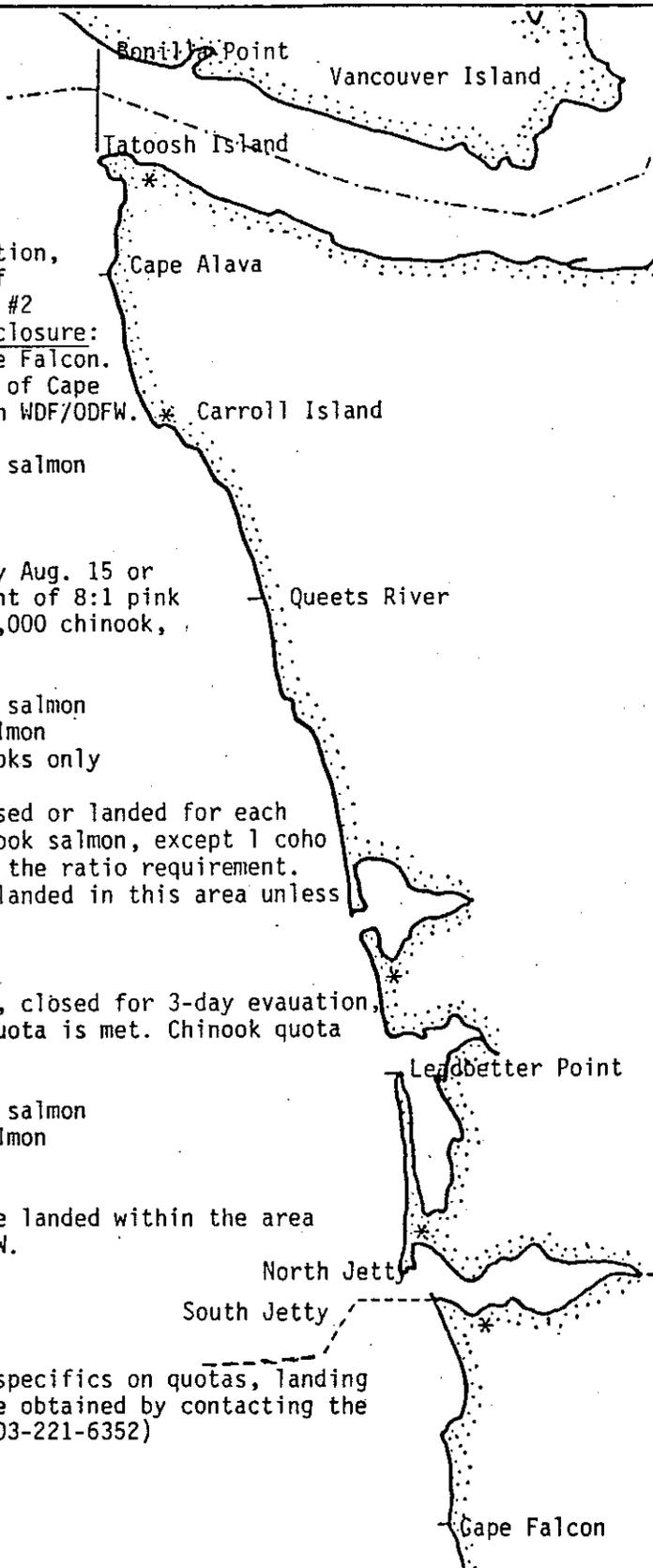
TROLL SEASON

Cape Falcon to Canada: May 1-June 15-- closed midnight May 15 for 3-day evaluation, re-opens May 19-June 15 OR achievement of 42,400 chinook quota. Conservation Zone #2 (Columbia River mouth) closed. Special closure: June 1-June 15 from Queets River to Cape Falcon. All chinook caught must be landed north of Cape Falcon unless previous notification with WDF/ODFW.
--All species excluding coho salmon
--28 inch minimum size limit on chinook salmon
--barbless hooks required

Carroll Island to U.S.-Canada border: by Aug. 15 or earlier, if test fishery shows attainment of 8:1 pink salmon to coho salmon ratio; quota of 4,000 chinook, 20,000 coho.
--All salmon species
--28 inch minimum size limit on chinook salmon
--16 inch minimum size limit on coho salmon
--flashers with barbless, bare blued-hooks only
--Conservation Zone #1 closed.
--At least 8 pink salmon must be possessed or landed for each coho and 20 pink salmon for each chinook salmon, except 1 coho and 1 chinook may be retained without the ratio requirement.
--salmon caught in this fishery must be landed in this area unless reported in advance to WDF/ODFW.

Queets River to Cape Falcon: July 25-27, closed for 3-day evaluation, re-open July 31 until chinook or coho quota is met. Chinook quota of 15,000, coho quota of 121,200 coho.
--All salmon species
--28 inch minimum size limit on chinook salmon
--16 inch minimum size limit on coho salmon
--barbless hooks required
--Conservation Zone #2 closed
--all salmon caught in this area must be landed within the area unless previously reported to WDF/ODFW.

Details on conservation zone closures, specifics on quotas, landing requirements and ratio fisheries can be obtained by contacting the Pacific Fishery Management Council (503-221-6352)



Cooperative Management

Under continuing jurisdiction of the federal courts, the Puget Sound tribes and the Washington Department of Fisheries initiated a program of cooperative management. This includes tribal and state joint participation in determining necessary escapement goals for individual fish stocks, sharing technical information, preparing management regulations, and establishing a dispute resolution system.

Cooperative management is embodied in the preparation of the Puget Sound Salmon Management Plan, the coastal management plan under Hoh v. Baldrige, now Hoh v. Verity, and the Columbia River management plan under U.S. v Oregon. Each plan sets forth specific procedures for the Department of Fisheries and the tribes to follow, from pre-season planning to post-season data sharing. The significance of the Plan lies in the equal responsibility assigned to each party.

The Future

The only certainty in salmon allocation is controversy. Because each user group, whether a nation, a tribe, a commercial gear group or a sports angler, wants additional fish, there is continual competition for the limited resource. The state's fishing history shows a pattern of intercepting the salmon farther and farther from the spawning grounds. Fish traps in the river caused fishermen to seek the fish in Puget Sound, the bays and harbors. Ocean trawlers sought the fish still farther out in open waters.

Through cooperative management, state administrative actions, legislation and court decisions, fisheries allocation will continue to change. The tumultuous Indian versus non-Indian allocation decisions of the past decade have given way to a decision-making process which, while far from smooth, offers a reliable framework for planning. International salmon allocations remain subject to periodic re-specification through negotiation of multi-year management strategies under the U.S.-Canada Salmon Interception Treaty.

The major regions now have fishing agreements: the Columbia River, the North Coast, and Puget Sound and the Straits of Juan de Fuca. The international interception of Washington fish by Canadian and Alaskan fishermen is dealt with through treaty.

The notable remaining issue involves protection of fish spawning and rearing habitat, the Phase II portion of the Boldt decision. If the tribes elect, they may go to court to seek clarification of whether or not treaty rights to take fish include a right to have those fish protected from man-made environmental degradation.

Numerous other issues will continue to affect fisheries. Water quality, water quantity - both in time and place, power production, municipal water needs and land management practices will play a role in determining fish abundance. Increasing population in Washington will place additional pressures on the fish and their environment. The presence of adequate financing will contribute to hatchery programs. Development of better information with which to manage fish will depend on funding. Public attitudes and priorities will influence the people who manage the fish and the physical environment.

Retaining the cultural and economic benefits of the salmon fishery will require a commitment by all parties to work within the established framework. Every party interested in the continuation of fish runs will need to be prepared to work towards that end.

Appendices

Appendix I: Definitions

Allocation - The quantity of fish either party is eligible to harvest.

Commercial fishing - The harvest of fish for the purpose of sale which generally includes trolling, purse seining, gillnetting, and reef netting.

Enhancement - The attempt to increase fish runs through acts such as hatchery propagation, improving habitat, and placing egg boxes.

Escapement - The number of salmon allowed to return to their river of origin to spawn to maintain the run.

Fisheries Advisory Board - A judicially-created board established to resolve disputes in Puget Sound. Before a technical dispute may go to court, it must be addressed by the FAB.

Hatchery stocks - Fish raised in a hatchery and released from the hatchery to return to the hatchery.

Inside fisheries - Generally, harvest of salmon in the Straits of Juan de Fuca, Puget Sound, the Straits of Georgia (see ocean fishery), Grays and Willapa harbors, and in rivers including the Columbia River.

Interception - Harvest of a run.

Management - Determination of the method of producing and harvesting a run to meet predetermined objectives.

Mixed stock fishery or area - The area or the fishery within which more than one specie of salmon is exposed to harvest.

Natural stocks - Fish breeding in the natural freshwater environment (compare: hatchery stocks).

Ocean fishery - Harvest of fish in the Pacific Ocean.

Recreational fisheries - Sports fishing, including fishing in rivers and saltwater. Charter boat fishing is recreational fishing.

Region of origin - The location where a salmon is hatched and returns to spawn.

Run - A specific specie returning to a stream at a specific time (e.g., chinook).

Run size - The number of fish.

Species - Any of the six kinds of salmon or steelhead (i.e., chinook (king, blackmouth); coho (silver); sockeye (red); pink (humpy, humpback); chum (dog); or steelhead.)

Stock - A component of a run returning to a river, e.g. fall versus spring or summer chinook.

Supplementation - A process of increasing natural fish runs by fertilizing eggs from natural and hatchery fish and placing juvenile fish out in the stream in order to have them return to the stream as adults.

Weak stock - The least abundant stock for which there is a management objective in an area where multiple stocks occur.

Appendix II: Weak Stock Management: The Limiting Factor

Washington's salmon harvest is made up of five species of salmon from several thousand small and large streams and roughly 150 hatcheries within this state, British Columbia, Oregon, and Idaho. The majority of fish harvested by Washington sport and commercial fishermen come from British Columbia's Fraser River and hatcheries operated by the Washington Department of Fisheries or the federal government. With one or two notable exceptions, runs from these sources are in strong and stable condition and sustain consistently high harvest levels.

The rest of Washington's salmon harvest is made up of fish spawned in a myriad of Northwest rivers and streams. Some streams are environmentally healthy and produce strong, viable runs of salmon which can sustain relatively high harvest rates. Runs from many other streams, however, have been impacted by a combination of environmental degradation and over-fishing, and cannot sustain such high levels of harvest. In a few cases, hatchery runs may become depressed, just as natural runs do.

The challenge of managing Washington's commercial and recreational salmon fisheries is to rebuild the weak stocks while optimizing the harvest of strong stocks. This "weak stock management" is the focal point for much of the department's activities in regulating salmon fisheries, in research and in its salmon rearing programs.

This task might be relatively simple if all fishing occurred in or near the specific rivers of origin. However, many of Washington's sport and commercial fisheries take place in the Pacific Ocean, Straits of Juan de Fuca and areas of Puget Sound where many stocks, weak and healthy, are mixed together. In some fisheries, most notably off the coast, fish from the strong stocks may outnumber those from the weak stocks by a factor of a thousand to one.

The strongest stocks might well be capable of supporting long seasons and a high level of harvest. (Often these stronger stocks are from hatcheries. Because survival of young hatchery salmon is so much higher than for naturally spawning fish, it takes fewer adult

spawners to perpetuate a hatchery run. Up to 90 percent of adult fish may be taken from hatchery runs while generally no more than 60 percent of naturally spawning runs can be harvested on a sustainable basis.) But if the harvest level is set too high, too many weak stock fish will be taken to allow an adequate spawning escapement. Hence, the harvest must be set at a lower level. When this happens, the weak stock (or stocks) become what is referred to as "driver stocks" since they control the duration of the season or total quota of fish which can be taken.

In all, the department manages the state's fisheries based on 15 key geographic regions which have a total of at least 60 stocks of fish which require separate management plans. Currently there are five chronic "driver stocks" which are the primary limiting factors for most of Washington's commercial and recreational harvest. These driver stocks are:

- North coastal coho salmon from the Olympic Peninsula.
- Coho salmon from the Skagit and Stillaguamish Rivers.
- Spring chinook from many Puget Sound streams.
- Spring chinook from the upper Columbia River.
- Fall "tule" chinook from the U.S. Fish and Wildlife Service's Spring Creek Hatchery on the Columbia River.

The strategy of the Department of Fisheries, the Pacific Fishery Management Council, and other regional and federal bodies which cooperatively manage salmon fisheries, is based on the necessity of achieving spawning escapement of these stocks.

The most complicated management problems usually occur in regulating the ocean commercial troll and recreational fisheries. There are two reasons for this. First, virtually all of the weak stocks are present and thoroughly mixed with other stocks off the Washington coast during traditional fishing periods. Second, populations of fish from the weak stocks may be heavily outnumbered by fish from the strong stocks. Because of this, it is often necessary to set seasons that forgo large portions of the strong stocks within these ocean fisheries.

Puget Sound fisheries can also be complicated to regulate because of "mixed stock" situations. A well-known example occurs with the spring recreational fisheries for chinook salmon in Puget Sound. While most of the harvest from this fishery is on immature chinook, or "blackmouth," fishermen may also take adult spring-spawning fish bound for weak stock river systems. In recent years, rather than closing the sport fishery, WDF managers have installed maximum size limits to protect the migrating adult spring chinook.

Why Protect Weak Stocks?

Over the course of evolutionary history, many streams have produced genetically unique stocks of fish. It is now widely recognized that this genetic diversity is one of the most important natural safeguards for the resource as a whole. Different stocks have different migrating times, routes and feeding areas in the ocean. They prefer different spawning environments and have differing resistance to diseases. When natural or man-made conditions threaten one stock, another may better survive, providing a natural resiliency for the resource as a whole and alternate harvest opportunities for fishermen.

There are two other important reasons for protecting weak stocks: First, many localized tribal fisheries depend on indigenous stocks of salmon. The U.S. Supreme Court, in its rulings on the territorial and tribal fishing treaties, has determined that the protection of these runs is a conservation priority. Second, healthy, naturally-spawning salmon runs are an economic boon to the state, providing a "no-cost" resource as opposed to hatchery produced salmon which are supported by taxpayers' dollars.

In theory, even when all stocks of salmon become healthy, natural fluctuations in productivity will mean that there will always be stocks which are relatively weaker than others. Sound biological management of the resource will require that these become the stocks of concern in setting harvest levels in mixed stock fisheries. In practice, the WDF now faces a situation in which there are several stocks which are chronically depressed.

Strong, if not drastic management measures in harvest management are necessary to ensure that these stocks have adequate

spawning escapement to perpetuate themselves. North coast coho on the Olympic Peninsula are an example of such stocks.

But catch restrictions are not enough. In order to ensure that these stocks do not remain as permanent restraints on harvest, substantial steps to rebuild the runs are necessary. This may take the form of habitat improvement, "seeding" of streams with genetically compatible donor stocks from a hatchery facility, or any of many other steps.

Direct gains in harvest from improvement of these chronically depressed runs may not be great relative to the total production from healthy streams and hatcheries. But, the overall increase in the harvest level can be very large. This is because of a "multiplier effect" that driver stocks have on harvest rates: The need to ensure that 100 salmon from a depressed run survive an ocean fishery may mean the harvest of several thousand fish from other runs is forgone. Conversely, a relatively small improvement in the weak stock run could yield a great benefit by allowing increased fishing on the healthy stocks which make up the bulk of the catch.

[This material was taken from the Washington State Department of Fisheries, Annual Report, 1986.]

Appendix III: Fisheries' Contacts

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Columbia River Inter-Tribal Fish Commission

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National Marine Fisheries Service

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Northwest Indian Fisheries Commission

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Pacific Fisheries Management Council

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Pacific Salmon Commission (Under U.S. Canada Treaty)

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Pacific Salmon Sportfishing Council

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Pacific Trollers Association

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Puget Sound Gillnetters

Fishermen's Terminal
C-3 Building, Room 103
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Purse Seine Vessel Owners' Association

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Trout Unlimited

NW Steelhead and Salmon Council
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Washington Department of Wildlife

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Washington State Charterboat Association

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Washington Trollers Association

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