UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HOOPA VALLEY TRIBE,

Plaintiff,

vs.

MALCOLM BALDRIDGE, et al.,

Defendants.

NO. C-82-3145 MHP

ORDER

Plaintiff, the Hoopa Valley Tribe, brought the instant action challenging the Secretary of Commerce's 1982 regulations managing fall-run chinook salmon on the Klamath River.[1/] The Secretary promulgated these regulations pursuant to the Fishery Conservation and Management Act of 1976 ("FCMA"), 16 U.S.C. §§1801-1882, and plaintiff seeks review under §1855(d). The parties have stipulated to submitting the matter on the record,[2/] and after exhaustively reviewing the record, the court concludes that the regulations must be set aside for the reasons set forth below.

I. Statutory Background

The FCMA establishes exclusive federal fishery management authority over the fishery conservation zone ("FCZ"), which extends from three to two hundred miles from the shore.[3/] §1811. This federal authority also includes management of anadromous species such as salmon throughout their migratory range even extending beyond the FCZ. §1812. In the Act, Congress placed primary management responsibility on eight

regional councils, which must prepare fishery management plans for the fisheries within their respective jurisdictions. In carrying out their duties, the councils must establish scientific and statistical committees to assist them in evaluating scientific information relevant to the development of fishery management plans. §1852(g)(1).

The Act also establishes seven national standards which must guide the preparation of fishery management plans and their implementating regulations. In the instant case, plaintiff claims that the Secretary's regulations are inconsistent with four of these standards:

> (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.
> (2) Conservation and management measures shall be based upon the best scientific information available.
> . . .
> (4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.
> (5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

§1851(a). The Act defines optimum yield as the amount of fish

> (A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and

> (B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery [i.e. the amount which may be harvested while still allowing for the propagation of an equal number for the next season], as modified by any relevant economic, social, or ecological factor.

§1802(18).

The Secretary of Commerce's role under the Act is limited. He must review the council's plans to determine whether they are consistent with the seven national standards, the other provisions of the Act, and any other applicable law. §1854(b). If he disapproves the plan, he must notify the council and include a statement explaining the basis for his objections, suggestions for improvement, and a request that the council resubmit a modified plan within forty-five days. §1854(a). In the event the council fails to submit a modified plan, the Secretary may prepare a plan which is consistent with the national standards, the other provisions of the Act and other applicable laws. §1854(c).

II. The Development of the 1982 Amendments

A. Previous Management of the Klamath Chinook

The Pacific Fishery Management Council ("PFMC") manages the salmon fisheries off the California, Oregon and Washington coasts, including the Klamath River chinook. The Klamath River is the single largest producer of chinook off northern California and southern Oregon. However, at least since the 1976-77 California drought, the stocks of Klamath chinook have been severely depressed.

There are two significant fisheries for the Klamath chinook. The first is the commercial troll fishery which

harvests fall-run Klamath chinook off the coasts of northern California and southern Oregon during the summer months. The PFMC has management authority over this fishery which it implements primarily through time and area closures and quotas. The second major fishery is the in-river Indian gill net fishery. For a number of years substantial controversy has surrounded gill net fishing on the Klamath River. However, the Department of the Interior has exclusive jurisdiction over the Indian fishery, and, consequently, the PFMC cannot regulate this aspect of the chinook problem. For 1982, the year at issue, the Department of the Interior limited the Indian harvest to 30,000 chinook for subsistence purposes.

In 1978, the PFMC prepared a fishery management plan for the entire Pacific coast. It set a spawning escapement goal of 115,000 fall-run Klamath chinook based on estimates of the capacity of the river to support that number of spawners. The goal was to be reached within two brood cycles or eight years. In 1979, because of the severe socio-economic impacts which meeting the long-term goal would entail, the Council set a lower interim goal of 86,000. Each year since 1978, the Council has prepared amendments to the plan based on the conditions present that particular season.

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The following table sets forth the status of the Klamath chinook between 1978-81:

Table III-7. Klamath River adult in-river fall chinook run size, spawning escapement, sport catch, and Indian net harvest (in numbers and percent of the total in-river run size) for the period 1978-81.

Run Component	1978 Numbers	1978 %	1979 Numbers	1979 %	1980 Numbers	1980 %	1981 Numbers	1981 %
Spawning escapement	69,700	72	34,100	61	29,900	66	36,700	48
Sport catch	1,700	2	2,000	4	2,600	6	3,900	5
Indian net harvest[a/]	25,000	26	20,000	36	3,000	29	35,500	47
In-River Run Size	96,400	100	56,100	100	45,500	100	76,100	100

(Proposed Plan for Managing the 1982 Salmon Fisheries off the Coasts of California, Oregon, and Washington ("Proposed Plan"), Exhibit G-4 at 14-III). As the table indicates, the Klamath fall-run chinook are severely depressed. The spawning escapement during the years 1979-81 were well below 50% of the interim goal of 86,000. To address this problem, the 1981 regulations closed the salmon fishery off northern California and southern Oregon for the entire month of June. They also instituted a troll quota in California north of Point Arena of 300,000 chinook.

B. The Council's Amendments

Preparation of the 1982 amendments began in late 1981 when the PFMC held a scoping session. In January, the Council adopted for public review five management options for the troll fishery which ranged from liberal to quite restrictive

controls on the troll fishing season, and extensive public hearings were then conducted in February 1982. The Council's Salmon Plan Development Team ("Salmon Team"), a team of experts in salmon management, prepared an analysis of the five troll options which discussed, inter alia, the predicted in-river run size and spawning escapement which could be expected from adoption of each option. (Appendix A to Proposed Plan, Exhibit G-4).

The Council then met from March 17-19 and on March 19 adopted a proposed amendment and implementing regulations which closely resembled troll option two, one of the more liberal options. For the area from Point Arena to the Oregon-California border (northern California), it provided for a season from May 2 to September 30 with a two-week closure from June 15-30. For the area from the Oregon-California border to Cape Blanco (southern Oregon), the season extended through October 31, but was otherwise the same as for the area south of the border. Despite a recommendation from the Salmon Team, the Council did not adopt a chinook quota.

After the March 19 meeting, the Salmon Team analyzed in detail the projected impact of the adopted amendment. (Appendix C to Proposed Plan, Exhibit G-4). According to the Team's projections, the PFMC's regulations would have resulted in a decrease in the in-river run size from 76,000 in 1981 to 69,000. (Id. at C-6). Since the Indian harvest would be limited to 30,000 and the in-river sport fishery was projected

to be 5,000, the regulations would have resulted in a spawning escapement of 34,000. This would have been a decrease of 3,000 from the 1981 escapement. In contrast, the ocean harvest from Point Arena to the Oregon border was expected to increase 20% over the 1981 and historic level of around 300,000 to approximately 350,000. (Id. at C-6).

On March 26, William Gordon, the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration ("NOAA"), and the responsible official in the Department of Commerce, wrote the Chairperson of the PFMC, Herman McDevitt. Reviewing the Council's March 19 actions, he indicated his inclination to disapprove the Council's proposed amendment for the area between Point Arena and Cape Blanco. He stated:

> The stock of Klamath River chinook continues to be in serious trouble. It has suffered from grossly inadequate spawning escapement in recent years, yet we are assured by the Salmon Team that the river is capable of handling the 86,000 spawners mentioned in the Council's interim goal.
>
> In view of these facts, I do not see how I can approve the Council's recommendations with regard to northern California and southern Oregon, which represent a step backward from the Council's interim goal. I would urge that the Council reconsider its action and forward to me a recommendation that will represent a significant step toward achievement of that interim goal. I am aware that the coast is suffering economically, but I do not believe that the salmon fishery, by itself, is capable of correcting that situation.

(Exhibit J-8 at 1). The Council agreed to meet again on March 31, and on that date Gordon sent another letter further

clarifying the basis for his informal disapproval of the March 19 proposed amendment.

> I believe that any management regime governing the 1982 Ocean Harvest of Klamath River chinook must be reasonably calculated to accomplish the following:
>
> (a) Move toward achieving the interim spawning escapement goal by achieving a significant increase over 1981 escapement;
>
> (b) Reduce the late summer catch of three-year old Klamath chinook off Southern Oregon;
>
> (c) Relate any increase in ocean harvest of Klamath River chinook over historic levels to achievement of spawning escapement goals.

He added:

> Shortened or interrupted fishing seasons and/or catch quotas appear to be effective methods for meeting these requirements, but we are willing to review any reasonable alternative including a one-time mitigation effort that is supported by the best scientific information available and that can be well documented.

(Exhibit P-3).

At the March 31 meeting, the Salmon Team representatives further illuminated Assistant Administrator Gordon's concern about the late summer harvest of three-year-old Klamath chinook off southern Oregon. (Transcript of Special Meeting of Pacific Fishery Management Council, Portland, Oregon, March 31, 1982 ("March 31 Transcript"), Exhibit S-11). The Team explained that most Klamath chinook mature and return up the river when they are four years old, though some mature at three and others at five. The ocean harvest of these mature

chinooks occurs almost exclusively in May and June. After that time, the fish go off-line and enter the river. Consequently, only regulations which restrict the ocean harvest during May and June will significantly affect that year's in-river run. In contrast, immature three-year-old Klamath chinooks are recruited to the fishery later than the mature fish and are harvested primarily off the southern Oregon coast in August and September. It is these immature fish which will return the next year to enter the river.

The Salmon Team further explained that the 1982 immature three-year-olds were a very depressed brood year because the year they were spawned, 1979, had had a very low spawning escapement. Unlike 1981 when the three-year-olds had a brood year escapement of close to 70,000, in 1982 the brood year escapement was 34,000. Moreover, this condition was expected to continue because of the low escapements in 1980 and 1981. It was to this problem that Gordon was referring when he stated that any management regime would have to reduce the catch of immature three-year-olds off southern Oregon. The Salmon Team pointed out that reducing the catch of three-year-olds was necessary to protect the 1983 escapement. (March 31 Transcript, Exhibit S-11 at 26-28, 34-35, 42-46).

Also at the March 31 meeting, Dr. Charles Fullerton, a Council member and the Director of the California Department of Fish and Game, indicated that the State of California would raise one million hatchery yearlings from the 1982 run and release them by "trucking" them down the river the following

year. The troll fishermen were to pay for the program, and although there was debate as to what effect the hatchery yearlings would have on spawning escapement, the Council apparently accepted the offer. (Id. at 10-16, 19-21, 24-31, 36, 114, 116, 123, 125, 132-34; Appendix D to Proposed Plan, Exhibit G-4 at D-3, 4, 5; Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 7-8). Moreover, after extensive debate, it also adopted new measures designed to meet the concerns expressed by Gordon. For the area from Point Arena to Cape Blanco, the modified plan retained the two-week June closure and added a further two-week closure from August 23 to September 6 to protect the immature three-year-olds. The Council also adopted a 140,000 chinook quota for the period prior to the June 15 two-week closure. However, at the March 31 meeting, Dr. Ken Henry of the Salmon Team expressed some of the Team's reservations about the yearling program. He stated that the yearling proposal was based on so many undocumented assumptions that the Team had had great difficulty evaluating its scientific basis and likely impacts upon escapement. Among other things, he noted that there was no evidence that trucking on the Klamath would achieve the same results as on other rivers and that the proposal failed to consider the fact that rearing an additional 1,000,000 yearlings would reduce the stocks of other salmon releases. He also noted that the proposal would be swapping natural spawners for hatchery fish. (March 31 Transcript, Exhibit S-11, at 28-9). Later in the

meeting, however, Dr. Henry appears to have confirmed that 5,000 is the correct figure for spawner equivalency. (Id. at 36).

After the March 31 meeting, the Salmon Team again analyzed the impacts of the adopted regulations. (Appendix D to Proposed Plan, Exhibit G-4). According to the Team, the chinook harvest quota of 140,000 would result in an in-river run size of 76,000, the same as 1981. Because of the projected decrease in the Indian in-river harvest, the spawning escapement would increase 4,400 to 41,000, a 12% increase over 1981. (Id. at D-4). The Team also indicated that California had agreed to rear and release 1,000,000 yearlings to increase production from the 1982 brood escapement. It declined, however, to predict what impact the additional hatchery fish would have on future escapements, stating that "potential contribution of the increased hatchery production to natural spawning escapements cannot be estimated at this time." (Id.) Later the Council's Scientific and Statistical Committee ("SSC") recommended that the Council "strenuously object" to the Secretary's reliance on this concept for three reasons:

> First, it is unclear that the release of 1,000,000 yearlings in 1983 can be accomplished under conditions that compensate for the presumed loss of 1,000,000 naturally-produced fish. Second, since the yearlings will be hatchery stock, not naturally spawning progeny, the fish are not "equivalent" unless the Council is unconcerned about the status of natural stocks. Finally, before concluding that the 1,000,000 yearling release is a significant addition to the 1983 yearling chinook stock, we would want to

examine the recent history of yearling releases and to evaluate the impact of this 1983 release on other hatchery releases.

(SSC Comments at 1, attached to Exhibit S-39).

Nonetheless, in two tables which set forth the predicted impacts of the regulations, the Team suggested that the yearlings might be the equivalent of 5,000 spawners.

Table 2. Changes in impact of adopted 1982 regulations on California and Oregon, in terms of estimated percentage change from 1981 harvest and projected 1982 escapement from the ocean (as adopted March 31, 1982).

AREA	1982 Council Adopted Regulations Percentage Change from 1981
ESCAPEMENT	
California	
Klamath[a/]	76 (81)[b/]
Sacramento	132
Oregon Coast	159

a/ Adult fall run escapement expressed as in-river run size.
b/ Assumes additional 5,000 chinook equivalents from raising an additional 1,000,000 yearlings from the 1982 brood.

Table 2a. Klamath River adult in-river fall chinook run size, spawning escapement, sport catch, and Indian net harvest (in numbers and percent of the total in-river run size) for 1981 compared with projected results for 1982.

Run Component	1981 Numbers	1981 Percent	Projected 1982 Numbers	Projected 1982 Percent
Spawning Escapement	36,700	48	41,000[a/]	54
Sport Catch	3,900	5	5,000	7
Indian Net Harvest	35,500	47	30,000	39
In-River Run Size	76,100		76,000	

a/ By raising an additional 1,000,000 yearling hatchery fall chinook, this escapement might be mitigated by the equivalent of about 5,000 additional fall chinook.

(Appendix D to Proposed Plan, Exhibit G-4 at D-3, 5). Regarding the August 23 - September 6 closure, the Team estimated that it would reduce the catch by 47,000 chinook, of which about 30% would be recaptured later in the season. Approximately 11,300 Klamath three-year-olds would be saved in 1982. (Id. at D-5).

Subsequent to the March 31 meeting, the California Department of Fish and Game developed a proposed methodology for assessing the abundance of Klamath fall-run chinook during the fishing season. (Description of Methodology, C.17). Prior to this proposal, both the Salmon Team and the SSC had consistently taken the view that inseason abundance estimates of Klamath chinook were not technically feasible. (Analysis of Two Alternative Proposals ("Analysis of Alternatives"), Exhibit C-19 at 1, quoting from 1978 plan; Proposed Plan, Exhibit G-4 at 46-IV, Appendices A-28-29, B-11). The Team was asked to reevaluate its position in light of the California proposal, and on April 27 it issued its analysis. Reaffirming its previous view, the Salmon Team stated,

> to the best of our knowledge, a reliable technique for estimating inseason salmon abundance in the ocean for any species has not been developed or utilized. The proposed method, while theoretically interesting, is based on many unsupported assumptions and subject to great variability and complexity and is supported by a limited amount of reliable background data.

(Analysis of Alternatives, Exhibit C-19 at 1). The Team then set forth in detail the specific weaknesses and the lack of reliability of the assumptions in the proposal and strongly

recommended that it not be adopted. (Id. at 1-2). At a later meeting of the Council in May, the SSC supported the Team's view. The SSC concurred in the Salmon Team's analysis:

> The SSC has been asked to evaluate the California proposal for inseason management of chinook and the Salmon Team's analysis of the proposal and to advise the Council on its 1982 Salmon Plan revision. We support the Team's view and reiterate our opinion expressed previously on inseason management. We have seen no information that leads us to believe that an inseason assessment of catch, effort and wire code data [i.e., the Department's proposal] can lead to a useful estimate of stock size.

(Staff Analysis of 1982 Secretarial Salmon Amendment ("Staff Analysis"), attached to Exhibit S-39 at 3, quoting Draft SSC Minutes, May 12-13, 1982 at 4).

C. The Secretary's Disapproval and the Secretarial Amendment

On April 22, Assistant Administrator Gordon wrote the Chairman of the PFMC to inform the Council of his intent to disapprove the regulations between Point Arena and Cape Blanco and to request that the Council reconsider its actions. Incorporating a letter written by Alan Ford, Regional Director of NOAA's National Marine Fisheries Service, dated April 9, Gordon explained, "it is clear that the recommendations voted by the Council on March 31 would not achieve any significant increase in spawning escapement on the Klamath River. As I have said previously, I think it is essential, given the depressed state of the Klamath River stocks, that the 1982 regime be designed to achieve a significant increase over the

low escapement of 1981." (Exhibit P-12). In his April 9 letter, Alan Ford pointed out the same defect and also noted that the projected results from the late August two-week closure were inadequate to justify the restriction on the ocean fishery. (Exhibit J-10). Despite Gordon's request, however, the Council declined to reconsider its March 31 regulations. (Exhibit C-13).

In a May 13 action memorandum, the Assistant Administrator further explained the basis for his disapproval of the Council's actions. He noted the depressed state of the Klamath chinook and the need for a reduction in the early-season harvest concluding that:

> [m]anagement measures for the 1982 commercial fishery in the FCZ off southern Oregon and northern California that were adopted by the Council will not permit significant progress toward the achievement of the fall chinook spawning escapement goal for the Klamath River and that overfishing on this stock will occur. ... Therefore, I have disapproved this portion of the 1982 ocean salmon FMP amendment and have so notified the Council.

(May 13, 1982 Action Memorandum, Exhibit P-29 at 3, 7).

Gordon also addressed the late August closure adopted on March 31 observing that based on assumptions of a twenty percent capture rate during closure, a thirty percent mortality rate and imposition of early season regulations, about 1,000 of the original 47,000 chinook not caught during the August 23 through September 5 closure, would reach the spawning grounds. (Id. at 6). Although he did not expressly disapprove the plan because of the late season closure, Gordon did state that his disapproval was consistent with the

concerns expressed by the Director of the Oregon Department of Fish and Wildlife that the closure would result in "unwarranted and excessive restrictions" on the southern Oregon troll fishery. (Id. at 4).

In a subsequent action memorandum, dated May 26, Gordon formally adopted a secretarial amendment to replace the disapproved March 31 amendments. (May 26 Action Memorandum, Exhibit P-17). He again reiterated that his reason for disapproving the Council's measures was that they failed to significantly increase the expected 1982 spawning escapement over the low 1981 level. (Id. at 1). In direct contrast to his March 31 memorandum and May 13 action memorandum, however, he asserted for the first time that his disapproval was based as well on his opposition to the Council's harvest quota, even though the quota allowed for a pre-July catch which was equal to the 1981 catch for the same time period:

> the Council's adopted plan was too restrictive on the commercial fishery; it contained a harvest quota and closed the fishery two weeks in the fall. California fishermen have been vociferous in their opposition to harvest quotas, and the commercial fishery came extremely close to meeting the quotas in place last year, being under by 2 percent north of Point Arena and 3 percent south of Point Arena.

(Id. at 2).

Emphasizing the socio-economic condition of the troll fishermen and the coastal communities of California, Gordon disclosed that the secretarial amendment deleted the 140,000 early season quota and the two-week closure in late August.