

Synopsis of Columbia River Fisheries Management in the Context of the Columbia River Compact and Concurrent Jurisdiction with the State of Oregon

Prepared by Cindy LeFleur, Federal Policy Program Coordinator, Fish Program and
Jeff Wickersham, Captain, Region 5 Enforcement Program

June 7, 2018

Disclaimer

This report was developed by the Fish Program and Enforcement staff. A review should be requested from the Attorney General's Office if a legal opinion is desired.

Background – Columbia River Compact

Excerpts from "The Columbia River Compact" by Fronda Woods, former Assistant Attorney General dated March 2007. Author's note: "The opinions expressed herein are solely those of the author, and are not necessarily shared by the Washington Attorney General's Office, the Oregon Department of Justice, the Washington or Oregon Departments of Fish and Wildlife, or any other person or entity"¹.

- The Columbia River Compact is a Congressionally-ratified interstate agreement between Oregon and Washington. In the Columbia River Compact, the two states promised each other in 1915 to adopt or amend laws for the conservation of fish in the Columbia River where it forms their common boundary only with both states' mutual consent. The procedures for implementing the Columbia River Compact have evolved over time, and today they reflect a mix of statute, court order, policy, and custom. The Columbia River Compact has proven to be a durable agreement that continues to work well today as a framework for fisheries management in the Columbia River.
- The legislatures of Oregon and Washington began enacting fishing season and gear regulations in the 1870s. Their regulations were not always consistent, however. After a federal court ruled in 1895 that someone fishing legally under Washington law on the Washington side could not be prosecuted for violating an Oregon closure, it became clear that conservation was possible only if the two states had similar laws that could be enforced on both sides of the river.
- Because the United States Constitution forbids states from entering into compacts without the consent of Congress,² Oregon and Washington asked Congress to approve the Columbia River Compact, which it did in 1918.

¹ Woods, F. 2007. The Columbia River Compact. Assistant Attorney General, Washington Attorney General's Office, Olympia, WA. March 2007.

² The Compacts Clause of the United States Constitution provides: "No state shall, without the consent of congress, . . . enter into any agreement or compact with another state . . ." U.S. Const. art. I, § 10, ¶ 3.

- By legislation, Oregon and Washington have specified that the waters subject to the two states' concurrent jurisdiction are those that coincide with the states' boundaries, effectively the Columbia River mainstem from its mouth to the Wallula Gap.
- By custom, Oregon and Washington have applied the Columbia River Compact only to commercial fisheries. In my opinion, the Compact contains no such limitation.³ The legislative history of the Columbia River Compact does suggest that the Compact applies only to "food fish," however. Thus, in my opinion, the proper distinction is between "food fish" and "game fish," not "commercial" and other fisheries.
- As a practical matter, Oregon and Washington today do work together in adopting regulations for non-commercial fisheries. So, whether the Columbia River Compact applies to them or not, the two states behave as if it does.
- The Columbia River Compact does not specify any particular procedure for adopting laws for protecting fish, so long as they are adopted "with the mutual consent and approbation of both States." Over the past century, the customs and laws that govern the states' interactions have evolved. Today, one person from each state's fish and wildlife administrative agency (the "Compact agencies") represents that state in most negotiations under the Columbia River Compact. Sometimes, people call those two persons the "Columbia River Compact." Legally, however, there is no rule-making entity, administrative body, or process called the "Columbia River Compact."
- In 1937, the Washington Legislature conferred on the Director of Fisheries the authority to work with Oregon to change fishing seasons under the Columbia River Compact.
- Today, that authority is exercised through the Washington Fish and Wildlife Commission, which has generally delegated it to the Director of Fish and Wildlife.
- The Oregon Director of Fish and Wildlife has emergency authority to adopt temporary rules, subject to the Commission's approval.
- According to Oregon law, Compacts must be held in Oregon or Washington within 25 miles of the Columbia River where commercial fishing is permitted.
- No law requires that a record be kept of the hearings.

³ My opinion is contrary to an official opinion of the Oregon Attorney General's Office. 45 OR. ATT'Y GEN. OP. 137, 138, 157-59 (No. 8182) (Nov. 13, 1986).

Revised Code of Washington

RCW 77.75.010

Columbia River Compact—Provisions.

There exists between the states of Washington and Oregon a definite compact and agreement as follows:

All laws and regulations now existing or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia river, or its tributaries, over which the states of Washington and Oregon have concurrent jurisdiction, or which would be affected by said concurrent jurisdiction, shall be made, changed, altered and amended in whole or in part, only with the mutual consent and approbation of both states.

Result of Non-Concurrent Rules in Columbia River

As can be seen from the commentary above, the two states strive for concurrency in regulations. Currently, there are still many areas where the two states do not have the same regulations, but in most cases – and in most of the important areas – the two states have been the same. One example of non-concurrency is the regulation regarding the daily limit for jack salmon; Washington rules say up to six in most cases and Oregon rules say five fish.

Additionally, Oregon does not require recording of jacks on a catch record card (tag) whereas Washington does. Most of the non-concurrent rules in place prior to the Policy have not compromised the ability to manage or enforce fisheries.

One interpretation of the language from RCW 77.75.010 that says “shall be made, changed, altered and amended in whole or in part, only with the mutual consent and approbation of both states” is that unless both states agree, regulations cannot be changed. The legislature determined “the waters subject to the two states’ concurrent jurisdiction are those that coincide with the states’ boundaries, effectively the Columbia River mainstem from its mouth to the Wallula Gap.” A legal interpretation would be needed to determine if one state could set fisheries that the other state does not agree with.

Another interpretation if fishery regulations are not concurrent in the Columbia River would be that the state boundary line becomes the line of enforcement for the respective jurisdiction. The definition of the state boundary on the Columbia River is contained in RCW 43.58.050, created by the Washington-Oregon Boundary Commission, and is a list of points defined by specific latitude and longitude. For reference purposes, in the lower river most of the waters are in Oregon (Figure 1) but in the upper river (just below Bonneville Dam) more of the waters are in Washington (Figure 2).



Figure 1. Map of Lower Columbia showing state boundary line.

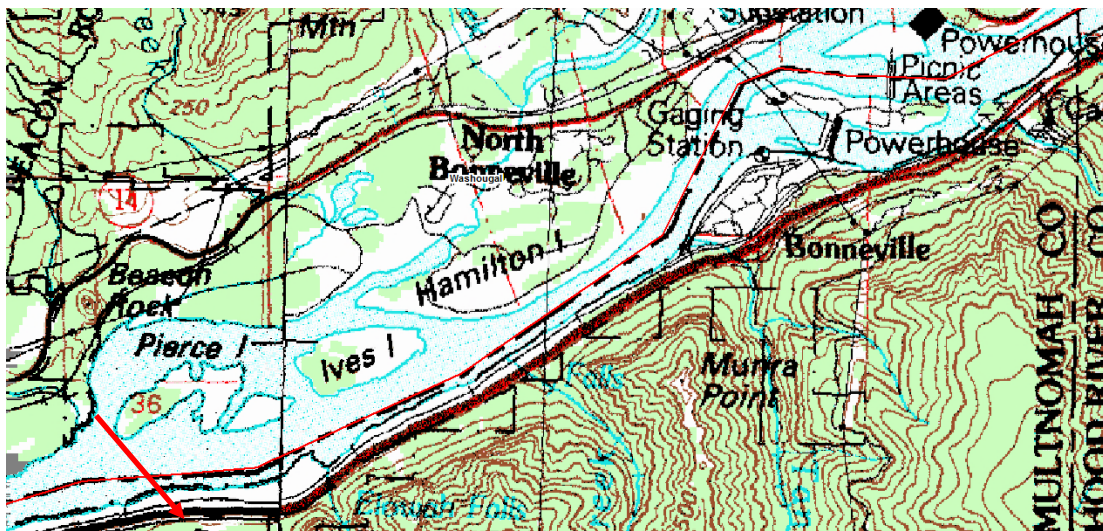


Figure 2. Map of Columbia River downstream of Bonneville Dam showing state boundary line.

If fisheries regulations were different between the states, fishers would need to understand the regulations for the state they are fishing in and adhere to their requirements. Enforcement would also lack proper jurisdiction to enforce another States' non-concurrent rule. A real world example follows:

Oregon does not allow night fishing for salmon or steelhead, Washington does. If Washington Officers contact a Washington or Oregon fisher fishing at night within the territorial boundaries of Oregon, they lack the jurisdiction to address the violation

except to refer information to the Oregon State Police. The same applies for Oregon Officers attempting to enforce a non-concurrent rule in Washington waters. This makes little sense.

The above example is akin to the circumstances in a Federal Court Opinion, *Nielsen v. Oregon*, in which "... the Court observed that when two states have concurrent jurisdiction, the one first acquiring jurisdiction over a crime may prosecute and punish for an act punishable by the laws of both states. The Court noted however that the rule is inapplicable when the act is prohibited in only one of the States, and went on to hold that a State cannot prosecute for a violation of its laws when the act not only occurs within the territory of another State but is also permitted by that State."⁴

*State v. Svenson*⁵, a court case from Pacific County in 1980 where two Washington licensed gillnetters were charged for violating Washington State law while fishing within the territorial boundaries of Oregon, the Washington Supreme Court ruled:

We affirm the trial court's dismissal of the cases against Svenson and Nelson. The Compact permits the States to enact legislation which limits fishing activity but it does not permit enforcement by one state of its own laws in the physical territory of the other absent similar legislation by the other state. When the State of Washington is enforcing its law in Oregon territory, it is the State's burden to prove how its jurisdiction extends from the (Washington) boundary line ... to the high tide on the Oregon side.

This is a large burden for Officers and prosecutors to overcome, to understand and know the intricacies of another States regulations and laws when non-concurrency exists. Loopholes created by such a regulatory landscape make enforcement near the border between the states near impossible. The public also suffers harm in that they have to navigate an unfamiliar regulation landscape and take a risk to participate in a recreational or commercial fishery. Concurrent fishing rules and regulations on the concurrent waters of the Columbia River are paramount to effective multi-agency operations and an informed, law abiding fishing public.

American Jurisprudence, a law encyclopedia which has a section focusing on Fish and Game⁶, had this to say about the Columbia River Compact:

The Compact, as written and interpreted, restricts the right of either state to expand fishing beyond that permitted in 1918, but does not restrict the right of either state to limit fishing. The purpose of the Compact is to assist in preserving the fish in the Columbia and gives both states the authority to act accordingly. The reference to concurrent jurisdiction does require concurrence by the other state,

⁴ *Nielsen v. Oregon*, [212 U.S. 315](#), 53 L. Ed. 528, 29 S. Ct. 383 (1909)

⁵ *State v. Svenson*, 104 Wn.2d 533 (1985), 707 P.2d 120

⁶ 35 Am.Jur.2d Fish and Game § 33 (1967); 81A C.J.S. States § 12 (1977)

however, when there is to be enforcement by both states on the entire river. In any event, each state may enforce its own laws with respect to its own citizens on its own side of the river absent concurrence in the law by the other state. However, for a person to be convicted of a Washington crime on the Oregon side of the river, Oregon must have similar legislation.

As outlined above, differences in commercial and recreational fishing laws and regulations between states that result in non-concurrence ensure non-effective regulatory presence and limited enforcement jurisdiction.

Non-Concurrent Allocations

Allocation differences can result in non-treaty impacts/shares not being fully utilized or fishing that occurs only in one state's waters. In the past, there have been instances of non-concurrent allocation guidance between the two states. The fishery managers have tried to meet both of the guidelines, with the result that some of the overall non-treaty share of fish has gone unharvested. This has happened with spring Chinook in the past.

Example – Summer Chinook Allocation

- Washington applies the unused commercial share to sport fisheries above Bonneville Dam or to spawning escapement. Oregon applies the unused share to escapement.
- Result – unused commercial share goes to escapement. Since Oregon's rule is more restrictive we would follow this rule. We could not allow unused commercial share to go to the sport fisheries because that would violate the Oregon rules.

Example – 2019 Fall Chinook Commercial Fishery in Zones 4-5

- Washington Policy states that commercial fisheries would not be able to use gillnets in the fall fishery beginning in 2019, while Oregon rules allow for the use of gillnets in this fishery.
- Washington Policy allocates up to 80% to sport fisheries and Oregon rules allocates 70% to sport fisheries.
- Commercial fishers with an Oregon or Washington license would be able to fish in this fishery on the Oregon side of the river with gill nets. Fishing would be closed to gillnets in Washington waters.
- The allocation would be 70% to sport fisheries as this does not violate either policy. The commercial fishery would occur with 30% of the allocation.

Summary

The Columbia River Compact provides a necessary venue for ensuring that the needs of both states and conservation of the fishery resources are considered. In 1914, "the two states promised each other..." to manage fisheries jointly in the Columbia River. Maintaining this relationship is good for the fisheries and the fishing public.