



NOAA
FISHERIES

Columbia Basin Partnership Workshop #2

Harvest Management

June 7, 2016

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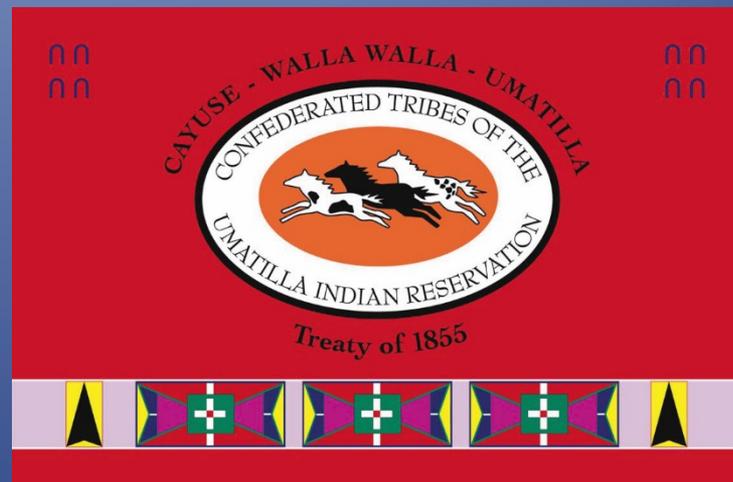
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The Treaty Fishing Right in the Columbia River: *U.S. v. Oregon*

Presented by:
Brent H. Hall



Topics Covered

- I. Off-Reservation Fishing Rights: Origins of *US v. Oregon*
- II. *US v. Oregon* Case Proceedings
- III. The 2008 – 2017 *US v. Oregon* Management Agreement

Tribally Reserved Rights

- A treaty is not a grant of rights to Indians but a grant of rights from them, and those rights not specifically granted are reserved to the Indians. *United States v. Winans*, (SCT 1905).
- Treaties take precedence over conflicting state laws by reason of the Supremacy Clause of US Constitution. Art. VI, Sect. 2; *Worcester v. Georgia*, (SCT 1832).

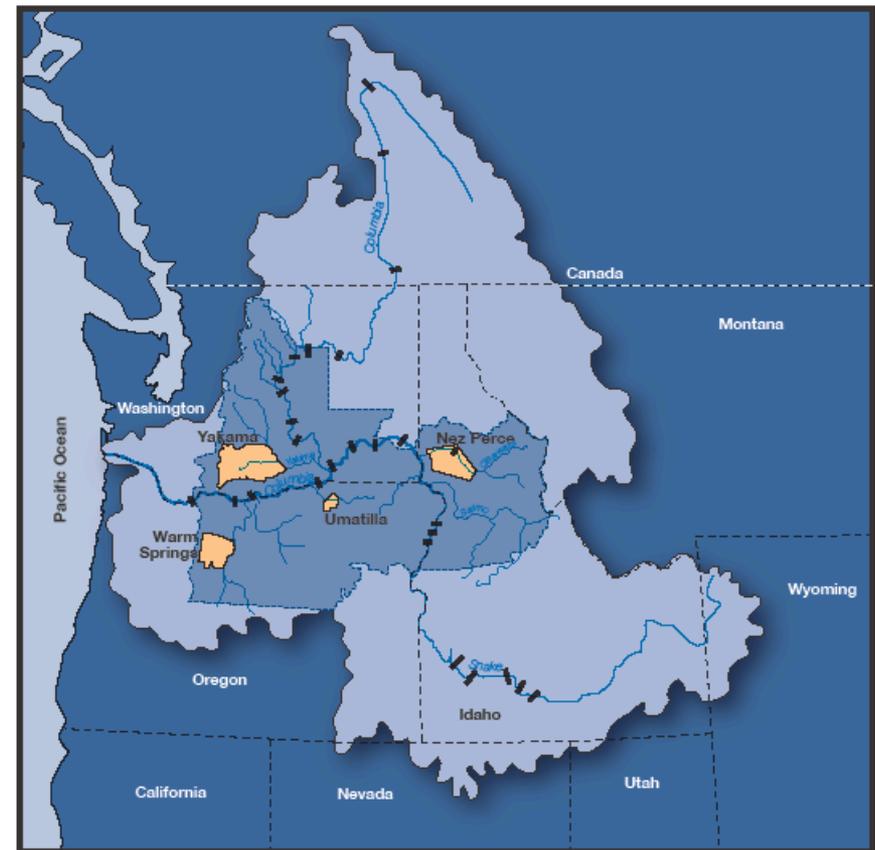
The Fishing Clause



- The treaties expressly provide: "That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with the citizens of the United States"
- The treaty minutes are clear that the tribes would not have entered into the treaties without the United States' promise to secure the fishing right.

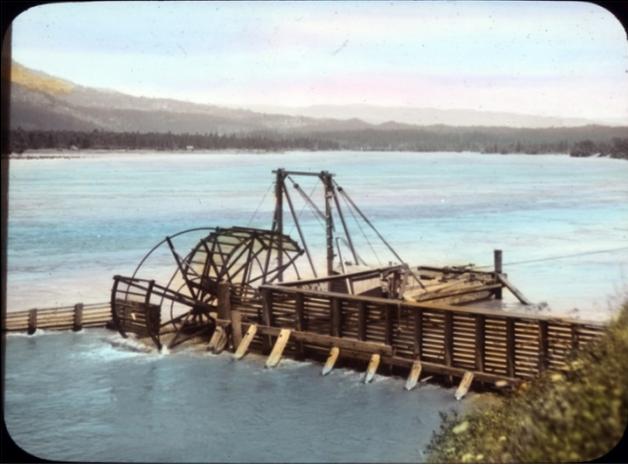
Ceded Lands

- The treaties cleared title to ceded lands that opened much of the interior Columbia River Basin to non-Indian settlement.



■ Columbia River basin ■ Present-day reservation boundaries
■ Ceded lands of the four Columbia River treaty tribes | Major dams on the Columbia/Snake rivers

Early Fishing Conflicts



- Beginning in the 1870's, large-scale non-Indian fisheries are developed on the Columbia River, and fishing conflicts soon arose over Indian access to their traditional fishing areas.
- By the late 1800's the United States filed several lawsuits against non-Indian individuals who are preventing tribal fishermen from fishing at the usual and accustomed places.

The Scope of the Reserved Right to Take Fish

Several of these cases reach the U.S. Supreme Court, which affirms the Tribes' reserved treaty rights to fish at all traditional areas.

- *U.S. v. Winans*: 198 US 371 (1905):



“The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the existence of which there was not a shadow of impediment, and **which were not much less necessary to the existence of the Indians that the atmosphere they breathed.**” (Emphasis added.)

- Cases holding state and federal regulation only for purposes of conservation: *Tulee*, *Maision*, *Puyallup*.

Changes to the Shape of the River



Changes to the Shape of the River



- In 1957, The Dalles Dam is completed inundating Celilo Falls.
- The Columbia River Compact restricts commercial fishing between Bonneville Dam and Miller Island upstream from The Dalles Dam.
- The Compact prohibits all commercial salmon fishing (treaty Indian & non-Indian) above Miller Island.

Conflicts Leading to *U.S. v. Oregon*

- The states of Oregon and Washington attempt to enforce these regulations on tribal fishermen, confrontations ensue and tensions run high.
- There are frequent state criminal court proceedings against individual tribal members.
- Tribal attorneys and U.S. attorneys assist in defending Indian fishermen in state courts.



Sohappy v. Smith

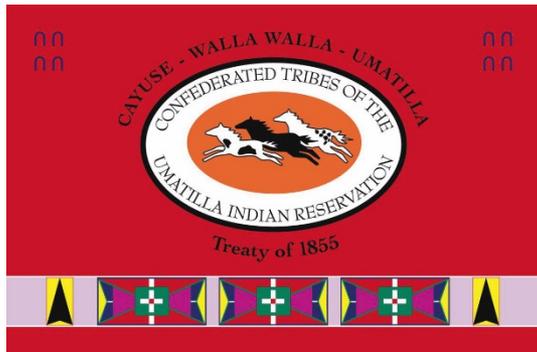
- In July 1968, fourteen members of the Yakama Nation filed suit in federal district court in Oregon against the Oregon Fish Commission (*Sohappy v. Smith*).
- The tribal fishermen seek a decree that would define their treaty fishing rights and a clarification on the manner and extent to which the State of Oregon may regulate Indian fishing.



U.S. v. Oregon



Confederated Tribes of the Warm Springs
Indian Reservation of Oregon



- In September 1968, the United States files suit in federal district court in Oregon against the State of Oregon to enforce Indian off-reservation fishing rights in the Columbia River Basin (*United States v. Oregon*).
- The Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Nez Perce Tribe, and the Confederated Tribes of the Warm Springs Reservation of Oregon intervene in *U.S. v. Oregon* as plaintiffs.

In 1969, Judge Belloni renders his decision in *Sohappy v. Smith/U.S. v. Oregon*:

- The parties agree to a lengthy set of facts in the Pretrial Order.
- The Court rules that the tribes have a right to a fair share of the available harvest and the state is limited in its power to regulate the exercise of the Indians' federal treaty rights.
- The state may regulate treaty fisheries only when reasonable and necessary for conservation, the state's conservation regulations must not discriminate against the Indians and must be the least restrictive means

Scope of the Treaty Fishing Right: *United States v. Oregon, CV 68-413*

- Judge Belloni upholds the Tribes right to fish at all traditional fishing areas free from unreasonable or unnecessary regulation.
 - State had argued that the treaty fishing right only gave Indians the same rights as given to all other U.S. citizens:

Judge Belloni: “Such a reading would not seem unreasonable if all history, anthropology, biology, prior case law and the intention of the parties to the treaty were to be ignored.”

302 F.Supp. 899, 905 (D.Or. 1969)

U.S. v. Oregon/ Sohappy 1969 Opinion

Judge Belloni also finds:

- That it is patently unfair to manage the Columbia Basin salmon such that few fish survive to reach the tribes' usual and accustomed fishing places.
- That the tribes have an absolute right to that fishery and thus are entitled to a fair share of the fish produced by the Columbia River system.



Key Rulings - 1974

- In February 1974, Judge Boldt renders his decision in *U.S. v. Washington*, mandating that treaty fishermen in the Puget Sound area have the opportunity to take up to 50% of the harvestable number of fish available to all fishermen.
- In November 1974, the Ninth Circuit in *Settler v. Lameer* affirms the right of the Yakama Nation to regulate the off-reservation fishing activities of its tribal fishermen.

Belloni's 1974 Decision in *U.S. v. Oregon*

- Judge Belloni modifies his original decision and applies Judge Boldt's 50% rule.
- "The Indian treaty fishermen are entitled to have the opportunity to take up to 50% of the spring Chinook run destined to reach the tribes' usual and accustomed grounds and stations. By 'destined to reach . . . ' I am referring to that portion of the spring run which would, in the normal course of events, instinctively migrate to these places except for prior interception by non-treaty harvesters or other artificial factors."
- This language is subsequently reflected in "conservation necessity principles."

Conservation Necessity Principles



- Is the application of conservation measures to the Indians necessary to preserve the fish?
- The courts have stated as part of the conservation necessity principle that the regulation of Indian treaty activities is only permissible if it is **not possible** to achieve the conservation measures by imposing restrictions on non-treaty activities that impact the treaty resource.

Court-Managed Fisheries

- From 1970-77, the tribes and U.S. continually challenge the Columbia River Compact's fishing seasons to assure the tribes a fair share of the fishery.
- The court repeatedly finds that the states' regulations are not reasonable and necessary for conservation and urges the parties to adopt a comprehensive plan to assure a fair share of the fish to all parties.
- In 1977, the *U.S. v. Oregon* parties adopt a "Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Tributaries Above Bonneville Dam" (aka Five Year Plan).

U.S. v. Oregon Court Adopted Fishery Management Plans

- 1988 – Columbia River Fish Management Plan (CRFMP) expired in 1998 and parties enter into a series of short term agreements.
- 2005-2007 Interim Agreement.
- August, 2008 Judge King adopts a ten-year management agreement signed by Oregon, Washington, Idaho, the tribes, and the federal government.

2008-2017 U.S. v. Oregon Management Agreement

- Part I: Structure and Process
 - Governance and Implementation
- Part II: Harvest
 - Stock by stock fishery agreements
- Part III: Hatchery Production Commitments
 - General agreements, specific program by program details, and identification of outstanding issues





Historical Perspective

- Commercial fishing became significant in about 1861
 - Salmon canneries began in lower river in 1866
 - Annual harvest ranged from 25-45 million lbs until 1938
- Commercial landings averaged over 600,000 Chinook during 1938-1950



TRIBAL FISHERY AT CELILO FALLS



Key Salmon Harvest Management Forums

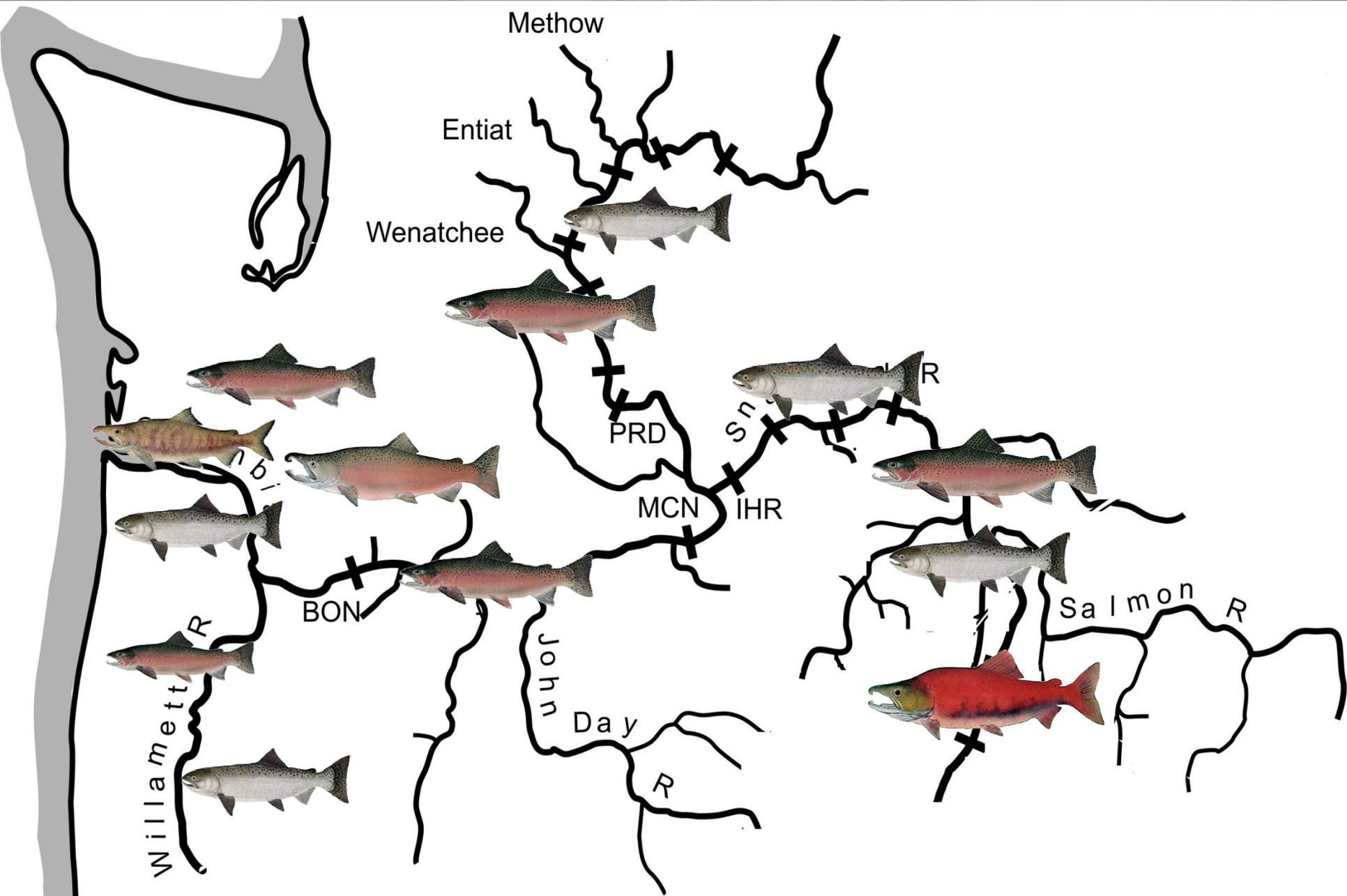
- *U.S. v Oregon*
 - Columbia River Compact
- Pacific Fishery Management Council (PFMC)
 - North of Falcon
- Pacific Salmon Treaty/Commission

Major Fishery Events

- 1968 U.S. v. Oregon judgment
- 1973 ESA passes congress
- 1976 Magnuson Fishery Conservation Act
- 1985 U.S. - Canada fishery treaty
- 1988 U.S. v. Oregon 10 year agreement for all species
- 1991-05 ESA listing of 13 Columbia River ESU's
- 1999 U.S. – Canada fishery management regimes modified
- 2001 U.S. v Oregon agreement for spring Chinook
- 2008 U.S. v. Oregon 10 year agreement for all species
- 2008 U.S. – Canada fishery management regimes modified

Endangered Species Act (ESA)

- First Columbia River listing in 1992
- ESA-listed fish in every major tributary
 - Chinook (5 ESUs) (1 Endangered)
 - Steelhead (5 DPSs)
 - Sockeye (Endangered)
 - Coho
 - Chum
 - Green Sturgeon
 - Bull Trout
 - Eulachon
 - Southern Resident Killer Whales



Who Manages Columbia Basin Fisheries?

- States and individual tribes share co-management in the tributaries
- States, federal government and treaty tribes share management in mainstem Columbia River
- Authorities
 - Tribal treaties reserved rights to fish in perpetuity
 - State laws require conservation of the public's fish
 - *United States v Oregon* clarifies Treaty and non-Treaty sharing of harvestable fish and hatchery production
 - ESA provides for federal oversight

U.S. v. Oregon Parties

- Washington Department of Fish and Wildlife (WDFW)
- Oregon Department of Fish and Wildlife (ODFW)
- Idaho Department of Fish and Game (IDFG)
- U.S. Fish and Wildlife Service (USFWS)
- National Marine Fisheries Service (NMFS)
- Yakama Nation (YN)
- Confederated Tribes of Warm Springs Reservation (CTWS)
- Confederated Tribes of Umatilla Reservation (CTUIR)
- Nez Perce Tribe (NPT)
- Shoshone-Bannock Tribes (SBT)
- Bureau of Indian Affairs (BIA)
- Department of Justice

U.S. v. Oregon

- 1968 Federal court ruled equitable harvest for Columbia River Tribes.
- Columbia River Fish Management Plan adopted (CRFMP) as court order in 1988.
- Plan aimed at rebuilding weak salmon and steelhead runs.
 - Rebuild upriver runs and fairly share harvest
 - Provide for spawning escapement first
 - Protect weak stocks

U.S. v Oregon TAC

- Includes all parties to *U.S. v Oregon*
 - State, federal and treaty-tribe agencies
- Review fisheries, provide updates to runs
- Technical review of all data pertinent to management of fisheries
 - Authors ESA Biological Assessments
 - Detailed Joint Staff Reports 2-3 times per year
 - Fact sheets for each Compact- includes real-time data
- Opportunity to review harvest data and monitoring methodologies by different agencies

Columbia River Compact

- 1918 - U.S. Congress ratified the compact and agreement between Oregon and Washington covering concurrent jurisdiction of Columbia River fisheries.

Pacific Fishery Management Council (PFMC)

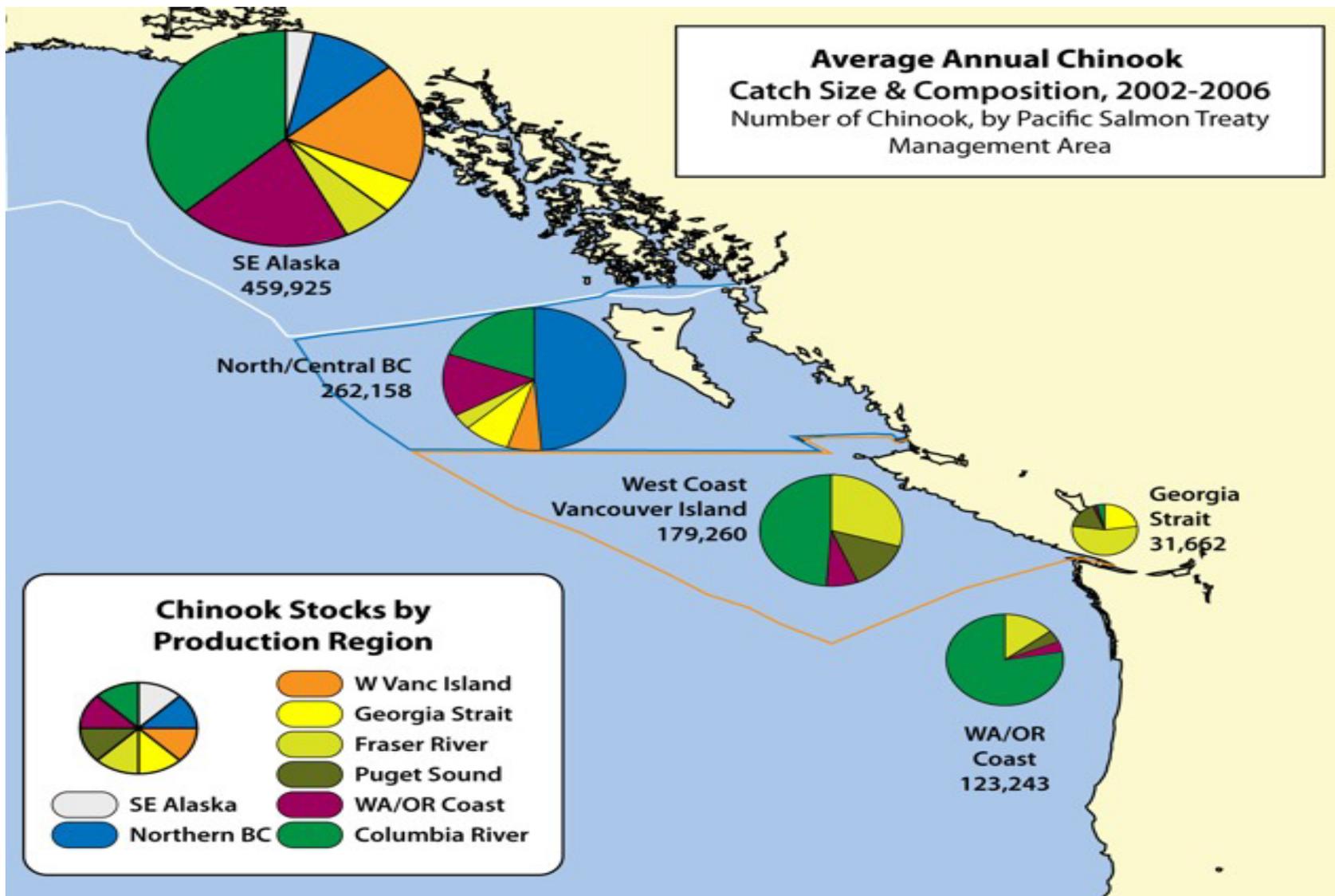
- Magnuson Fishery Conservation and Management Act of 1976 established PFMC
- Manages the conservation and ocean harvest of fish from the U.S.-Canada border south to Mexico
- Fourteen voting members
- Columbia River stocks key contributor to ocean fisheries
 - Fall Chinook
 - Summer Chinook
 - Coho

Columbia River Stocks not Caught in Ocean Fisheries

- Steelhead
- Sockeye
- Chum
- Upper Columbia River Spring Chinook
- Snake River Spring/Summer Chinook

Pacific Fishery Management Council (PFMC)

- PFMC technical committees collaborate to reach consensus on scientific data
- PFMC technical committees coordinate with other committees
 - TAC and Chinook Technical Committee (CTC)
- PFMC recommended ocean seasons are promulgated by the Secretary of Commerce
- States adopt ocean regulations in state waters

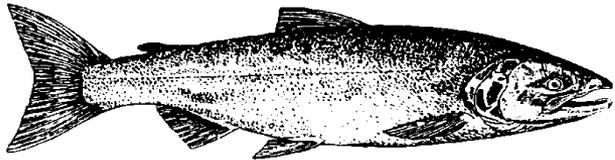


North of Falcon (NOF)

- Ocean/In-river coordination
 - Planning of freshwater fisheries concurrent with ocean season setting
 - Provides assurance that Columbia River, Puget Sound and Washington coastal fisheries are reconciled with ocean fisheries
 - Escapement goals, ESA requirements, and harvest sharing objectives achieved
 - Includes public involvement

Pacific Salmon Commission

- 1985 salmon treaty between the U.S. and Canada for management of Pacific salmon
- Four commissioners and four alternates from each country
- There are four panels (Northern, Southern, Fraser and TBR)
- Several technical committees including a Chinook Technical Committee (CTC)



Chinook Management Processes



2008 Chinook Agreement

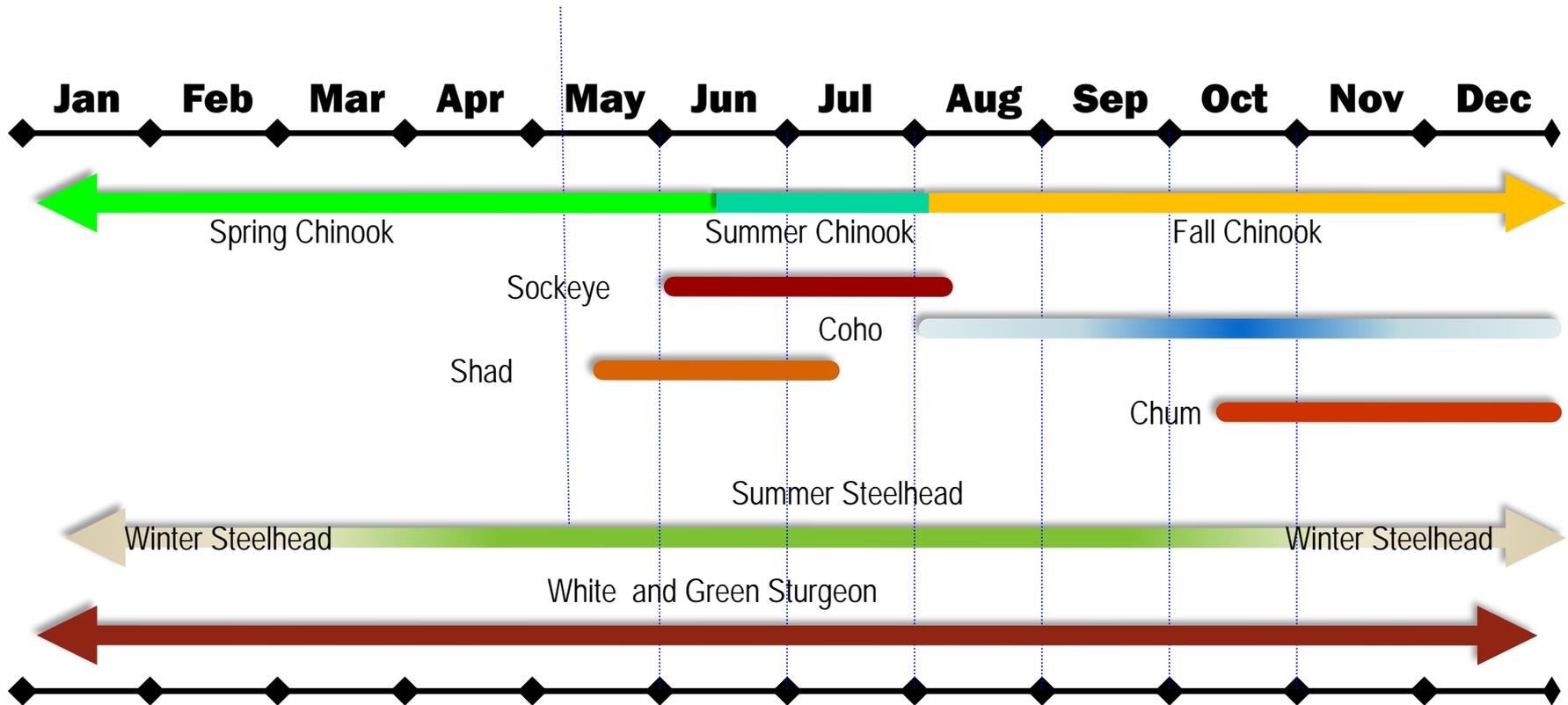
- Several changes over the 1999 Agreement
- Major reductions to northern AABM* fisheries:
- New limits for ISBM* fisheries impacting stocks that fail to meet agreed-to escapement objectives:
- A shift to a total mortality management regime...
- Appropriates finances for treaty implementation:
- The Agreement expires in 2018

* AABM = an Aggregate Abundance-Based Management regime; catch levels are set by the expected abundance (index) summed over all stocks present in a fishery

*ISBM = an Individual Stock-Based Management regime; fisheries are shaped w/ consideration of objectives for particular stocks (all So. US, most So. BC fisheries)

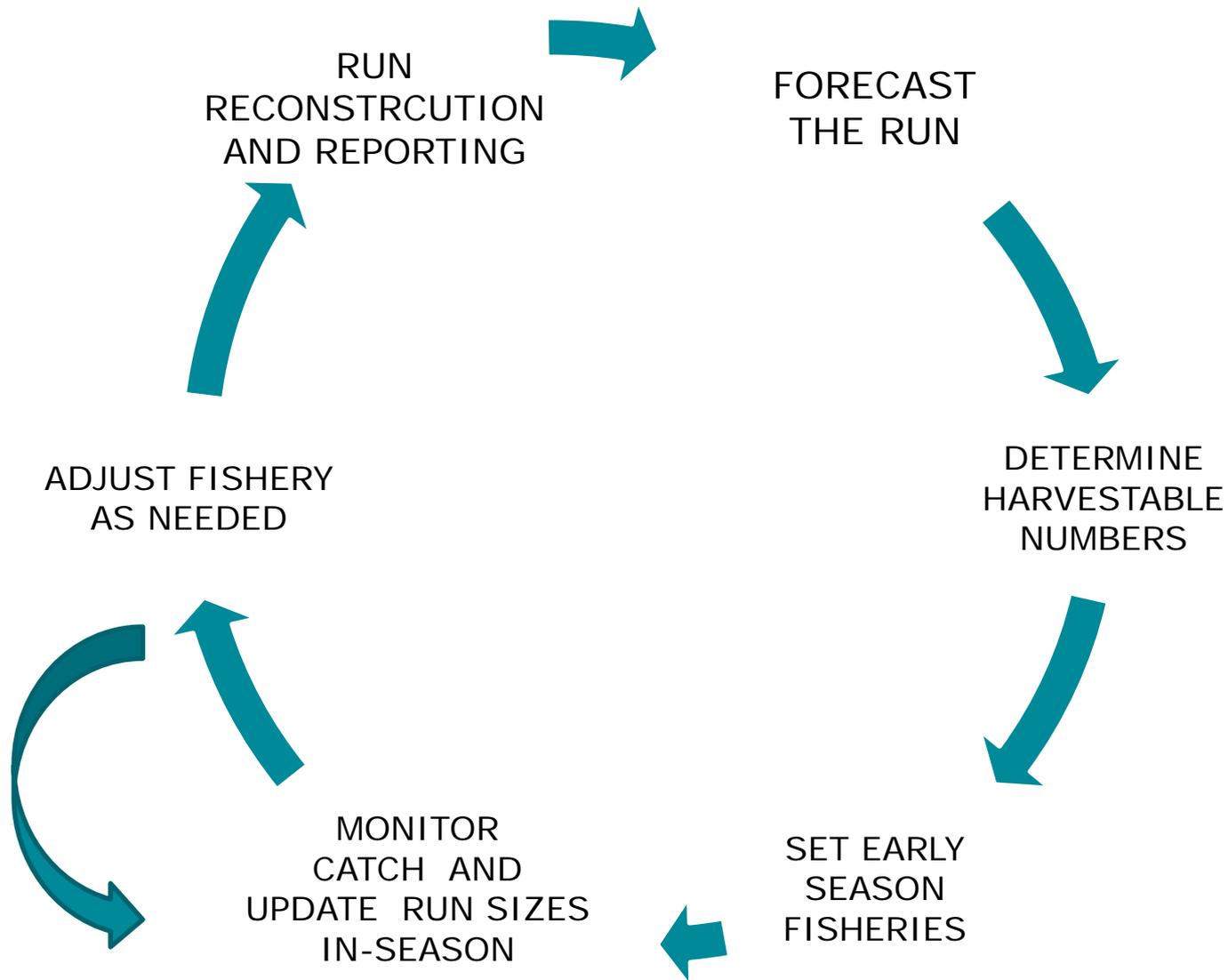
Columbia River

Annual presence of management species



Management Cycle

- Preseason forecasts with TAC
- Meet with Advisor Groups to develop seasons
 - Columbia River Recreational and Commercial
- Compact/Joint State hearing
 - Public provides comments on recommendations
- Monitor fisheries and runs in-season (TAC)
 - Catch estimates, CWTs, dam counts
- Modify fisheries as needed



Pre-Season Forecasts

- Age Based Relationships
- Efforts to incorporate environmental factors
- Error often larger with extreme data points
- Pre-season forecast used for planning early season fisheries
- Pre-season forecasts are not as critical if timely run size updates can be made

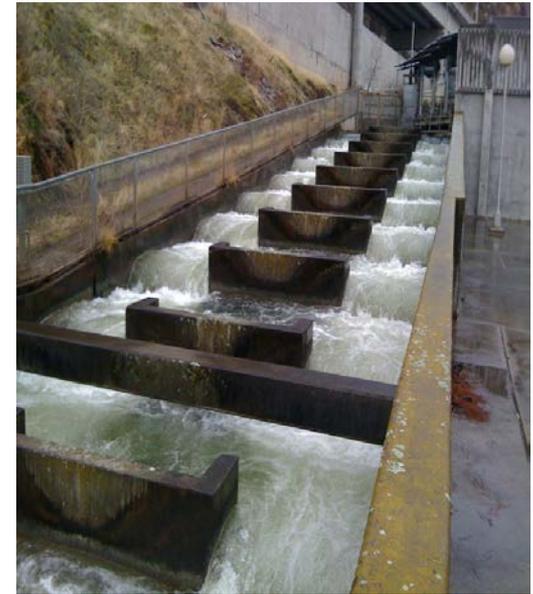
Database – URB Fall Chinook

Returns to the Columbia River of the Upriver Bright Stock, By Age, 1964-2011.

<u>Return Year</u>	<u>Age 2</u>	<u>Age 3</u>	<u>Age 4</u>	<u>Age 5</u>	<u>Age 6</u>	<u>Total</u>	<u>Total Adults</u>
1964	18.0	47.0	28.8	1.2		95.0	77.0
1990	34.6	8.8	70.1	68.0	6.7	188.2	153.6
1991	37.6	9.7	26.2	62.1	5.4	140.9	103.3
1992	29.0	17.6	37.7	24.3	1.4	110.0	81.0
1993	14.0	13.4	62.3	26.7	0.6	116.9	102.9
1994	29.7	13.0	63.1	56.4	0.3	162.6	132.8
1995	40.2	23.0	19.4	62.2	1.9	146.6	106.5
1996	14.2	49.6	71.0	16.9	1.8	153.6	139.4
1997	21.8	22.2	108.1	30.8	0.7	183.5	161.7
1998	23.1	43.3	22.2	75.2	0.9	164.7	141.6
1999	22.6	25.2	119.4	19.3	2.0	188.4	165.9
2000	47.8	18.4	63.3	74.7	0.3	204.4	156.6
2001	62.9	76.1	111.1	41.6	3.6	295.2	232.4
2002	35.5	59.1	168.1	52.0	0.4	315.0	279.5
2003	42.0	45.5	216.5	111.4	0.8	416.1	374.2
2004	34.8	103.4	94.2	160.3	4.9	397.6	362.8
2005	19.0	58.6	155.1	57.5	7.3	297.6	278.5
2006	23.4	39.3	88.2	100.1	2.9	253.8	230.4
2007	45.4	27.3	52.2	32.1	2.4	159.4	114.0
2008	35.7	102.7	56.5	37.5	0.6	233.0	197.3
2009	99.6	45.4	137.6	28.3	0.8	311.7	212.1
2010	55.8	148.1	112.1	64.3	0.4	380.7	324.9
2011	76.3	93.8	196.5	33.4	0.3	400.4	324.1

Forecast Updates

- Bonneville Dam counts key to updating forecasts
- Historic run timing data used
 - Runs can be early, late or normally timed
- Goal to update run accurately as early as possible
 - High counts early may mean a large run, but they might mean just an early run
- Updating run sizes uses both data and judgment
- Typically runs can't be updated accurately until about 50% of passage is complete – but when is 50%??



Run Reconstruction

- Runs are “reconstructed” post-season using actual catches, dam counts, hatchery returns and spawning ground data
- Reconstructed run sizes and actual fisheries are used to assess ESA and Management Agreement compliance
- Reconstructed runs by age are used for forecasts
- Generally, post season estimates are close to in-season estimates

Run Reconstruction – Fall Chinook

- Fishery harvest by age and stock group for each fishery
 - Sport, commercial, tribal, SAFE, tributary
 - By fishing periods
- Hatchery and natural escapements added to fisheries by stock and age
- Product is Columbia River mouth returns by age and major stock groups



Management Stocks

- Fall Chinook stock groups are:
 - LRH – Lower River Hatchery
 - LRW – Lower River Wild
 - SAB – Select Area Bright
 - BUB – Bonneville Upriver Bright
 - BPH – Bonneville Pool Hatchery
 - PUB – Pool Upriver Bright
 - URB – Upriver Bright



Tools For Managing Fisheries

- Catch quotas
- Selective fisheries
 - Mark-selective (MSF) – release fish with fins intact
 - Time, area, gear selective
 - Season structure (time/area)
 - Gear type (e.g. net mesh size)
- On-board monitoring

Catch Quotas

- Fisheries managed for catch guidelines/quotas
- May be stock-specific within total catch
- Sport fisheries estimated by catch and effort counts
- Commercial estimated by landings
- Tribal estimated by both

Selective Fisheries

- Mark-Selective: Harvest limited to retention of fin-marked hatchery fish
- T-A-G Selective: Fisheries using time, area, and/or gear regulations to minimize by-catch while targeting a specific species or stock



Time, Area, and Gear Selectivity

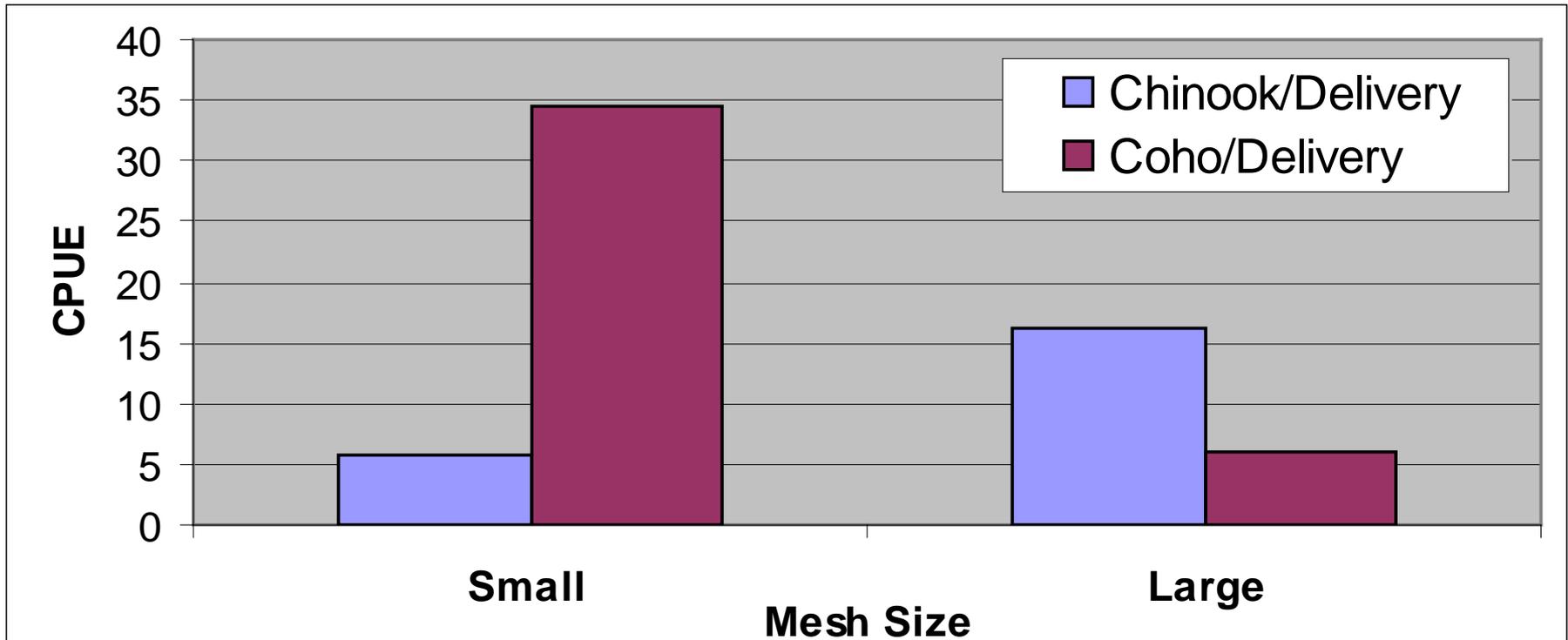


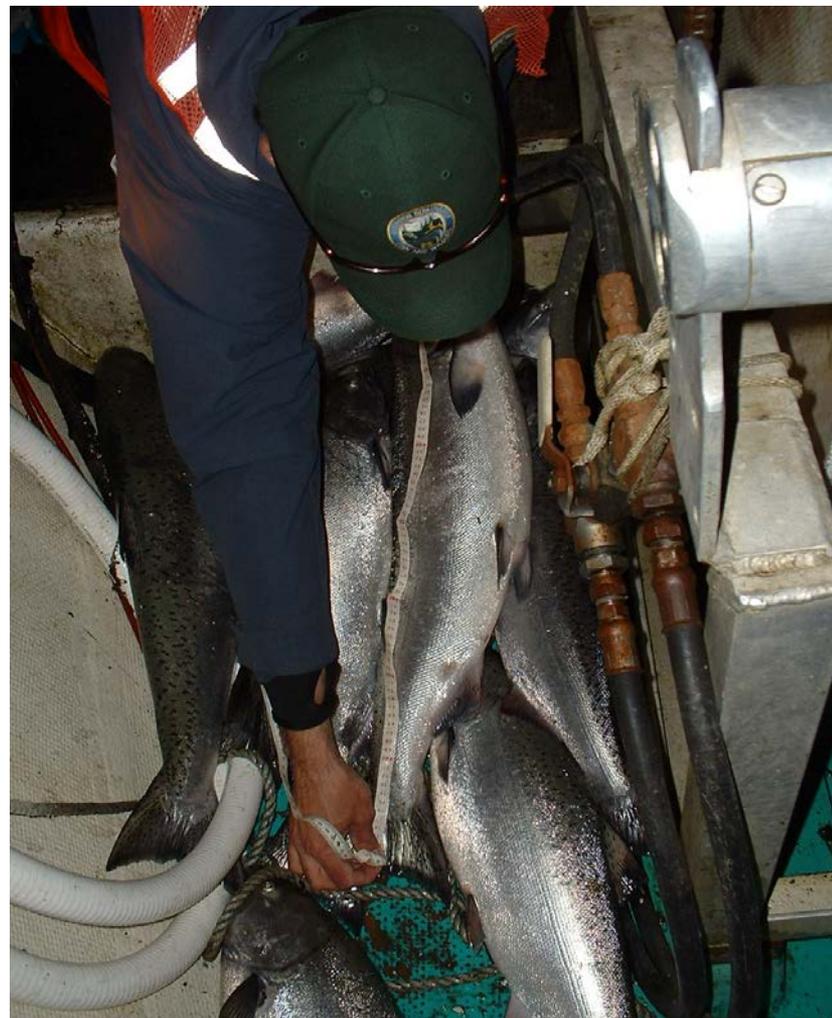
Figure X. Average catch per delivery by mesh size during mainstem late fall commercial fishing periods, 2006-2007

On-board Monitoring

- Conducted during spring Chinook commercial fishery
- Requires budgetary commitment
- Occasionally conducted during summer and fall season fisheries



Commercial monitoring



Fishery Biological Sampling

- Sport, commercial, tribal
- Mainstem, SAFE, tributaries
- Mouth upstream to Wells Dam and Snake River



Fishery Biological Sampling

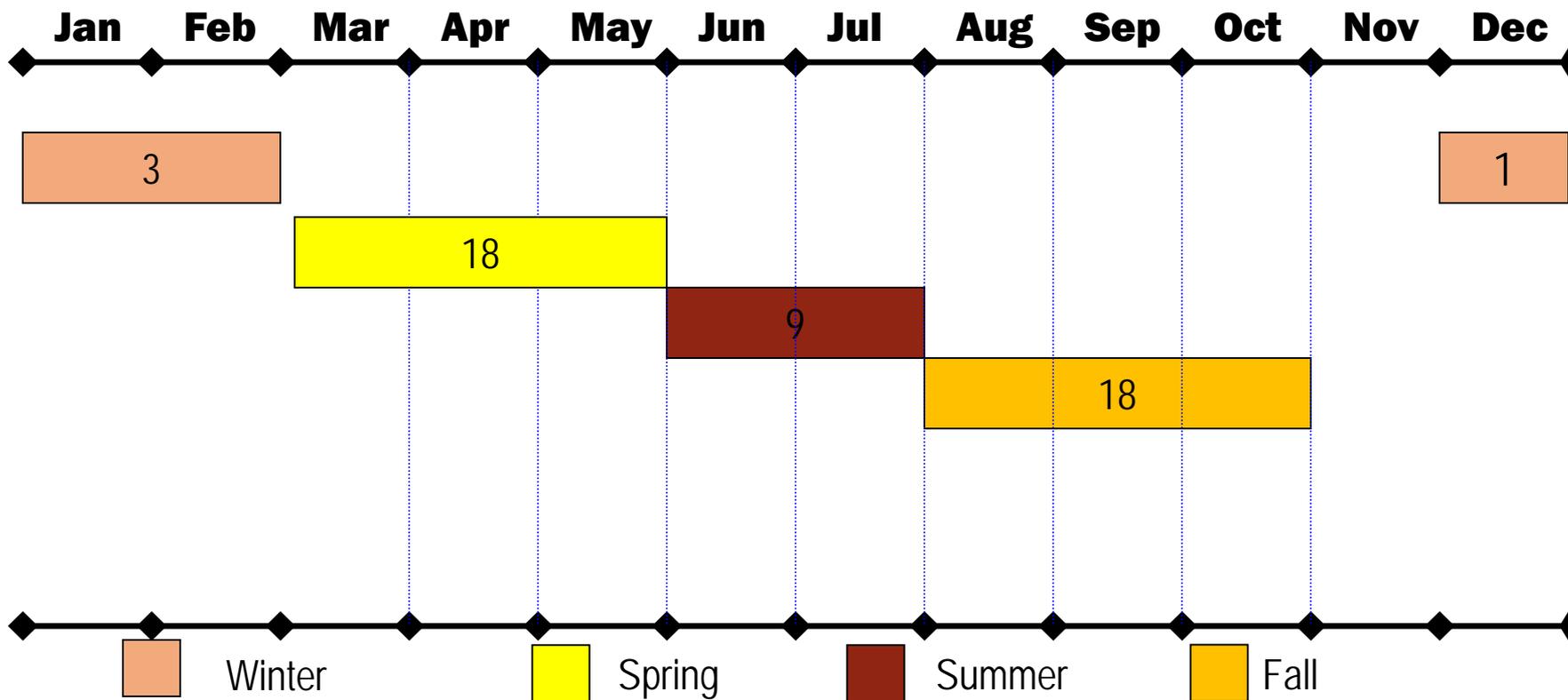
- Information Collected
 - Weight, sex, scales, length, marks, scars/bites, skin color
 - CWT, PIT, DNA, other tags as needed
 - Catch and effort estimates in sport fishery
 - Landings in commercial fisheries



Columbia River Compact

- Compact and agreement between Oregon and Washington ratified by Congress 1918
- Laws adopted by mutual consent
- Fishery decision-making authority
 - Provides concurrent jurisdiction of Columbia fisheries
 - Compact comprised of Directors or designees of WDFW and ODFW
 - Public hearings held to adopt or modify seasons and regulations

Average Compact/Joint State Hearings



Forecast Updates and In-Season Management

- Expected run to Bonneville updated first
- Catches in lower river fisheries added to get river mouth run size
 - Actual catches plus any additional expected catches derived from harvest models
- Run sizes normally updated weekly – sometimes twice a week
- Fisheries catch by stock in-season based on CWT analysis

Sport Harvest Numbers Below Bonneville Dam

- Aerial Flights (ODFW)
 - Count bank rods (OR & WA)
 - Boats by river section (1-10)
 - ~80 midday flights/year (6-12 per month; February – October)
 - Weekdays and weekends
 - Model incorporates tide, weather, and water conditions
- Creel sampling at boat ramps and bank fishing areas (WDFW and ODFW)

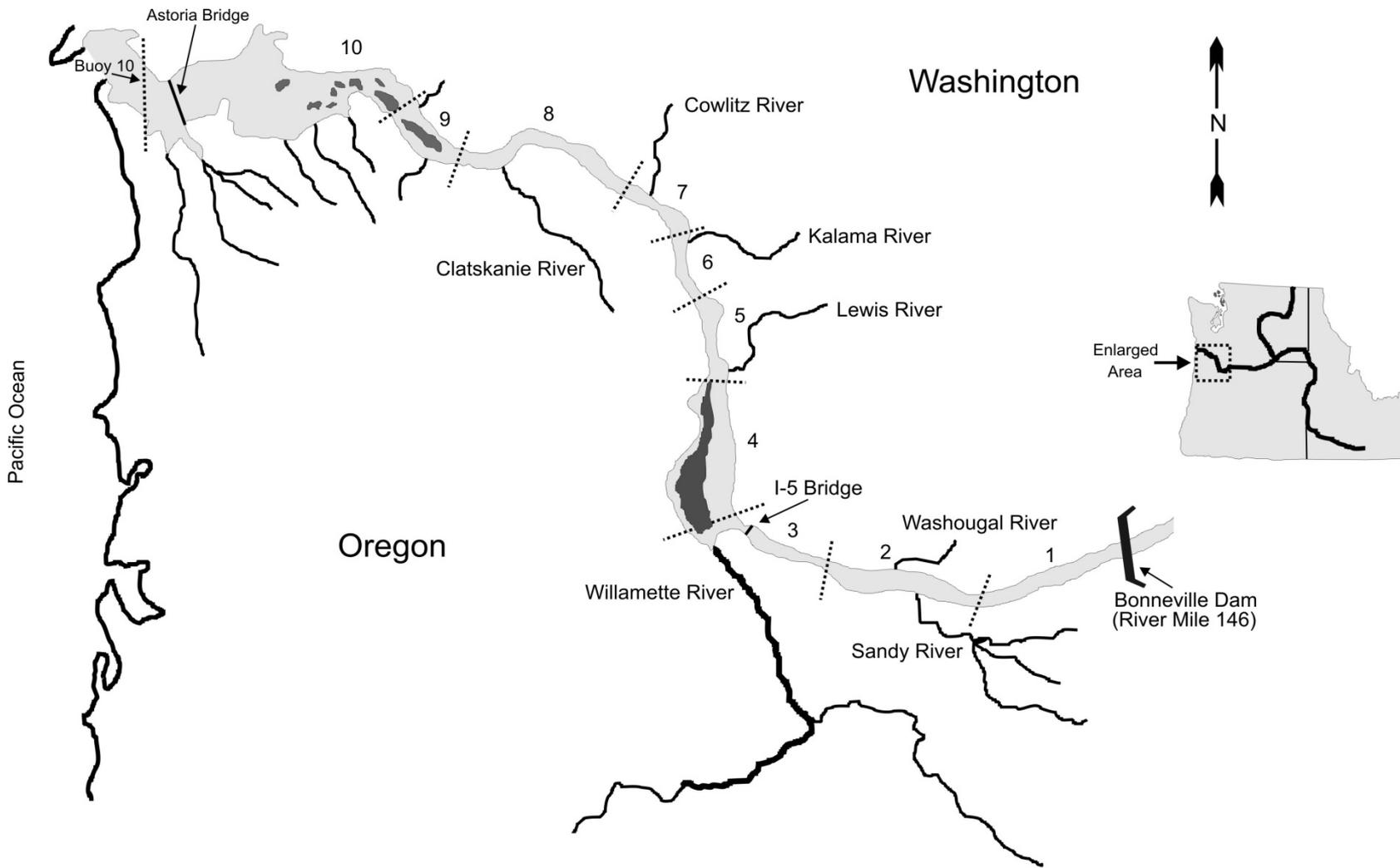


Figure 1. Recreational Sampling Sections on the Columbia River Below Bonneville Dam

Aerial Effort Counts



Commercial Sampling



Non-Indian



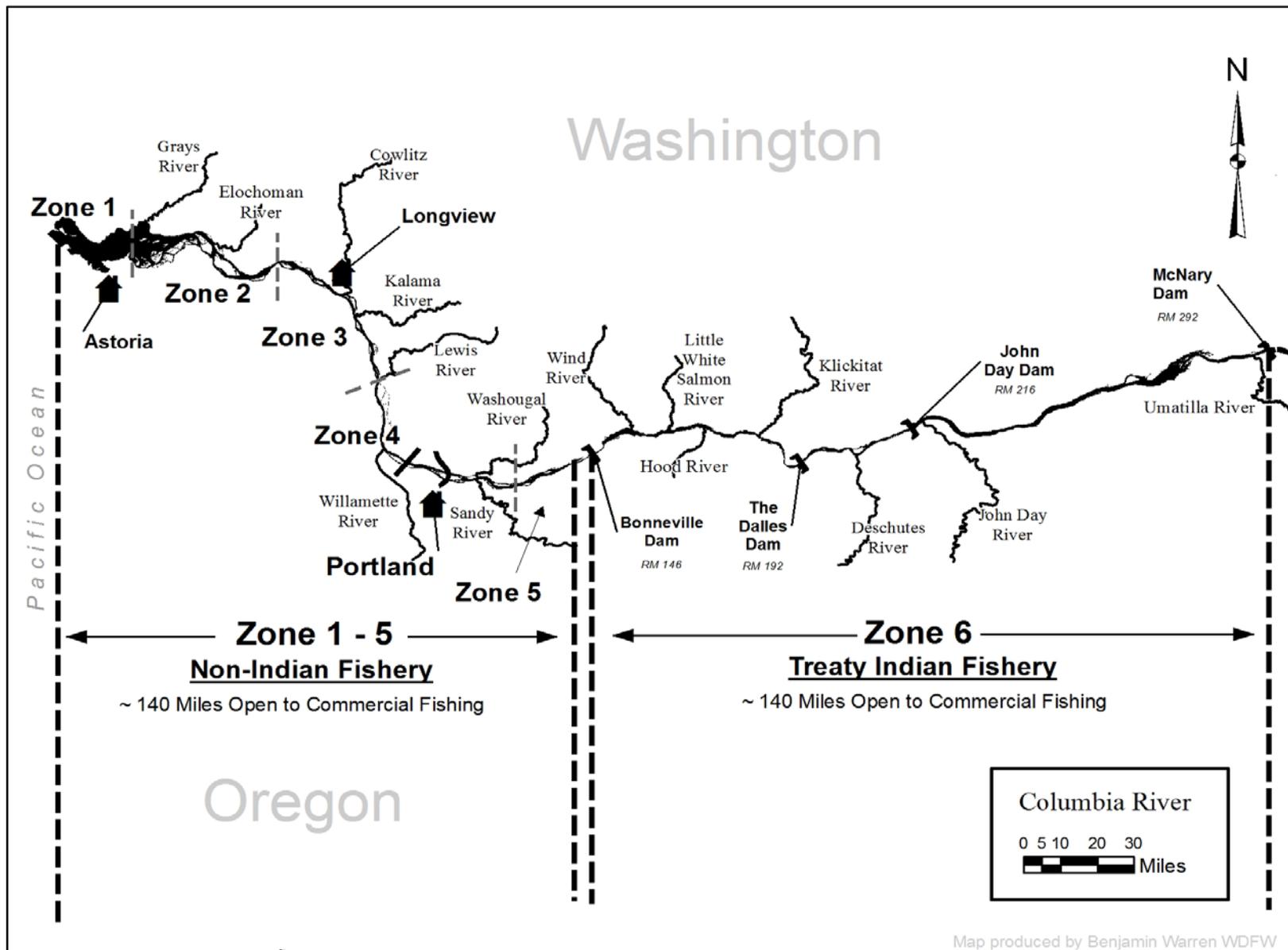
SAFE



Treaty Indian

Non-Indian Commercial Fishery

- WDFW and ODFW staff sample fish at major fish buyers
- Information Collected
 - Weight – used to get average weight
 - Average weight applied to total pounds to get landings
 - Scale samples – used to get age composition
 - CWTs – used to get stock composition
- Landings are reported to agencies within 24 hours



Treaty Indian Fishery

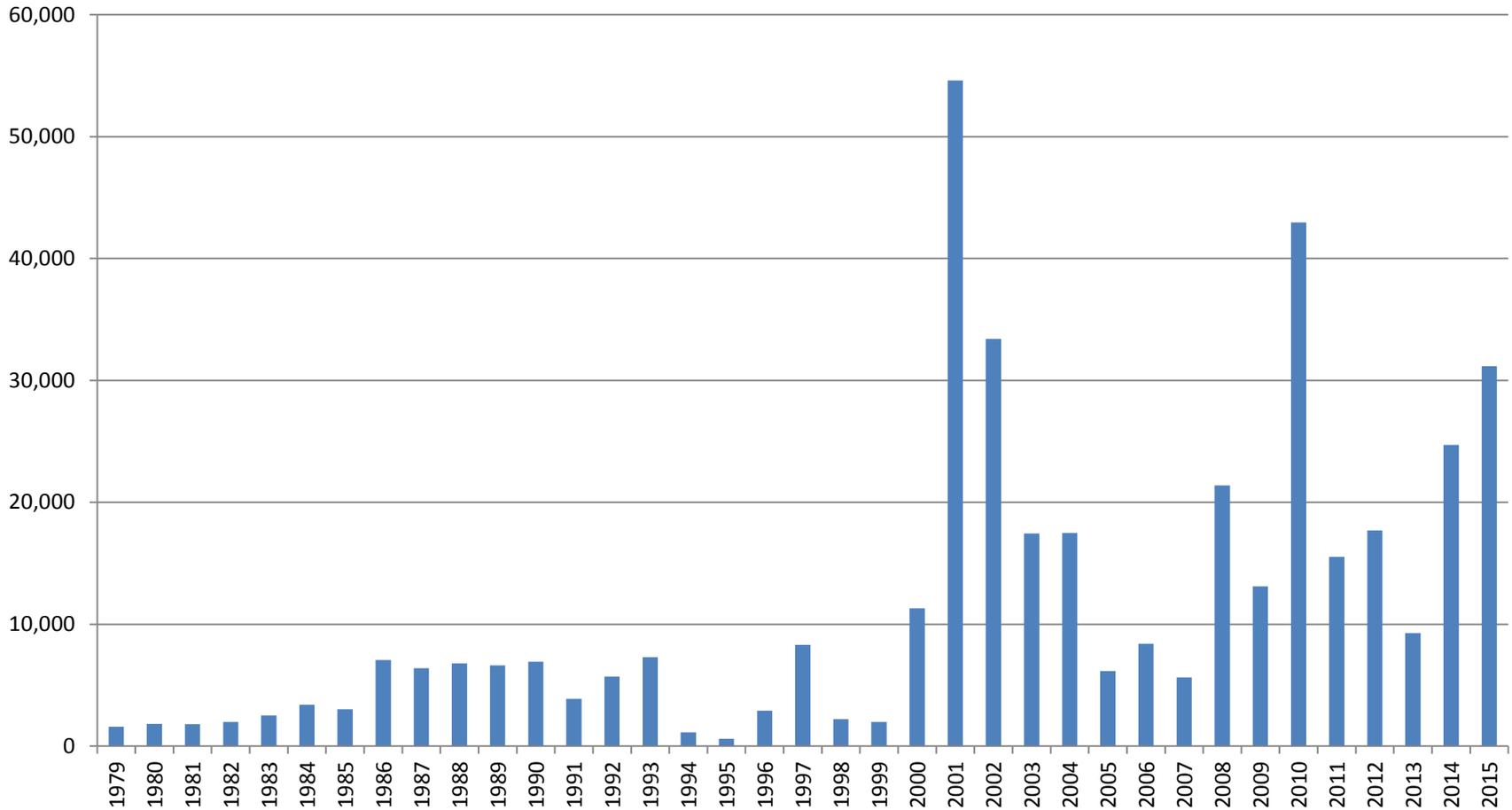
- Fishery conducted with set gill nets, drift gill nets, hoop nets and hook and line
- Tribal staff estimates effort with weekly flights and expands based on dockside interviews
 - Net counts by reservoir
- WDFW and ODFW staff sample fish at major fish buyers
 - Commercial harvest only
 - Primarily during set net or drift net seasons
- Information Collected
 - Weight – used to get average weight
 - Average weight applied to total pounds to get landings
 - Scale samples – used to get age composition
 - CWTs – used to get stock composition
- Landings are reported to agencies within 24 hours



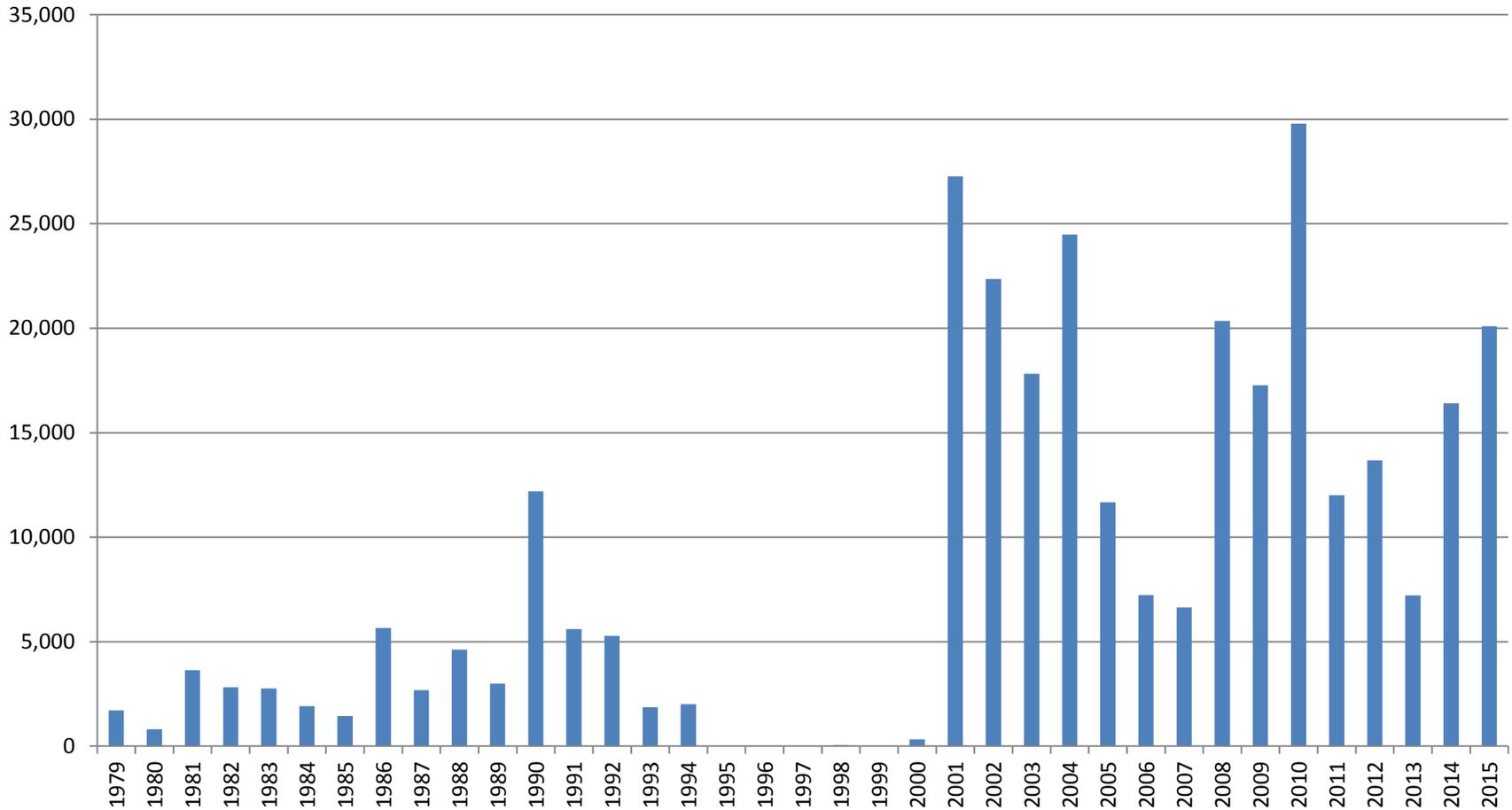
Abundance Based Management

Spring Management Period Harvest Rate Schedule-U.S. v. Oregon						
Total Upriver Run Size	Snake River Natural Run Size	Treaty Indian Harvest Rate	Treaty Indian Catch Guideline	Non-Indian Harvest Rate	Non-Indian Mortality Guideline	Total Harvest Rate
82,000	8,200	7.4%	6,068	1.6%	6,068	9.0%
109,000	10,900	8.3%	9,047	1.7%	9,047	10.0%
141,000	14,100	9.1%	12,831	1.9%	12,831	11.0%
217,000	21,700	10.0%	21,700	2.0%	21,700	12.0%
271,000	27,100	10.8%	29,268	2.2%	29,268	13.0%
326,000	32,600	11.7%	38,142	2.3%	38,142	14.0%
380,000	38,000	12.5%	47,500	2.5%	47,500	15.0%
434,000	43,400	13.4%	58,156	2.6%	58,156	16.0%
488,000	48,800	14.3%	69,784	2.7%	69,784	17.0%

Treaty Indian Harvest of Spring Chinook



Spring Chinook Sport Harvest Below Bonneville Dam

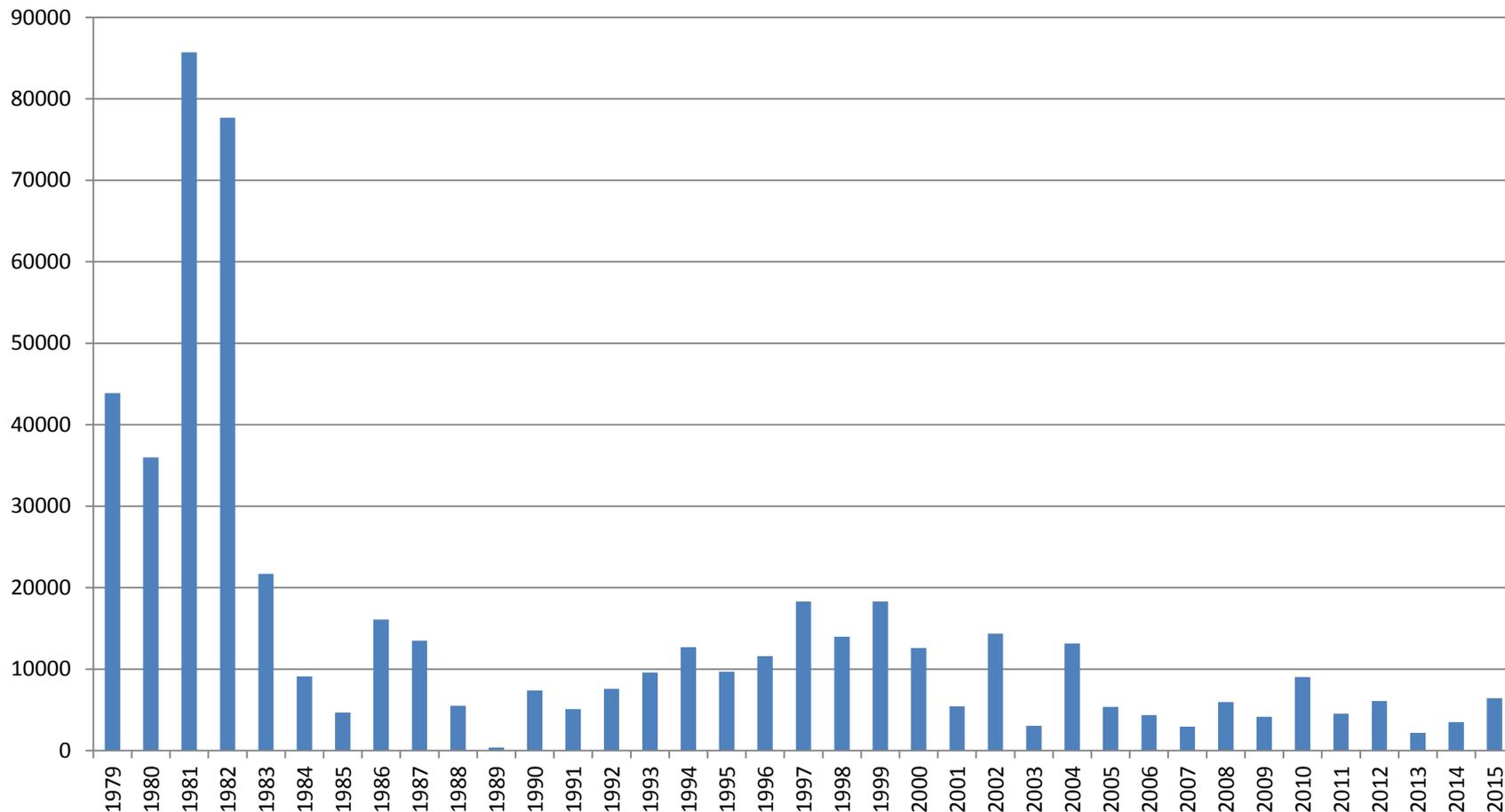


Spring Commercial Fisheries

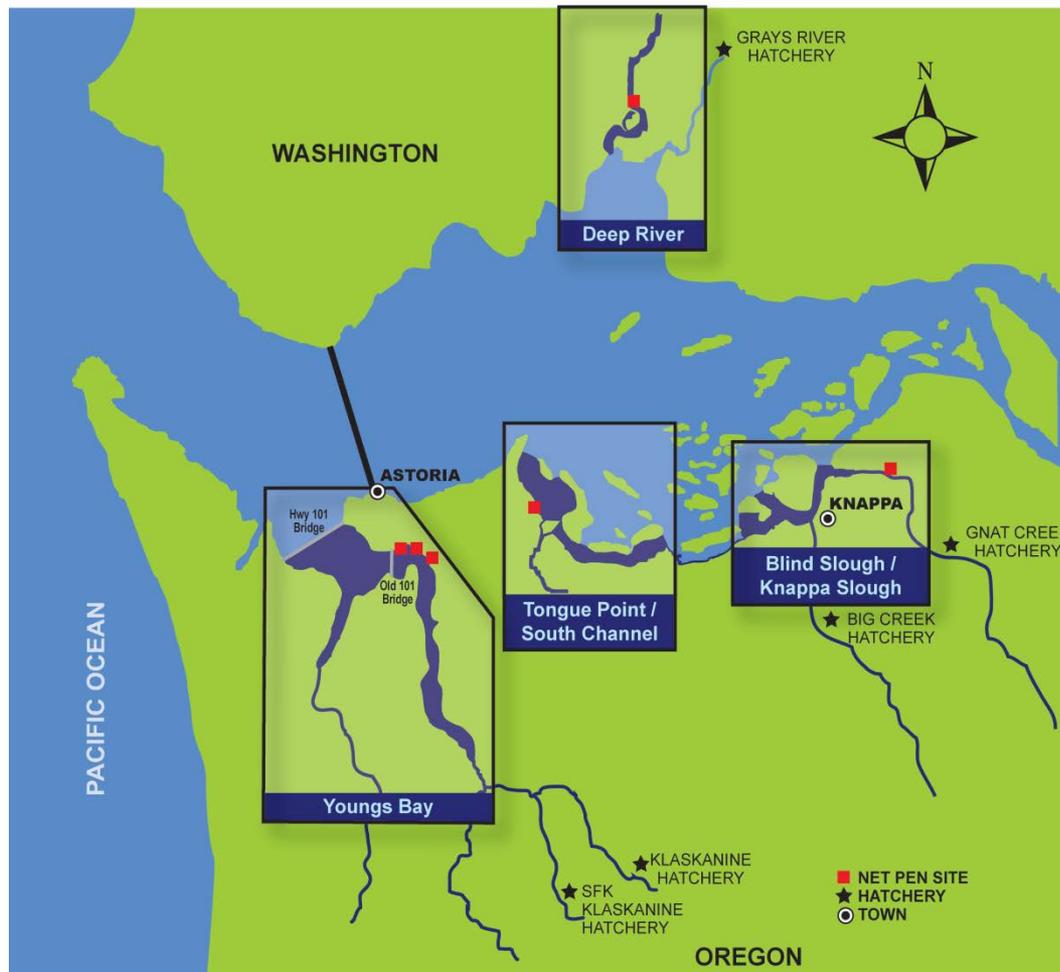
- Tangle nets
- Boxes
- Training
- Regulations
- On-board monitoring



Non-Indian Spring Chinook Commercial Harvest



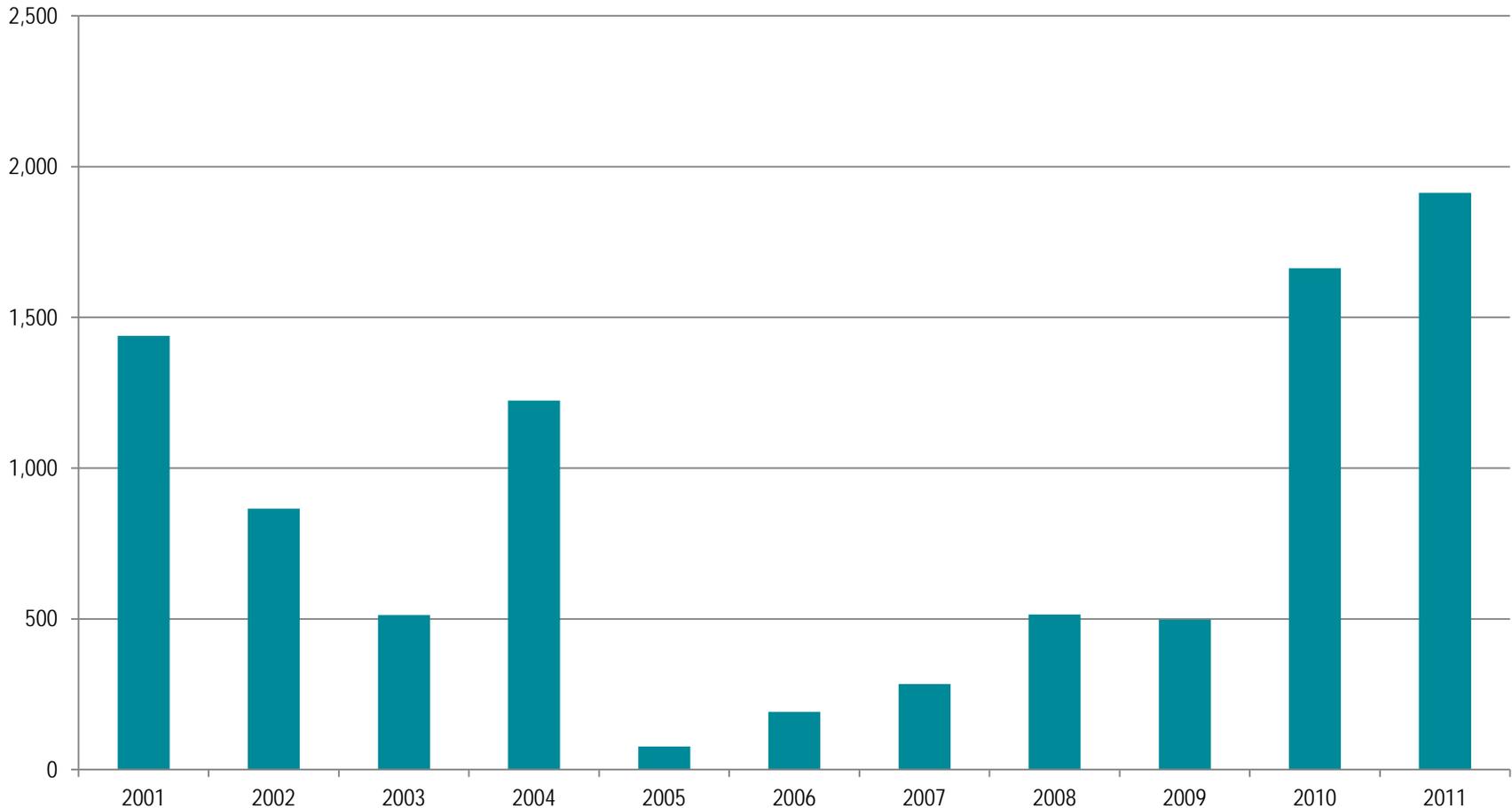
Select Area Fisheries (SAFE)



Youngs Bay



Spring Chinook Sport Harvest in the lower Snake River



Field Work - Winter Surveys



Bring your gloves – work doesn't stop with the weather

Questions?

