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:
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> (a) Move toward achieving the interim spawning escapement goal by achieving a significant increase over 1981 escapement;
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> (b) Reduce the late summer catch of three-year old Klamath chinook off Southern Oregon;
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> (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.

Instead, it extended the two-week June closure to three weeks. Gordon also indicated that he had accepted the California Department of Fish and Game's one-time offer to raise and release 1,000,000 yearlings from the 1982 spawners, and he asserted that the hatchery releases were the equivalent of at least 5,000 spawners. He further indicated that he had requested the Salmon Team to evaluate the status of the chinook fishery during the first week in August to determine whether inseason measures would be necessary to protect the immature three-year-olds. (Id. at 4-5). According to Gordon, the secretarial amendment would result in an in-river run of 79,000 and a spawning escapement of 44,000, an increase of three thousand over the 41,000 which he estimated would spawn under the Council's March 31 proposal. (Id. at 2, Attachment 1). It would also be, he noted, less restrictive on the ocean troll fishery. (Id. at 5).

Accompanying the action memorandum was a Regulatory Impact Review ("RIR") of the secretarial amendment (Appendix G to Proposed Plan, Exhibit P-17), which further elucidated Gordon's projections for in-river run and spawning escapement. The RIR indicated that the Secretary's regulations would result in an in-river run size of 74,000 and spawning escapement of 39,000. Gordon based his estimation that the in-river run would be 79,000 and spawning escapement 44,000, the RIR explained, on the inclusion of an additional 5,000 spawner equivalents from the 1,000,000 yearling release. The RIR also stated that, in contrast, the Salmon Team had

estimated that the Council's March 31 proposal would a 76,000 in-river run and 41,000 escapement. (RIR accompanying Exhibit P-17 at 5-7).

However, the analyses of both Gordon and the RIR were clearly incomplete, and their conclusion that the secretarial amendment would result in a higher escapement than the Council's proposal was merely sleight of hand. Neither the RIR nor Gordon noted that the Council's proposal had also included the 1,000,000 yearling release and that in estimating the in-river run and escapement at 76,000 and 41,000, the Salmon Team had not included any contribution from the yearling release. As noted above, the Salmon Team had concluded that it could not estimate the yearling contribution at that time. Consequently, since Gordon counted the yearlings as the equivalent of 5,000 spawners, to compare properly the secretarial amendment with the Council's proposal, 5,000 spawners must be added to the Salmon Team's estimate. This would bring the in-river run size to 81,000 and spawning escapement to 46,000, an increase of 2,000 over the expected results of the secretarial amendment.

Moreover, the May 26 action memorandum and the RIR did not provide any further explanation for their conclusion that the hatchery release should be counted as 5,000 additional spawners. Further, neither addressed the technical problems involved in assessing the abundance of Klamath three-year-olds inseason. They did, however, contain a short cost-benefit analysis which relied in part on the recently completed California Inter-Industry Fisheries ("CIF") model for

projecting the impacts on the California economy of the various options considered. On June 3, the Secretary published emergency regulations implementing the secretarial amendment in the Federal Register. The regulations became effective as of June 1. (Defendant's Statement of Material Facts at 3, attached to Defendant's Motion for Summary Judgment.)

After receiving the May 26 action memorandum, the Council requested that the Salmon Team and the SSC analyze the secretarial amendment. Both objected strenuously to the scientific bases for the Secretary's action. Among other things, the Salmon Team addressed the Secretary's request that it evaluate the abundance of immature three-year-olds during the first week in August:

> In the Council's 1982 Amendment, the Salmon Team stated:
>
> > "A technique has yet to be developed to accurately predict the abundance of chinook available to the ocean fisheries in any single year. ...
>
> The Salmon Team has "pointed out on numerous occasions, not only our inability to forecast pre-season chinook, even less ability to forecast in-season...and our conclusion is that no chinook forecasting techniques are available to the Team for 1982 in-season run size estimates." (Ken Henry, Salmon Team Chairman, from transcript of March 17-19, 1982 Council meeting, p.279)
>
> The Scientific and Statistical Committee (SSC) concurred with the Team on the problems of inseason management:
>
> > "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 can lead to a useful estimate of stock size....
>
> > "Our view of the lack of technical merit in inseason stock estimation applies both to the California proposal and to the draft Secretarial plan for inseason management in August." (Excerpt of Draft SSC Minutes, May 12-13, 1982, p.4.)
>
> Furthermore, the Secretarial Amendment and attendant documents do not provide specific criteria to determine whether in-season measures are necessary to protect 3-year-old immature salmon.

(Staff Analysis, attached to Exhibit S-39 at 2-3).

The SSC fully concurred in the Salmon Team's analysis. It specifically objected to the Secretary's inclusion of 5,000 spawners from the release of 1,000,000 yearlings:

> On the question of "spawner equivalents" the SSC recommends that the Council strenuously object to the Secretary's use of this concept. 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 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 attached to Exhibit S-39 at 1). It also objected to the Secretary's economic analysis:

> Also, the SSC finds some serious problems with the Secretary's economic analysis contained in the Supplementary

> Regulatory Impact Review. The two main points of concern are as follows:
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> (1) Use of the output multiplier impacts from the California Inter-Industry Fisheries Model seriously overstates the probable increase in GNP (or national income) due to increased 1982 salmon catch. This is because the multiplier effects include "secondary impacts" that are offset in reality by decreased economic activity elsewhere. Recent cost-benefit methodology does not permit inclusion of regional secondary impacts in the benefit measurement except when all secondary purchases can be shown to derive from currently unemployed resources.
>
> (2) The analysis of future costs is rightly tied to future reductions in run size due to reduced 1981 spawning escapement. But the Secretary's analysis gives an unbalanced treatment to 1982 benefits versus future costs. Benefits are claimed for total increase in 1982 ocean salmon catches south of Cape Blanco--forty percent of which is reckoned to be from Klamath River stocks. Costs in terms of reduced run size in 1985-86 are estimated only for Klamath River runs and only for that portion of the catch taken off northern California. This ignores the reduction in 1982 spawning escapement to other river systems, and the reduction in future chinook catch in southern Oregon.

(Id. at 1-2). On July 30, the PFMC adopted these staff analysis and wrote Gordon to express the Council's concerns about these facets of the secretarial amendment. (PFMC, dated 7-30-82, Exhibit S-39).

III. Mootness

Although neither party has raised the issue, the court must consider whether the present action is moot in light of the fact that the 1982 season is over and the 1982 regulations have expired. Judge Schwarzer faced the same question in Washington Trollers Ass'n v. Kreps, 466 F. Supp. 309, 312-13 (W.D. Wa. 1979), rev'd on other grounds, 645 F.2d 684 (9th

Cir. 1981). In that case, plaintiffs challenged the Secretary's 1978 regulations, and, like here, the court did not rule on the merits of the claim until after the 1978 season was over and the regulations had expired.

The court concluded that the action was not moot for two reasons. First, it reasoned that a ruling on the 1978 season would be relevant to action taken on the 1979 season. Therefore, the 1978 regulations were part of a regulatory scheme having a continuing effect on the parties sufficient to preclude a finding of mootness. Second, the court held that the action fell within the exception for orders "'capable of repetition yet evading review.'" Id. at 312, quoting Southern Pacific Terminal Co. v. Interstate Commerce Comm., 219 U.S. 498 (1911). On appeal, the Ninth Circuit did not address the mootness question. Since mootness is jurisdictional, this court must presume therefore that the Ninth Circuit concurred in the district court's analysis.

The reasoning of Washington Trollers is directly applicable here. Both parties agree that declaratory relief in this matter will have a substantial effect on the regulatory scheme because of its continuing impact on plans developed for future years. Furthermore, the Secretary's regulations are the type of order which is capable of repetition yet evades review. The Secretary has promulgated emergency regulations to implement the salmon plan and amendments every year since 1978. The fishing season is of short duration, and the Act specifically forbids the courts from issuing preliminary

relief in actions challenging the Secretary's regulations. See Pacific Coast Federation of Fishermen's Ass'n, Inc. v. Secretary of Commerce, 494 F. Supp. 626, 628 (N.D. Cal. 1980). The court therefore concludes that the instant action is not moot.

IV. Discussion

A. Scope of Review

The scope of judicial review of the Secretary's regulations is narrow. Section 1855(d) specifically provides that a court may set aside a regulation only on the grounds specified in 5 U.S.C. §706(2)(A), (B), (C), or (D) of the Administrative Procedure Act. These subsections provide that the court shall

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law.

Under the arbitrary or capricious standard, the court owes the Secretary great deference, especially where, as here, Congress has vested a specialized administrative agency with the authority to resolve technical questions of fact. See, e.g., Maine v. Kreps, 563 F.2d 1043, 1050 (1st Cir. 1977); Pacific Coast Federation, 494 F. Supp. at 628. The court may not substitute its judgment for that of the Secretary.

Nonetheless, the Secretary must provide a reasoned basis for his actions or they will be set aside. "The agency must articulate a 'rational connection between the facts found and the choice made.' ... [W]e may not supply a reasoned basis for the agency's action that the agency itself has not given..." Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974), quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962). See also California v. Watt, 683 F.2d 1253, 1269 (9th Cir. 1982); RKO General, Inc. v. Federal Communications Commission, 670 F.2d 215, 221 (D.C. Cir. 1981); K. Davis, Administrative Law Treatise, Vol. 3 at §14.29 (2d Ed. 1980). As will be set forth in detail below, because the Secretary failed to provide a reasoned basis for his decision, the court must declare that his emergency regulations are invalid.

B. National Standard One: Overfishing

Plaintiff's first claim is that the secretarial amendment is inconsistent with national standard one in that it allows overfishing of the Klamath River chinook. According to plaintiff, the Secretary's regulations are so unrestrictive on the troll fishery that they place the existence of the Klamath chinook in jeopardy. This contention is without merit. From the record before him, it was neither arbitrary nor capricious for the Secretary to conclude that the regulations adopted would not substantially endanger the continued existence of the Klamath chinook. Depending upon whether 5,000 spawners are added for the yearling program, the secretarial amendment

was expected to allow for an escapement of either 39,000 or 44,000, including an estimated 35,000 in-river catch. In either case, the expected results represented an increase over the escapements for the previous three years.

Plaintiffs in Maine v. Kreps, 563 F.2d at 1048-49, pressed a similar contention. In rejecting this argument, the court stated:

> But we find nothing in the Act which prescribes a particular annual rate at which below-par stock need be rebuilt. To be sure, the strong conservation and management aims of the Act clearly preclude the setting of an optimum yield which permits overfishing, see 16 U.S.C. §1801; but the Secretary's present allotment is based on credible evidence that 33,000 m.t. will allow a ten percent increase in the stock. We cannot say this rate of increase is too slight to promote the purposes of the Act.

Id.

The Secretary's judgment as to what constitutes overfishing and optimum yield is entitled to substantial deference, and he may choose the rate at which the stocks of a depressed species are to be increased. To find here that the secretarial amendment in some absolute sense permits overfishing would invade the province of the Secretary, and the court declines to do so.

C. Failure to Provide a Reasoned Basis for the Secretarial Amendment

Although as noted above, the Secretary could reasonably have concluded that his amendment would not permit overfishing, there is another reason why his regulations must be

set aside. As discussed below, the secretarial amendment was inconsistent with the Secretary's previous actions taken throughout the 1982 administrative process. Despite this inconsistency, however, the Secretary failed to explain his change in position or even acknowledge that his amendment was inconsistent with his previous actions. The court therefore concludes that the Secretary failed to provide a reasoned basis for his regulations, and they must be set aside as arbitrary and capricious.

Throughout the Council's proceedings, Gordon's primary reason for disapproval of the Council's amendments was their failure to provide a significant increase in the spawning escapement over 1981. He unequivocally stated this position in every action which he took prior to the May 26 action memorandum informally adopting the secretarial amendment. (See, e.g., Exhibits J-8, P-3, P-12, P-17, P-29). Prior to adoption of the secretarial amendment, the Secretary had unambiguously enunciated that his construction of national standard one required that there be a significant increase in escapement over 1981 levels in 1982, and that the Council's March 31 amendment was insufficient in this respect.

Less than two weeks after the May 31 action memorandum, the Secretary appears to have changed directions. Without explanation or even acknowledgement of the inconsistency, he adopted a secretarial amendment and implementing regulations which were less restrictive than the Council's March 31 proposal. In the May 26 action memorandum, Gordon reiterated

that the Council's plan failed to provide for the requisite significant increase in escapement. He also asserted that the secretarial amendment provided for a greater increase. However, the Secretary's regulations deleted the Council's chinook quota and instead instituted a three-week June closure. Without acknowledging his earlier conflicting statement in the May 13 action memorandum, Gordon explained that the deletion was justified because the quota was too restrictive on the troll fishery. As a result of the deletion, however, the in-river run size was expected to be only 74,000 and escapement 39,000, a 2,000 decrease from the Council's proposal. The increase over the Council's plan which Gordon asserted would occur was to come from the California Department of Fish and Game's agreement to release 1,000,000 hatchery yearlings from the 1982 brood. According to Gordon, the yearlings were the equivalent of at least 5,000 spawners, and therefore the secretarial amendment would result in a 44,000 escapement as compared to the Council's 41,000.

As noted above, however, the California Department of Fish and Game had indicated at the March 31 meeting that it would release the yearlings, and the Council had accepted the offer. The Salmon Team's estimated escapement of 41,000 did not include any contribution from the yearling release because the Team did not believe that it could accurately forecast the contribution based on the scientific information available at that time. Therefore, the Secretary's comparison was specious. If 5,000 should have been added to the escapement

under the Secretary's regulations, this was equally true for the March 31 proposal. In fact, the Secretary's plan provided for a less significant increase than did the Council's, despite his repeated statements previously that the Council had failed to provide for a significant increase.

Furthermore, the Secretary's reliance on the hatchery release to provide an increase in spawning escapement was of questionable validity. Both the Salmon Team and the SSC expressed serious reservations about the scientific basis for the 5,000 figure. The Salmon Team declined to speculate as to the likely contribution from the release, and the SSC "strenuously object[ed] to the Secretary's use of this concept." (Staff Analysis, SSC Comments, Exhibit S-39). Although it is a close question discussed in more detail below, the court has concluded that reliance on the 5,000 figure did not constitute a violation of national standard two, which mandates that management measures be based on the best scientific information available. Nonetheless, the Secretary's reliance on this concept to provide the requisite increase in escapement, even in the face of substantial scientific evidence to the contrary, is indicative of his retreat from his previously adopted position. In his March 31 memorandum, Gordon had indicated that he would consider a one-time mitigation effort, but only if it "is supported by the best scientific information and ... can be well documented." (Exhibit P-3). It is questionable whether on review the court can conclude that this proposal was based on the

best scientific information available; it certainly was not well documented. If the Secretary had reconsidered the basis for his earlier disapprovals and determined that a less restrictive approach was necessary, he should have so stated. As will be further illuminated below, before disapproving the Council's proposed amendment, however, he would then have had to find that it was inconsistent with the national standards because it was too restrictive on the ocean fishery and have provided the Council with another opportunity to adopt a modified amendment.

A similar analysis applies to Gordon's second major reason for disapproval of the Council's March 19 plan providing for late season closure.

In his amendment, the Secretary deleted the late season closure, and in its place adopted a contingency plan. Instead of instituting a measure to protect the three-year-olds at that time, he requested the Salmon Team to assess the status of the three-year-olds during the first week in August to determine whether emergency regulations should be implemented for their protection. This alternative was, in fact, illusory. Both the Salmon Team and the SSC had long taken the view that no scientific basis existed for assessing the abundance of chinook inseason. Shortly before the secretarial amendment they both categorically reaffirmed this view. (Staff Analysis, Exhibit S-39 at 2-3); Draft SSC Minutes, May 12-13, 1982 at 4, quoted in Supp. 5 at 3; Analysis of Alternatives, Exhibit C-19 at 1-2, quoting, inter alia, 1978

plan; Proposed Plan, Exhibit G-4 at 46-IV, A-28-9, B-11). The Secretary's reliance on this procedure amounts to no more than a token gesture towards protection of the three-year-olds, and, as will be discussed below, it was inconsistent with the requirement that management measures be based on the best available scientific information.

Moreover, not only was the scientific basis for the proposal unreliable, the Secretary did not attempt to provide the Salmon Team with a technical basis for conducting the inseason assessment. He failed even to address the scientific evidence which was contrary to his position or his earlier statement that the 1982 plan would have to reduce the late season catch of three-year-olds. He simply noted that the late season closure was too restrictive on the ocean fishery.

Based on this review of the record the court must conclude that the Secretary's actions were arbitrary and capricious. He made no attempt to justify his change of position or explain it in terms of his earlier, apparently inconsistent position. Accordingly, the court must conclude that the Secretary failed to provide a reasoned basis for his actions.

Important statutory considerations also support the court's conclusion. Viewing the Secretary's actions in the context of the Act's statutory scheme, it is apparent that the Secretary blatantly disregarded the careful limitations which Congress placed upon his role in the administrative process. In commenting upon a proposed House Bill amending the Act, the

Department of Commerce expressed its view that the Council and the Secretary are partners in the development of management plans and regulations. See H. R. Rep. No. 97-549, 97th Cong. 2d Sess., at 44, reprinted in [1982] U.S. Code Cong. & Admin. News at 4357. The Secretary's actions in the instant case fail to reflect that view. During the 1982 administrative process, the Secretary appears to have treated the Council like a junior partner responsible for preparing "recommendations" for him to consider. This treatment is in direct conflict with the congressional scheme, which places primary authority for promulgating fishery management plans in the regional councils and specifically limits the Secretary's authority in a variety of respects.

First, the statutory language and legislative history of the Act clearly indicate that the Secretary's discretion is limited to reviewing plans to determine whether they are consistent with the national standards, the other provisions of the Act, and other applicable law. Section 1854 sets forth the Secretary's responsibilities regarding the preparation of fishery management plans. Section 1854(a) provides:

> (a) Within 60 days after the Secretary receives any fishery management plan, or any amendment to any such plan, which is prepared by any Council, the Secretary shall--
>
> (1) review such plan or amendment pursuant to subsection (b) and
>
> (2) notify such Council in writing of his approval, disapproval or partial disapproval of such plan or amendment.
>
> In the case of disapproval or partial disapproval, the Secretary shall include in such notification a statement and explanation of the Secretary's objections and the reasons

> therefor, suggestions for improvement, a request to such Council to change such plan or amendment to satisfy the objections, and a request to resubmit the plan or amendment, as so modified, to the Secretary within 45 days after the date on which the Council receives such notification.

Any implication that the Secretary's review is de novo is dispelled by §1854(b):

> (b) The Secretary shall review any fishery management plan, and any amendment to any such plan, prepared by any Council and submitted to him to determine whether it is consistent with the national standards, the other provisions of this chapter, and any other applicable law. In carrying out such review, the Secretary shall consult with--
>
> (1) the Secretary of State with respect to foreign fishing, and
>
> (2) the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea.

Thus, the Act clearly limits the discretion of the Secretary to disapproving plans which he finds are inconsistent with the national standards, the other provisions of the Act, and other applicable law.

The legislative history confirms this construction of §1854. The version of §1854 ultimately adopted by the Conference Committee closely resembled the Senate version of this section.

The Senate Committee report explained the question of the division of authority between the Secretary and the councils:

> The regional Councils are, in concept, intended to be similar to a legislative branch of government. The Councils are afforded a reasonable measure of independence and authority and are designed to maintain a close relation with those at the most local

> level interested in and affected by fisheries management. The Secretary of Commerce is given authority under the bill to act as the "executive," with ultimate authority to make decisions about management regulations for the entire nation. However, the Secretary's responsibility is by no means intended to be plenary. His duties will be to insure that the Councils are properly constituted; that they operate according to the procedures set forth in the Act; that the management regulations which the Councils recommend are compatible with the national management conservation standards; that such regulations do not conflict with any provision of this Act or other applicable law; and generally that the Councils abide by this Act.

S. Rep. No. 94-416, 94th Cong. 1st Sess., reprinted in A Legislative History of the Fishery Conservation and Management Act of 1976 ("Legislative History"), Committee print, 94th Cong. 2d Sess., October 1976 at 684-85.

The Committee Reports accompanying the 1982 amendments to the Act are even more explicit. As finally enacted, the amendments modified various aspects of the statutory scheme including the time periods provided for secretarial review and the wording of §1854. Though apparently not directed to this issue, the modifications in wording eliminated some of the awkwardness of the original provision, strengthening its language limiting the Secretary's discretion. The House Bill, H. R. 5002, modified only the dates of the original provision and left the other aspects of §1854(b) intact. The House Report notes,

> it should be re-emphasized that the Secretary is not to substitute his judgment for that of the Council's regarding how to manage a fishery. The Secretary can disapprove a plan only if it is found to be in clear violation

> of the national standards or a clear violation of law.
>
> . . .
>
> The Committee also expects NMFS to confine its comments during the review period to issues relating to compliance with the national standards and other applicable law.

H. R. Rep. No. 97-549, 97th Cong. 2d Sess., at 28, reprinted in [1982] U.S. Code Cong. & Admin. News 4320, 4341. Although clearly the views of a later Congress are not controlling, this comment unequivocally expresses the House's view of its own previous enactment.

It is clear, therefore, that Congress placed primary responsibility for preparing management plans on the councils and limited the Secretary's discretion in reviewing proposed plans. In addition to limiting the scope of his review, moreover, it also limited his authority in several other respects. Under §1854(a) when the Secretary disapproves a plan, he must provide the Council with a statement and explanation of his objections, the reasons therefor, and his suggestions for improvement. He must also request the Council to resubmit a modified plan satisfying the objections within forty-five days. Finally, the Secretary may promulgate his own plan only in certain delineated circumstances. Section 1854(c) provides that the Secretary may prepare his own plan after disapproving a Council's plan only if the Council fails to submit a modified plan within the forty-five day period.

In the instant case, the Secretary treated these statutory requirements rather cavalierly. Gordon disapproved the March 19 amendment because it was not restrictive enough

on the troll fishery,[4/] and he provided the Council with instructions on the specific areas in which the amendment would have to be more strict. The Council then met on March 31 and after considerable debate directed towards Gordon's expressed concerns, it adopted a more restrictive amendment which addressed those issues. Gordon was still not satisfied that the amendment was strict enough. Consequently, he disapproved the amendment again. In turn, the Council denied his request to reconsider its action a third time. In denying the request, Chairperson McDevitt explained that there were simply not enough votes for a more restrictive plan.

Sometime between disapproval of the March 31 plan and promulgation of the secretarial amendment, the Secretary apparently reconsidered his reasons for disapproving the Council's plan. Although he failed to acknowledge it publicly, it seems that he no longer viewed the Council's amendment as too liberal, but rather as too restrictive. At that point, his statutory duties were clear. He should have reformulated his objections to the March 31 amendment and presented those to the Council for its reconsideration. In light of its earlier actions, the Council would likely have been willing to consider adopting a less restrictive alternative. In derogation of these duties, however, the Secretary neither reformulated his objections nor requested further reconsideration by the Council. Under the congressional scheme, the Council should at least have been afforded the opportunity to consider another amendment, and the instant case demonstrates the wisdom of this requirement. Had the

Council met again, it might well have adopted a less restrictive amendment satisfying the Secretary's concerns without basing its proposed management measures on unreliable scientific information.

Finally, it appears that the Secretary may even have violated the requirement that he disapprove the Council's amendment only if it is inconsistent with the national standards. In disapproving the Council's amendments and setting forth the reasons for his actions in his various letters and memoranda, the Secretary perforce enunciated his construction of the requirements of national standard one. By then promulgating a secretarial amendment which was less adequate than the March 31 amendment when measured against his earlier standards, he promulgated an amendment which was inconsistent with his own construction of the national standard. If he had not changed his view about the proper construction of national standard one, then his amendment is clearly arbitrary and capricious. On the other hand, if he had reconsidered his earlier position, as it appears he did, he should have specifically so stated and informed the Council that the March 31 amendment was inconsistent with national standard one because it was too restrictive on the ocean fishery. He failed to do so and, therefore, for all the reasons set forth above, the court concludes that the 1982 regulations must be declared invalid.

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D. National Standard Two: Best Scientific Information Available

National standard two, §1851(a)(2), provides that "[c]onservation and management measures shall be based upon the best scientific information available." Plaintiff contends that the secretarial amendment also violates this requirement. Three facets of the secretarial amendment rely on disputed scientific bases: 1) the request for inseason assessment of three-year-old chinooks, 2) the 5,000 spawner equivalents concept, and 3) the Secretary's economic analysis.

Unfortunately, the legislative history provides little guidance on how this standard should be interpreted. Doubtless the Secretary must be granted wide discretion as the expert administrator in determining what constitutes the best scientific information, and the court may not substitute its judgment for that of the Secretary's as to which disputed scientific position is the better. On the other hand, Congress specifically enacted this requirement as one of the seven national standards for fishery management plans, and the court presumes therefore that the requirement is not without some force. In the instant case, the Secretary's reliance on highly questionable scientific information falls somewhere near the line. As a result, the court has carefully reviewed the record to determine whether there is a sufficient basis for concluding that the information relied upon was the best available.

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1. Inseason Assessment

In his amendment, the Secretary deleted the late season closure and instead requested the Salmon Team to assess the status of immature three-year-olds during the first week in August for possible emergency action. Since at least 1978, the Salmon Team had taken the view that there was no reliable basis for inseason forecasting of the abundance of chinook. (Analysis of Alternatives, Exhibit C-19 at 1, quoting from 1978 plan). It reaffirmed this view in both 1981 and 1982. (Proposed Plan, Exhibit G-4 at 46-IV, A-28-9, B-11). Shortly after the Council's March 31 meeting, the California Department of Fish and Game took a different view. As more fully explained in Part II.B supra, the Team and SSC strongly took issue with the view of Fish and Game. After adoption of the secretarial amendment, the Salmon Team again categorically reaffirmed its earlier view.

Although it presents a close question, the court concludes that the inseason abundance assessment measure was not based on the best scientific information available. Three reasons support this result. First, under the statutory scheme, the Secretary owes considerable deference to the scientific views of the SSC and the Salmon Team. Section 1852 establishes the regional councils and sets up their administrative structure. Section 1852(g) provides:

> (1) Each Council shall establish and maintain, and appoint the members of, a scientific and statistical committee to assist it in the development, collection, and evaluation of such statistical, biological, economic, social, and other scientific information as is relevant to such Council's

> development and amendment of any fishery management plan.

Thus, the SSC and the Salmon Team by reason of its appointment by the PFMC are statutorily mandated expert panels designed to aid the PFMC in the evaluation of scientific information. Furthermore, the legislative history demonstrates that Congress intended the councils to rely heavily on these panels' scientific expertise. The Senate Committee Report states:

> Subsection (e) authorizes each council to establish two types of committees. First, a scientific and statistical committee would be named to assist each council in the development, collection and evaluation of statistical, biological, economic, social, and other scientific information as is relevant to management plans or recommended regulations.... Active use of a scientific and statistical committee, the committee believes, is a very important part of the overall management program. Independent decisions by fisheries experts is indispensable to wise management decisions.

S. Rep. No. 94-416, reprinted in Legislative History at 689-90.

The conclusion that considerable deference is owed these panels does not imply that either the Council or the Secretary must in all circumstances rely on their scientific views and conclusions. Neither the statutory language nor the legislative history support such a broad rule, and it would place undue authority in the scientific committees. Nonetheless, the Councils and the Secretary should not lightly disregard these committees' considered expert advice, and the deference due grows with the firmness with which a particular view is held. In the instant case, the view of the SSC and Salmon Team that no reliable basis existed for inseason assessment

was longstanding, consistent and firmly held. Both concurred in the other's views, and both categorically rejected the California proposal. Under these circumstances, the SSC and Salmon Team views were entitled to great deference.

A second reason for the court's conclusion is the weakness of the California proposal. In contrast to the strong conviction of the SSC and Salmon Team, the California proposal was equivocal. Although Fish and Game staff strongly recommended that it be adopted, the staff's analysis conceded that inseason assessment was extremely difficult especially for chinooks, that its methodology was theoretical, that abundance assessments of three rather than four-year-olds involved additional problems, and that the proposal was based on many underlying assumptions. Thus, the Secretary's rejection of the SSC's and Salmon Team's views must be seen in the context of his acceptance of an admittedly uncertain alternative.

Finally, the court is disturbed by the Secretary's seemingly cavalier adoption of inseason management as an integral management measure. In the May 26 action memorandum, Gordon merely stated that he had requested the Team to make an inseason assessment. Despite the detailed criticism by the Salmon Team of the assumptions underlying the California proposal, he failed even to acknowledge the opposing views of the SSC and Salmon Team. Furthermore, far from setting forth the technical basis upon which the assessment was to take place, he failed even to state that he was relying on the

California proposal. The court simply presumes that the proposal was the basis for his action.

The court recognizes that the Secretary's determination as to which evidence to rely upon is entitled to great deference. If the view of either the SSC or the Salmon Team had been equivocal or the Department's proposal more certain, the court might well have upheld the Secretary's decision. Similarly, if the Secretary had explained the basis for his decision or rebutted the Salmon Team's critique, the result might have been different. Under the circumstances of this case, to allow the Secretary to rely on the California proposal without making any attempt to justify his disregard of the SSC and Team analysis would be to render essentially unenforceable the congressional requirement that management measures be based on the best scientific information available. Accordingly, the court concludes that the Secretary violated national standard two by relying on the inseason assessment measure and that his regulations are invalid for this reason as well.

2. The 5,000 Spawner Equivalents

The Secretary's reliance on the 5,000 spawner equivalents concept was also based on information of questionable reliability. The California Department of Fish and Game first proposed that it would rear and release 1,000,000 yearlings at the March 31 PFMC meeting. The extent of this proposal and its evaluation by the Salmon Team and SSC are discussed in detail supra at 9-12. Despite the criticism of both the Team

and SSC regarding the methodology and scientific validity of the Fish and Game proposal the Secretary proceeded to rely upon it, and apparently rejected the conclusions of the Team and the SSC without an explanation.

The court is again disturbed by the Secretary's cavalier reliance on a scientific position challenged by both the SSC and the Salmon Team. Nonetheless, it concludes that the Secretary's reliance on this concept falls, but barely, on the acceptable side of the line. In contrast to the inseason management measure, the positions of the Salmon Team and the SSC were not entirely consistent. The Salmon Team's opposition to the use of the spawner equivalency concept was much more equivocal than the SSC's or than its position regarding inseason management. This uncertainty in its position provides greater weight to the Department's view that 5,000 or more was a reasonable estimation. Moreover, there is no indication in the record that the Team or SSC view was longstanding. Accordingly, the court concludes that the Secretary's reliance on the equivalency concept did not violate national standard two.

3. Economic Analysis

In the May 26 action memorandum and the accompanying Regulatory Impact Review, the Secretary relied on the California Inter-Industry Fisheries ("CIF") Model to demonstrate the breadth of the impact which restrictions on the troll fishery have on the California economy. He also included a cost-benefit analysis of the three different

options he proposed. The SSC strongly objected to the use of the CIF model and to the Secretary's cost-benefit analysis. (Supra at 20-21.)

The defendants have not cited any evidence in the record contrary to the SSC's position. It is clear that the Secretary relied on the CIF model to justify his conclusions regarding the short-term benefits and costs of his amendment, even though he acknowledged its limitations. (May 26 Action Memorandum, Exhibit P-17 at 3). Moreover, his cost-benefit analysis on its face understates future costs as a result of the amended regulations. National standard two requires that the Secretary utilize a more rigorous economic analysis. Yet he chose not to explain inconsistent data before him or account for the contrary opinion of the SSC. Accordingly, the court concludes that the Secretary's economic analysis violated national standard two as well.

E. National Standard Four: Discrimination

In relevant part, national standard four, §1851(a)(4), provides: "Conservation and management measures shall not discriminate between residents of different States." Plaintiff claims that the Secretary's regulations discriminate against the Hoopa Tribe. According to plaintiff, the regulations were so unrestrictive that they threatened the continued existence of the species and forced the Tribe to cut back their in-river harvest unilaterally. Plaintiff points to the fact that although the 1982 spawning escapement was over 40,000, the in-river run size was under 63,000. If the

plaintiff had not cut back their harvest, the spawning escapement would have been as low as 25,000.

Plaintiff's contention is without merit. Like its argument regarding national standard one, plaintiff mistakenly assumes that the Secretary's regulations endangered the continued existence of the species. The court may not review the 1982 plan based on its hindsight knowledge of the results of the 1982 plan. Rather, it must review the Secretary's actions based on how they appeared at the time he adopted the regulations. His regulations were expected to result in an in-river run size, not including the hatchery release, of 74,000. With a 30,000 Indian harvest and 5,000 sports catch, the spawning escapement would have been 39,000, a slight increase over the 1981 level. As noted above, based on the record before him, the Secretary could certainly have concluded that a 39,000 escapement did not endanger the species. Accordingly, the Secretary implemented regulations designed to provide plaintiff with its share of the Klamath chinook.

Underlying plaintiff's papers is the veiled suggestion that the Secretary's plan violated the Tribe's treaty fishing rights. To the extent that plaintiff is making such a claim, the proper defendant, as plaintiff knows, is the Secretary of the Interior, not the Secretary of Commerce. The restrictions on the Tribe's gillnet fishing were instituted by the Secretary of the Interior, and the defendants here have no responsibility for those limitations.

Accordingly, plaintiff's national standard four claim must be dismissed.

F. National Standard Five: Economic Allocation

National standard five, §1851(a)(5), provides that "[c]onservation 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." Plaintiff contends that the Secretary violated national standard five because his amendment was based solely on economic considerations. According to plaintiff, the Secretary's only concern was for the economic impacts which his regulations would have on the troll fishery.

This contention is also without merit. It is true that the Secretary considered the socio-economic conditions of the troll fishermen and the coastal communities of northern California. However, the determination of optimum yield under §1802(18) permits the consideration of economic factors, and there is no basis for plaintiff's contention that this was the only consideration underlying the secretarial amendment. Though less restrictive than the Council's March 31 plan and than plaintiff would have liked, the amendment instituted a three-week June closure and was expected to result in a slight increase in spawning escapement. It appears that the Secretary based his actions on more than concern for the economic conditions of the fishermen.

Plaintiff's national standard five claim must therefore be dismissed.

G. Public Comment Provisions and NEPA

Plaintiff's final contention is that the Secretary violated the comment provisions of the FCMA, §1853(a)(3), and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4331-4332. The parties have not addressed these claims in detail, and plaintiff has hardly fleshed out the theories on which it relies. Nonetheless, as the court understands these claims, they both appear to be without merit.

The Council proposed five different troll options ranging from liberal to quite restrictive on the ocean fishery, and voluminous public comments were received on these five options. Plaintiff has no basis for suggesting that the Council's actions prevented the Tribe from meaningfully commenting on the alternatives which the Council was considering. Insofar as plaintiff objects to the Secretary's reliance on scientific concepts which were not presented for public comments, its claim is more viable. The Secretary relied on the spawner equivalents concept, the inseason assessment proposal and the CIF model even though the public was not provided an opportunity to comment on their scientific reliability. Nonetheless, plaintiff's claim still must fail. No comment period was provided because the Secretary implemented the plan on an emergency basis. Although §§1855(a) and (c) provide for a comment period before the Secretary implements a plan or amendment, §1855(e) grants the Secretary authority when a fishery resource emergency exists to promulgate emergency regulations without permitting a

comment period. Accordingly, there is no basis for finding a violation of the comment provisions of the Act.

Plaintiff also makes two NEPA claims. First, it contends that the Secretary did not consider a sufficiently broad range of alternatives. This claim is without foundation. An agency need only consider those alternatives which are necessary to permit a "'reasoned choice.'" California v. Block, 690 F.2d 753, 767 (9th Cir. 1982), quoting Save Lake Washington v. Frank, 641 F.2d 1330, 1334 (9th Cir. 1981). The five options considered by the Council and proposed for public comment were wide-ranging in their environmental impacts. The fourth and fifth options were extremely restrictive. Plaintiff's real complaint is not that the range of alternatives was insufficient, but that the choice made was too liberal.

Plaintiff's second claim presents more difficult questions. Plaintiff contends that the Secretary's proposed action departed significantly from the alternatives discussed in the draft supplemental environmental impact statement ("SEIS"), and therefore that the Secretary should have circulated another draft SEIS. Defendant counters that the adopted secretarial amendment closely resembled troll option two except in particulars favorable to plaintiff, and therefore another draft SEIS was unnecessary. In California v. Block, the Ninth Circuit set forth the proper test for determining when a further draft SEIS is necessary to allow for public comment on a proposed action. The standard is: (1) whether the alternative finally selected was within the

range of alternatives the public could have reasonably anticipated the agency to be considering and, (2) whether the public's comments on the initial draft SEIS also apply to the chosen alternative and inform the agency meaningfully of the public's attitudes toward that alternative. Id. at 772. In the instant case, the court agrees with plaintiff that the public could not have reasonably anticipated the Secretary's proposed actions and the public's earlier comments did not apply fully to his amendment. The Secretary's reliance on three disputed scientific concepts could not have been expected, and the three concepts were not fully explored in the earlier comments.

Despite this inconsistency with NEPA'S requirements, the Secretary did not violate the Act for another reason. NEPA's provisions must be complied with to the fullest extent possible. See Flint Ridge Development Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976); California v. Block, 690 F.2d at 775. In some instances, however, the statutory authority under which an agency acts is in unavoidable conflict with the provisions of NEPA. In such cases, NEPA is not applicable. See Flint Ridge, 426 U.S. at 778; California v. Block, 690 F.2d at 775. In the instant case, the FCMA authorized the Secretary to forego the comment provisions of the Act and to implement the 1982 regulations on an emergency basis. Requiring the Secretary to circulate another draft SEIS prior to implementing the regulations would be entirely inconsistent with his authority to promulgate regulations when there is a

fishery resource emergency. Plaintiff's comment and NEPA claims must therefore be dismissed.

V. Conclusion

For the reasons explained above, the 1982 secretarial amendments to the 1983 Fishery Management Plan are declared invalid because they violate national standards one and two, §§1851(a)(1) and (2), the Secretary has failed to provide a reasoned basis for his amendments, and he has failed to observe the statutory authority and limits of that authority. The ruling in this case is narrow. It in no way restricts the Secretary's choice of future management plans to those providing either for any specific spawning escapement for Klamath chinook or for any yearly increase in spawning escapement on the Klamath River. Within wide bounds, these decisions remain in the discretion of the Council and the Secretary, and the court will not substitute its judgment for that of the expert administrative agency's. The court will only issue declaratory relief, stating that the regulations are invalid for the reasons set forth above. Injunctive relief or remand is not permitted under the FCMA. 16 U.S.C. §1855(d). See Pacific Coast Federation, 494 F. Supp. at 628.

Nevertheless, the court's ruling is significant in several respects. First, it enforces the fundamental principle that agencies must supply reasoned bases for their actions. It also clarifies the proper functional roles of the Council and the Secretary under the congressional scheme. Finally, it makes clear that the Secretary must abide by the

requirement that he rely only upon the best scientific information available.

Plaintiff shall submit a form of order and judgment in accordance with this decision.

IT IS SO ORDERED.

Dated: JUN 25 1984

MARILYN HALL PATEL
United States District Judge

FOOTNOTES

1/ The Pacific Coast Federation of Fishermen's Association ("Federation") has intervened in this action. Its papers, however, add little to the arguments presented by the Secretary. It appears that the Federation would like to turn this proceeding into a full-blown inquiry into plaintiff's conduct and the condition of the Klamath River. Because its factual submissions for the most part go beyond the administrative record and include much inadmissible evidence such as newspaper and magazine articles, the court will not address them in detail here.

2/ At the hearing in this matter, counsel for both plaintiff and the Secretary stated that they expected the court to resolve this matter on cross-motions for summary judgment. Both indicated that they did not intend to present any evidence beyond that contained in the administrative record.

In contrast, intervenor seeks discovery of factual materials regarding Indian fishing violations and the condition of the Klamath River. Since these matters have no relevance to the proper resolution of this case, the court denies intervenor's discovery request. This case must be resolved by review of the administrative record.

3/ Congress has subsequently amended the Act. P.L. 97-453, 96 Stat. 2481-2493 (Jan. 12, 1983). Since the Secretary promulgated the regulations at issue in the instant case prior to the amendments, the court must review the regulations under the provisions in effect at that time. In any event, the amendments did not modify the Act in any respect material to this lawsuit.

4/ Gordon never formally disapproved the March 19 amendment. His letter of March 24 indicates, however, that his clear intent was to disapprove the amendment. Therefore, despite the informality, the court construes the March 24 letter as a disapproval within the meaning of the Act.