

## APPENDIX B

### MINORITY OPINION

#### Minority Opinion Opposing Lethal Removal

In 1994, Congress amended the Marine Mammal Protection Act (MMPA) to include Section 120, which allows the Secretary to authorize the intentional lethal taking of “individually identifiable pinnipeds which are having a significant negative impact on the decline or recovery of salmonid fishery stocks” that are or are approaching threatened or endangered species status. 16 U.S.C. § 1389(b)(1). In its deliberations, a Pinniped-Fishery Interaction Task Force (the task force) is required to consider a number of factors, which are outlined on page 2 of the task force report.

In the House Report accompanying the 1994 Amendments, after acknowledging that pinniped predation may be having a significant impact on stocks in some instances, the House Merchant Marine and Fisheries Committee expressly stated that it “recognizes that a variety of factors may be contributing to the declines of these stocks and intends that the current levels of protection afforded to seals and sea lions under the Act should not be lifted without first giving careful consideration to other reasons for the decline.” H.R. Rep. No. 439, 103<sup>rd</sup> Cong. (1994).

Given these clear boundaries, I believe Congress did not intend, nor will the plain language of the MMPA allow, Section 120 to apply to the current situation at Bonneville Dam. Evidence was presented to the task force and, while most of the task force interpreted this evidence to support lethal take of sea lions, I believe that the evidence does not show: (1) that predation is having a “significant” negative effect on status of salmon populations, particularly compared to the number of fish permitted to be killed in hydroelectric dams and directly harvested by tribal and other fishermen, or (2) that lethal taking will successfully minimize pinniped predation. The National Marine Fisheries Service (NMFS) should not grant a permit for lethal take of California sea lions in the Columbia River.

#### The Decline and Recovery of the Fish

A lethal take under Section 120 is only permitted when pinniped predation is having a “significant negative impact on decline or recovery of salmon stocks.” 16 U.S.C. § 1389(b)(1). However, the evidence currently before the task force shows that pinniped predation has little, if any, effect on the status of salmon in the Columbia River.

The states’ Section 120 application was largely intended to address predation that occurs on spring runs of salmonids in the Columbia because sea lions are only present in the river during the spring run, not the fall. The task force compared the decline and/or recovery of *spring* run listed salmon stocks that are potentially affected by predation to the decline and/or recovery of listed *fall* run salmon stocks that are not subject to predation. As the chart entitled “Total Annual Salmonid Counts at Bonneville Dam 1988-

2007” shows, fall and spring run Chinook have similar run trajectories *despite* the presence of sea lion predation solely during the spring. That is, both the fall and spring runs show fluctuations in their run sizes that spike and fall in similar years. In addressing the difference between recovery trends of fall and spring run salmon, a memo to the task force from Guy Norman of the Washington Department of Fish and Wildlife stated that “*the difference in status could not be attributed to pinniped predation.*” (emphasis added).

### **The Issue of Significant Negative Impact**

A lethal take under Section 120 is only permitted when pinniped predation is having “a *significant* negative impact” on decline or recovery of salmon stocks. 16 U.S.C. § 1389(b)(1) (emphasis added). However, the evidence provided to the task force does not demonstrate that predation has a “significant” effect, particularly when compared to much higher rates of take that NMFS itself allows for fisheries and other extractive users.

Information requested by the task force confirmed that, in some years, pinnipeds have been observed to eat up to 4% of the spring run fish near Bonneville Dam. The task force was provided information to help document other sources of in-stream fish removal and their roles as limiting factors in the salmon recovery. The task force was not provided with information to justify the states’ contention that a 4% rate of predation near the Dam was having a “significant” negative impact on the fish’s statuses, as required for Section 120 to apply. 16 U.S.C. § 1389(b)(1). Further, despite requests of task force members, no analysis was provided regarding the level of predation that would *not* be considered significant; or to justify why the current predation level should be considered a significant negative impact when other higher levels of extraction are permissible.

Indeed, California sea lions are far from the only source of extractive mortality to the fish in the river. The NMFS permits other forms of extraction at levels the agency believes sustainable for fish, yet this mortality exceeds the level taken by pinnipeds. For example, an analysis done for the task force by its members from the Columbia River Inter-Tribal Fishery Commission documented that *tribal harvest rates ranged from 6% to 10% of the spring Chinook* between 2002 and 2006; the years in which the documented rate of pinniped predation ranged from 0.3% to 2.7%.

In addition to tribal harvest, non-tribal fisheries affect salmon populations. Despite a specific request, the task force was not provided with information on the impact of ocean intercept fisheries on the spring run stocks. Nonetheless, there is some information available from NMFS to shed light on these impacts. In April 2007, the NMFS published a proposed rule to establish catch accounting requirements for Pacific whiting. 72 Fed. Reg. 17,469 (Apr. 9, 2007). This proposed rule cited a 1999 biological opinion allowing the whiting fishery to incidentally take 11,000 Chinook. Although this level has been exceeded in some years, the whiting fishery took an average of 7,300 Chinook per year over the past 15 years. The bycatch was stated to affect a number of runs including the Snake River spring/summer runs and spring runs in the lower and upper Columbia and Willamette Rivers. As another example, in a 2005 report on Observed and Estimated

Bycatch of Salmon in the 2002-2004 West Coast Limited-Entry Trawl Fisheries for Groundfish, the NMFS estimated that during the summer (defined as May to October), over 5,000 Chinook were caught between 2002-2004 (the most recent data provided). Although the paper did not specify months or stocks, we may presume that this fishery also captures spring run Chinook. When thoroughly evaluated by stock, the mortality caused by these ocean intercept fisheries may well exceed the documented pinniped take at the Dam of 3,000 fish.

The by-catch of these runs of Columbia River salmon by Alaskan and Canadian trawl fisheries is also an issue of potential concern. The HSUS noted these concerns previously in our comments on the application.

Further, NMFS' own documents demonstrate that other in-stream takes, not related to pinnipeds, have population level impacts, while the same documents provided to the task force do not identify pinniped predation as a problem. For example, a Biological Assessment dated August 2007 assessed the "Effects of Federal Columbia River Power System and Mainstem Effects of Other Tributary Action on Anadromous Salmonid Species Listed under the Endangered Species Act" (BA). The BA assessed the status of the Upper Columbia River Spring Chinook Salmon ESU and key limiting factors. The BA found that there was a 38% improvement in the return of natural adult spawners; and, although some portions of the ESU have declined between 2000 and 2003, others (e.g., the Entiat run) have slightly increased. With regard to limiting factors for this spring run, the BA states that *juvenile* fish mortality is "the most important area where improvements might be made to benefit this ESU." It further states that "hatchery practices [are] the second most important limiting factor affecting this ESU." These impacts have yet to be adequately addressed.

The BA also discussed other, as yet poorly mitigated human impacts that pose greater threat than predation. *The BA concluded that direct and latent mortality due to hydropower dams varies between 30 and 35 percent of these runs.* The BA further estimates direct harvest rates at an average of 8%, but since 2001 they have been as high at 11% of the run. Again, although NMFS and the states have permitted this rate of harvest, the predation rate is considerably lower, at only 4%. The BA states that "the estimated portion of the human impact attributable to combined Tribal and non-Tribal harvest effects for each population [may be as high as] 42%." In assessing predation, it simply states "predation has been noted as a factor limiting fish survival at mainstem reservoirs and in the Columbia estuary." In its later and more thorough discussion of predation, the BA focuses *entirely* on avian and piscivorous predation (primarily northern pikeminnow). Pinniped predation is not identified as having any appreciable effect on the decline or recovery of the ESU. BA at 8-4.

The chapter of this BA discussing effects on Snake River Spring and Summer Chinook that migrate past the dams during the same period noted that "[a]ll populations in the ESU show increasing or steady population growth trends in the 1990-recent period." Key limiting factors were noted as: direct and latent hydro-related mortality of smolts; harvest rates that vary between "5.5 percent and 17 percent depending on run strength," and the "estimated portion of the human impact attributable to combined Tribal and non-Tribal

harvest effects is 37% to 69%. If latent mortality is omitted, the range associated with combined harvest impacts is 14-15%.” BA at 5-4. Again, this permitted level of extraction is substantially higher than the predation rate for pinnipeds and the discussion of impacts of predation on this ESU is confined to a discussion of impacts from avian and piscivorous predation.

In sum, the information provided to the task force has not documented sea lion predation as having a “significant” impact of predation on salmonids. Nor was the task force provided with information or analysis of what level of predation would be considered not significant to the salmon populations.

Indeed the fact that there is a documented predation rate near the Dam of 3,000 fish (less than 4% of the runs) pales in comparison to other sources of mortality to the fish, many of which remain inadequately mitigated. Even if predation is compared solely to the allowed in-stream capture of fish from the ESUs, both native and sport fishermen take more fish than the pinnipeds. NMFS and the states apparently consider the level of human extraction, whether from tribes, fisheries, sportsmen, or dams, not to be “significant” in terms of its impact on the decline or recovery of the fish or else they would not permit such taking. Thus it is unclear why a lower rate of predation by pinnipeds would be considered a significant level. If these much larger sources of mortality are so substantial that the small additive mortality from natural predation pushes stocks below sustainability, then the agency should address these larger factors that should be first addressed because addressing them will be far more effective in improving stock sustainability than decreasing the comparatively much lower rate of pinniped predation.

### **Lethal Taking Will Not Be Successful**

The task force report acknowledges that a very large number of pinnipeds eat salmon. Although the states requested an annual lethal take of 1% of the Potential Biological Removal (PBR) of California sea lions, or approximately 85 sea lions per year, far more sea lions have been identified as involved in predation. State representatives to the task force acknowledged that 1% was not chosen because it had bearing on the predation, but because it would have limited impact on the stock of California sea lions. The report of the task force acknowledges that 271 individual sea lions have been identified as eating fish at Bonneville Dam. Of these, only 151 are considered “highly identifiable.” The states have variously estimated that there are 1,000-2,000 sea lions between the mouth of the river and the Bonneville Dam who may also be eating some of the salmon as they pass. The task force report also acknowledges that sea lions seen at the Dam travel repeatedly down river and back and are thus capable of leading others to the site. Government representatives on the task force have acknowledged that if animals are removed, others quickly fill into the void.

Sea lions have followed fish upstream on the Columbia for over a decade. Far from resolving the predation, killing sea lions at the Dam will only provide a vacated foraging niche for other remaining sea lions to exploit. This is not the situation Congress

envisioned when it enacted Section 120. Instead, Section 120 was intended to address situations in which a few, identifiable animals have developed a novel foraging habit that is having a significant negative impact on endangered or threatened fish, such that if they can be eliminated, their removal will appreciably assist recovery. That is simply not the situation at Bonneville Dam.

## **Conclusion**

It may be frustrating for fishermen and managers to watch sea lions eat salmon, but the animals' predation is not having a significant negative impact on the salmon populations. Other sources of mortality contribute far greater to the status of the fish. Human extractive activities, whose impacts NMFS permits, are responsible for far more mortality than are sea lions. The House Committee stated in its 1994 Report that it did not intend for protections to be lifted without "careful consideration" of other factors contributing to declines that could be mitigated. Indeed, impacts from extractive sources (largely fisheries) should be mitigated before NMFS considers killing natural predators whose deaths will not appreciably reduce predation because other sea lions in the river will only fill the vacated foraging niche.

The NMFS must not permit the intentional shooting of sea lions in the river. It will not appreciably help the fish, which is the purpose of Section 120, it will merely waste the lives of the sea lions to no purpose.